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GATT's Entertainment: Before and Nafta

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ARTICLES

GATT's ENTERTAINMENT: BEFORE AND NAFTA

*David Nimmer**

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I. INTRODUCTION

Although it has been over a century since the Chace Act nominally opened the door for U.S. Copyright to extend to works authored by foreigners,¹ the major chore of harmonizing American copyright law to world standards did not take place until adherence to the Berne Convention in 1989.² To comport with the standards of the world's foremost multilateral copyright convention, Congress had to abandon cherished U.S. copyright law formalities³ and effect several substantive changes to the Copyright Act, such as providing an alternative to the jukebox compulsory license enacted in 1976⁴ and extending protection to architectural works.⁵ In the years since accession to that treaty, Congress has returned to the international realm several times, fine-tuning the Copyright Act for the sake of increased⁶ Berne compliance.⁷

We are at present witnessing a new phenomenon. No longer does membership in the Berne Convention suffice to protect member nations from the perils of copyright non-compliance. An inherent deficiency plagues enforcement of Berne Convention strictures, inasmuch as the mechanism of enforcement under the treaty is limited to actions brought by one country against another country in the International Court of Justice, a cumbersome procedure which has never been invoked.⁸ In a world service economy, for which the copyright industries produce works that account for billions of dollars of international trade, the lack of effective enforcement mechanisms in the Berne Convention renders it insufficiently potent to safeguard authors' rights.

For that reason, the last year has seen the emergence of copyright into the general treaty mechanisms governing international trade. In response to deficient protection for American movies in country X, for example, no

1. See 3 NIMMER ON COPYRIGHT § 17.01[C][1][a].

2. See *id.* § 17.01[C][2].

3. See 2 NIMMER ON COPYRIGHT § 7.01.

4. See 2 NIMMER ON COPYRIGHT § 8.17. On amendments to this provision see *infra* part IIC.1.

5. In 1989, Congress simply tinkered with protection of architectural plans. See 1 NIMMER ON COPYRIGHT § 2.08[D][2][a]. A subsequent 1990 amendment explicitly added protection for architectural works. See 1 NIMMER ON COPYRIGHT § 2.20.

6. See 2 NIMMER ON COPYRIGHT § 8D.06 n.5.

7. In addition to the 1990 architectural amendment previously noted, in 1990 Congress afforded a limited type of moral right protection to specified works of fine art. See 2 NIMMER ON COPYRIGHT § 8D.06.

8. See Berne Convention (Paris text 1971), art. 33(1).

longer will the United States be limited to the inefficacious method of spending years to sue country X in the World Court in The Hague under the Berne Convention, with little prospect for meaningful relief. Instead, the possibility presents itself that the U.S. could file a complaint under the General Agreement on Tariffs and Trade ("GATT") framework.⁹

Interestingly, at the time of this writing (March 1994), trade sanctions are assuming yet another guise within the national agenda. President Clinton is considering imposition of retaliatory sanctions against Japan for failure to open its internal market to outside competition, notwithstanding thirty years of U.S. pressure.¹⁰ What is fascinating about the current minuet is that it is taking place outside the GATT framework. Now that the new GATT treaty has finally been negotiated, one would expect the U.S. to institute a formal complaint against Japan under its auspices. Instead, President Clinton is threatening to revive "Super 301"¹¹ and to implement unilateral retaliation.¹² Though such a move, if implemented, would seem to fall afoul of GATT and in turn subject the U.S. to a GATT complaint by Japan,¹³ perhaps what is transpiring is an international game of "chicken." Presumably, the Japanese desire an international trade war even less than does the U.S., and Japan may suffer more from the contemplated sanctions, with their concomitant for escalation, than will the U.S. from ultimately being held in violation by a GATT panel. If the United States' threats produce Japanese movement prior to the actual imposition of unilateral sanctions, then the U.S. will have triumphed without ever actually breaching GATT terms. In any event, the volatility of world trade is such that, regardless of what international compacts win widespread signature, events on the ground will generally run ahead.

9. See the reference to 'cross-retaliation' under GATT *infra*, part II.C.2.

10. Disputes between the U.S. and Japan involve such issues as Motorola's access to cellular phone lines in the Tokyo Nagoya corridor and Japanese purchase of semi-conductor chips. Reuters, WORLD REPORT, Mar. 14, 1994 ("Under the Super 301 trade clause revived by Clinton, Washington will issue a preliminary list of world trade barriers on March 31 and then whittle it down to a list of top offenders by September 30.").

11. See *infra* part II.B.

12. "Washington is set to announce on March 17 a target list of Japanese products that would be subject to U.S. sanctions if no settlement is reached." Reuters, EUROPEAN COMMUNITY NEWSWIRE, Mar. 10, 1994.

13. Ironically, the Executive Summary appended to the President's submission to Congress regarding GATT states as follows: "If Members of the DSU [Dispute Settlement Union; see *infra* part II.C.2.a.] do not comply with their obligations at the end of the dispute settlement process, trade action under section 301 of the Trade Act of 1974 will be legitimized and there will be no risk of counter-retaliation." 58 Fed. Reg. 67,263, 67,292 (Dec. 15, 1993).

With that general framework in mind, it is time to turn to the major trade events of the last year. GATT is the more overarching, while the North American Free Trade Agreement ("NAFTA") is the further advanced in terms of implementing legislation.

II. GATT

A. *Background*¹⁴

Even while the Second World War raged, the Atlantic Charter of 1941 set the stage for the eventual founding of the United Nations. In 1944, the Bretton Woods system for regulating monetary policy was instituted, from which stem such current institutions as the International Monetary Fund and the World Bank. To complement that international monetary system, a world body governing trade was still required.

In 1947, eighteen nations set into "provisional operation" Chapter IV of a draft hammered out at negotiating sessions in New York and Geneva. The anticipated final text never eventuated; thus, Chapter IV evolved into the General Agreement on Tariffs and Trade ("GATT").¹⁵

GATT's purpose, in brief, is to foster mercantilism, overcoming the inhibiting effect of national laws as "stumbling blocks" to free trade. "With all its limits, modifications, and shortcomings, GATT is the economic pillar within the legal framework that was designed to build a peaceful world after 1945. Free trade was regarded as a major contribution to this aim."¹⁶ The overriding principle upon which GATT is founded is the most-favored nation clause.¹⁷

Since 1947, there have been a dozen negotiating rounds to amend the GATT. The last commenced in 1986 at the Ministerial Meeting at Punta del Este, Uruguay. Building on the GATT's framework of regulating trade in products, the Uruguay Round introduced the innovation of developing rules for trade in services. Into that mixture was added for the first time a trade structure for intellectual property.

14. The discussion below derives largely from Fikentcher, "GATT Principles and Intellectual Property Protection" in Beier & Schriker, eds., *GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY* (1989).

15. A contemplated International Trade Organization was formulated in Havana in 1948; U.S. refusal to participate doomed that nascent organization, leaving GATT as the de facto standard.

16. Fikentcher, *supra* note 14, at 103.

17. For the operation of that principle in the copyright context, see *infra* part II.C.1.a.

Over the years, the GATT has expanded ultimately to 117 countries.¹⁸ Progress in negotiating the Uruguay Round ebbed and flowed over seven years.¹⁹ Finally, the negotiations culminated in an agreement on December 15, 1993.

B. *The Omnibus Trade and Competitiveness Act of 1988*

Congress laid the groundwork for current developments in the GATT when it passed the Omnibus Trade and Competitiveness Act of 1988.²⁰ Against the backdrop of the "new global economy," which, in the preceding ten years had brought "trade, technological development, investment, and services [into] an integrated system,"²¹ Congress concluded that the President should be "authorized and encouraged" to negotiate trade agreements covering a variety of fields, including intellectual property.²² In the meanwhile, Congress armed the President with the stick of "Super 301" to retaliate against countries erecting "major barriers and practices distorting trade."²³

The 1988 law establishes three overall trading objectives for the United States: obtaining "(1) more open, equitable, and reciprocal market access;²⁴ (2) the reduction or elimination of barriers and other trade-distorting practices;²⁵ and (3) a more effective system of international trading disciplines and procedures."²⁶ It also mandates sixteen principal trade negotiating objectives, such as addressing trade imbalances,²⁷ stabilizing the international monetary system,²⁸ and attacking unfair trade

18. Of course, this number has fluctuated over the years. "The Uruguay Round offers us hope to achieve freer, more open and fairer trade relations among the 107 GATT nations." H.R. REP. NO. 103-128(II), 103d Cong., 1st Sess. 4 (1993).

19. H.R. REP. NO. 103-128(I), 103d Cong., 1st Sess. 5 (1993).

20. Pub. L. No. 100-418, 102 Stat. 1107, 1179-81 (Codified at 19 U.S.C. § 2420 (1988)).

21. *Id.* § 1001(a)(1). Congress acknowledged that "the United States is not in a position to dictate economic policy to the world, [but] the United States is in a position to lead the world and it is in the national interest for the United States to do so." *Id.* § 1001(a)(6).

22. *Id.* § 1001(a)(5).

23. As originally enacted, Section 301 of the Trade Act of 1974 authorizes the President to "take all appropriate and feasible action within his power" in order to combat unjustifiable, unreasonable or discriminatory acts of foreign countries. 19 U.S.C. § 2411. Section 310 of the Omnibus Trade and Competitiveness Act of 1988 colloquially known as "Super 301," arms the U.S. Trade Representative with authority to identify countries engaging in particularly egregious trade practices, against whom U.S. retaliation will be aimed. 19 U.S.C. § 2420.

24. 19 U.S.C. § 2901(a)(1).

25. 19 U.S.C. § 2901(a)(2).

26. 19 U.S.C. § 2901(a)(3).

27. 19 U.S.C. § 2901(b)(5).

28. 19 U.S.C. § 2901(b)(6).

practices,²⁹ including such non-tariff measures as subsidies and dumping.³⁰ Primary among such negotiating objectives are enhancement of the status of the GATT³¹ and providing for "more effective and expeditious dispute mechanisms and procedures,"³² which includes³³ ensuring that the GATT agreements themselves "provide for more effective and expeditious resolution of disputes and enable better enforcement of United States' rights."³⁴

With respect explicitly to intellectual property, the 1988 law seeks enactment and effective enforcement of laws by foreign countries that "recognize and adequately protect intellectual property, including copyrights, patents, trademarks, semi-conductor chip layout designs,³⁵ and trade secrets,"³⁶ as well as unfair competition.³⁷ Beyond seeking generally to "supplement and strengthen standards for protection and enforcement" of existing international treaties in the intellectual property arena,³⁸ such as (with respect to copyright)³⁹ the Berne Convention and Universal Copyright Convention,⁴⁰ the Omnibus Trade and Competitiveness Act of 1988 also proposes the signal innovation that the GATT itself be amended to require protection of intellectual property.⁴¹ To the extent that existing multilateral treaties already "provide adequate protection," it is contemplated that those standards should form the basis for the GATT's substantive

29. 19 U.S.C. § 2901(b)(8).

30. 19 U.S.C. § 2901(b)(8)(A). *See id.* § 2901(b)(13).

31. 19 U.S.C. § 2901(b)(2).

32. 19 U.S.C. § 2901(b)(1)(A).

33. This treatment discusses only a small portion of that 1988 law, most of the provisions of which fall outside the intellectual property realm. For example, one provision directs that the GATT shall not apply between the United States and major foreign countries that accede to GATT after August 23, 1988, whose "state trading enterprises" are both significant and unduly restrict the foreign trade of the United States. 19 U.S.C. § 2905(a). *See* 19 U.S.C. § 2906(6) (definition of "state trading enterprises").

34. 19 U.S.C. § 2901(b)(1)(B).

35. *See* 2 NIMMER ON COPYRIGHT § 8A.

36. 19 U.S.C. § 2901(b)(10)(A)(i).

37. 19 U.S.C. § 2901(b)(10)(A)(ii).

38. 19 U.S.C. § 2901(b)(10)(D). Included in that goal is the expansion of such existing treaties "to cover new and emerging technologies and elimination of discrimination or unreasonable exceptions or preconditions to protection." *Id.*

39. Outside the copyright arena, other international compacts govern such rights as patents and trademarks. The Paris Convention for the Protection of Industrial Property has existed since 1883.

40. *See* 3 NIMMER ON COPYRIGHT § 17.01[B].

41. 19 U.S.C. § 2901(b)(10)(B)(i). Such implementation must be "without prejudice to other complementary initiatives undertaken in other international organizations." *Id.* § 2901(b)(10)(C).

standards.⁴² For areas in which the existing multilateral treaties provide inadequate or no protection, then it is proposed that "the standards in national laws" form the basis for the GATT's substantive provisions.⁴³

Beyond implementing those standards, the 1988 law specifies that effective procedures must exist to enforce those standards, "both internally and at the border."⁴⁴ To round out the picture, the GATT should "implement effective dispute settlement procedures that improve on existing GATT procedures."⁴⁵

Having charged the President to secure trade agreements incorporating the parameters specified above, Congress further mandates that "fast track procedures" shall apply to implementing bills.⁴⁶ The primary significance of this characterization is that Congress must simply approve or defeat the entire package, rather than subjecting it to the infinite pressures of the logrolling process.⁴⁷ To qualify for such treatment, the President must certify that various criteria have been satisfied.⁴⁸ Authority for entering such arrangements initially expired on June 1, 1993,⁴⁹ with respect solely to the Uruguay Round of GATT negotiations, Congress in 1993 extended the deadline to April 16, 1994.⁵⁰ The President was simultaneously obligated to submit supporting information to Congress 120 calendar days before that deadline.⁵¹

C. Consummation of the Uruguay Round

On December 15, 1993 — just under the wire established by the 120-day deadline before the final day of April 16, 1994 set forth above — President Clinton submitted to Congress notification of his intent "to enter

42. 19 U.S.C. § 2901(b)(10)(B)(i)(I). The statute does not specify what constitutes "adequate protection."

43. 19 U.S.C. § 2901(b)(10)(B)(i)(II). Whose national laws are to be implemented remains unspecified.

44. 19 U.S.C. § 2901(b)(10)(B)(ii).

45. 19 U.S.C. § 2901(b)(10)(B)(iii).

46. 19 U.S.C. § 2903(b).

47. Fast track procedures provide, *inter alia*, that any member of Congress "may move to consider an implementing bill, and the motion to proceed is considered highly privileged, unamendable and not debatable." H.R. REP. NO. 103-128(II), 103d Cong., 1st Sess. 3 (1993).

48. 19 U.S.C. § 2902(b), (c).

49. *Id.*

50. Pub. L. No. 103-49, 107 Stat. 239 (1993). See 19 U.S.C. § 2902(e)(1). "Extension of the U.S. trade agreement authority and 'fast track' implementing procedures is essential to permit completion of these important negotiations this year." H.R. REP. NO. 103-128(I), 103d Cong., 1st Sess. 4 (1993).

51. 19 U.S.C. § 2902(e)(3)(A). Prior to the 1993 amendment, the deadline was 90 calendar days. 19 U.S.C. § 2903(a).

into the trade agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade."⁵² Consonant with the negotiating objectives set forth in the Omnibus Trade and Competitiveness Act of 1988, the President certified that "the Uruguay Round results will provide an unprecedented level of new market access opportunities for U.S. goods and services exports."⁵³

Matters addressed in this round of the GATT range from agriculture to textiles to phytosanitary measures, from preshipment inspection to anti-dumping to market access. For copyright purposes, the protocol on Trade Related Aspects of Intellectual Property ("TRIPs") is key.

The entire GATT enterprise almost foundered at the last instant from failure of French and American negotiators to hammer out questions of European film subsidies and television quotas, which effectively constitute nontariff barriers to U.S. films. To avoid sacrificing everything, the U.S. ultimately blinked.⁵⁴ Under an exception to the principles of national treatment and most favored nations,⁵⁵ the European Union may therefore accord preferential treatment under the General Agreement on Trade in Services ("GATS") to its own domestic entities. These preferences are allowed under the GATT to last for ten years.

The entire agreement is currently scheduled to take effect on July 1, 1995. Note, however, that like adherence to the Berne Convention, treaty implementation is not self-executing.⁵⁶ The new measures will have no domestic legal force until Congress enacts appropriate implementing legislation.⁵⁷

1. Trade Related Aspects of Intellectual Property

Of primary significance to the copyright world is the Uruguay Round's inclusion in the GATT of the Agreement on Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods.⁵⁸ The TRIPs protocol comprises seventy-three articles on a broad

52. 58 Fed. Reg. 67,263, 67,264 (Dec. 15, 1993).

53. *Id.*

54. "With regard to entertainment issues, we were unable to overcome our differences with our major trading partners . . ." *Id.* at 67,267. According to President Clinton, "we can best advance the interests of our entertainment industry by reserving all our legal rights to respond to policies that discriminate in these areas." *Id.*

55. See *infra* part II.C.1.a.

56. See 1 NIMMER ON COPYRIGHT § 1.12[A].

57. 58 Fed. Reg. 67,263, 67,267 (Dec. 15, 1993).

58. The 1994 GATT contains several parts. First comes the Final Act. Next comes the Agreement Establishing the World Trade Organization, to which numerous annexes are appended.

range of subjects, whose overall objective is to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."⁵⁹ To foster such international cooperation,⁶⁰ the protocol sets up a Council for Trade-Related Aspects of Intellectual Property.⁶¹ President Clinton has hailed TRIPs as "a major step forward in establishing a more effective system of international trading disciplines and procedures."⁶² The reaction of affected U.S. copyright industries has been a bit more tepid.⁶³

TRIPs addresses trademarks,⁶⁴ industrial designs,⁶⁵ patents,⁶⁶ and protection of undisclosed information.⁶⁷ To protect the U.S. wine industry and others,⁶⁸ it provides protection (not contemplated by Congress in the Omnibus Trade and Competitiveness Act of 1988)⁶⁹ for geographical indications.⁷⁰ For current purposes, the focus is on its provisions relating to copyright and related rights⁷¹ and to topographies of integrated circuits.⁷² In addition to those specific provisions, it contains general provisions, also to be discussed herein, for enforcement of intellectual

TRIPs is included as Annex 1C. Finally, there are various Ministerial Decisions and Declarations. The Members have agreed that the latter two instruments embody the results of their negotiations and hence form an integral part of the Final Act. TRIPs is therefore as juridically binding as are other aspects of the GATT.

59. TRIPs, art. 7.

60. TRIPs, art. 69.

61. TRIPs, art. 68.

62. 58 Fed. Reg. 67,263, 67,291 (Dec. 15, 1993). President Clinton hails TRIPs for its "establishment of standards for the protection of a full range of intellectual property rights and for the enforcement of those standards both internationally [sic] and at the border." Presumably, the President meant to use the word "internally." *See id.* at 67,266.

63. Eric Smith, Executive Director of the International Intellectual Property Alliance, testifying to Congress on behalf of interest groups representing the film, publishing, software, music, and record industries, expressed "grave disappointment" that perceived deficiencies were not rectified in the final TRIPs Agreement. "While none of our members will seek to oppose the WTO Agreement, many of them will not be able to warmly endorse it," he concluded. Testimony to House Ways and Means Committee, Feb. 1, 1994.

64. TRIPs, arts. 15-21.

65. TRIPs, arts. 25-26.

66. TRIPs, arts. 27-34.

67. TRIPs, art. 39.

68. 58 Fed. Reg. 67,263, 67,289 (Dec. 15, 1993).

69. *See supra* part II.B.

70. TRIPs, arts. 22-24.

71. TRIPs, arts. 9-14.

72. TRIPs, arts. 35-38.

property rights, acquisition and maintenance of intellectual property rights, and dispute prevention and settlement.

a. Basic Principles

Countries that adhere to the GATT are called Members. All Members are expected to comport with the various matters discussed herein.⁷³ Inasmuch as reservations from TRIPs are subject to consent of the other Members, it is doubtful that partial accessions will eventuate.⁷⁴ Members are obligated to apply TRIPs one year after the entry into force of the Agreement establishing the WTO,⁷⁵ which is scheduled to occur on July 1, 1995. Developing nations⁷⁶ and ex-communist countries adopting free-enterprise economies⁷⁷ have an extra grace period to implement TRIPs, and do not need to harmonize their laws until five years after the 1995 entry into force.⁷⁸ Least developed countries need not implement TRIPs until ten years after entry into force.⁷⁹

TRIPs builds upon the foundation of previous intellectual property treaties. It therefore cannot serve as the basis for releasing Members from their antecedent treaty obligations to each other.⁸⁰ For copyright purposes, the standards of reference are the 1971 Paris text of the Berne Convention⁸¹ ("Berne Convention"), the International Convention for Protection

73. Note that even when countries are acting "to promote the public interest in sectors of vital importance to their socio-economic and technological development," they are expected to adopt only measures consistent with TRIPs. TRIPs, art. 8, para. 1.

74. TRIPs, art. 72.

75. TRIPs, art. 65, para. 1. Instead of WTO, the reference therein is actually to the "MTO." Subsequent to composition of that article, a *corrigendum* issued explaining that "World" should be substituted for "Multilateral" and hence the proper name of the entity is "WTO."

76. TRIPs, art. 65, para. 2.

77. TRIPs, art. 65, para. 3.

78. The grace period does not apply to the provisions relating to national treatment and most-favored nations, discussed below. TRIPs, art. 65, para. 2. *See also* TRIPs, art. 65, para. 5 (changes in domestic law must not result in lesser degree of consistency).

79. TRIPs art. 66, para. 1. Note that further extensions may be granted. *Id.* Note also the requirements for technical cooperation between advanced and developing economies. TRIPs, art. 66, para. 2; art. 67.

80. "Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the . . . Berne Convention. . . ." TRIPs art. 2, para. 2. Omitted from that provision are Parts V to VII of TRIPs, relating to Dispute Prevention and Settlement, Transitional Arrangements, and Institutional Arrangements. It would therefore seem that TRIPs should be regarded as the exclusive vehicle in such matters as dispute prevention.

81. *See* 3 NIMMER ON COPYRIGHT § 17.01[B][1]. TRIPs states in its introductory clauses that its Members "desir[e] to establish a mutually supportive relationship between the MTO [i.e., the WTO] and the World Intellectual Property Organization," which is the Berne Convention's Geneva-based Secretariat.

of Performances, Producers of Phonograms and Broadcasting Organizations, ("Rome Convention"), and the Washington Treaty regarding semiconductor chips. The United States acceded to the Berne Convention in 1989.⁸² Because American copyright law does not embody the Continental distinction between pure copyrights (*droits d'auteurs*) and neighboring rights (*droits voisins*), the United States does not adhere to the Rome Convention. With respect to the Treaty on Intellectual Property in Respect of Integrated Circuits, the sole signatories are China, Egypt, Ghana, Guatemala, India, Liberia, Yugoslavia, and Zambia; for that reason, this Treaty has never entered into force.

The first basic principle of TRIPs is that Members must give effect to the *minimum standards* contained in its provisions.⁸³ As with the Berne Convention,⁸⁴ the obligation in TRIPs to afford minimum standards applies not to domestic claimants, but to nationals of other Members.⁸⁵ For these purposes, "nationals of other Members" are defined to include "those natural or legal persons that would meet the criteria for eligibility for protection provided for" in the Berne, Rome,⁸⁶ and Washington Conventions.⁸⁷

Also, again mirroring Berne,⁸⁸ Members are free to implement even higher standards in their domestic laws than the minimum standards outlined in TRIPs.⁸⁹ The precise vehicle used to implement TRIPs is left for each Member to determine within the framework of its own domestic laws.⁹⁰

Apart from minimum standards, the other overarching consideration in Berne Convention jurisprudence is *national treatment*.⁹¹ Subject to two exceptions, TRIPs adopts that philosophy: "Each Member shall accord to the nationals of other Members treatment no less favourable than that it

82. See 3 NIMMER ON COPYRIGHT § 17.01[C][2].

83. TRIPs, art. 1, para. 1.

84. See 3 NIMMER ON COPYRIGHT § 17.01[B][1].

85. TRIPs, art. 1, para. 3.

86. The Rome Convention allows Contracting States to decline to apply the criteria of publication or of fixation specified therein. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, art. 5(3). It also allows Contracting States to limit protection to broadcasts emanating from specified locations. *Id.*, art. 6(2). GATT members who have so elected under the Rome Convention are obligated to notify the Council for Trade-Related Aspects of Intellectual Property. TRIPs art. 1, para. 3.

87. TRIPs, art. 1, para. 3.

88. See 3 NIMMER ON COPYRIGHT § 17.01[B][1].

89. TRIPs, art. 1, para. 1 ("provided that such protection does not contravene the provisions of" TRIPs).

90. *Id.*

91. See 3 NIMMER ON COPYRIGHT §17.01[B][1].

accords to its own nationals with regard to the protection of intellectual property. . . ."⁹² The first exception is that the requirement of national treatment applies with respect to neighboring rights — *i.e.*, to performers, producers of phonograms and broadcasting organizations — only with respect to obligations imposed by TRIPs itself, not to those contained, for example, in the Rome Convention.⁹³ The second caveat is that national treatment under TRIPs is subject to pre-existing treaty exceptions.⁹⁴ For example, because the Rule of the Shorter Term⁹⁵ represents an exception to national treatment incorporated into the Universal Copyright Convention and Berne Convention,⁹⁶ TRIPs does not override it. It is further provided that, as they relate to judicial and administrative procedures,⁹⁷ Members may invoke the foregoing exceptions "only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade."⁹⁸

The Berne Convention does not go beyond national treatment to create a *most-favored nation* scheme. Therefore, to the extent that U.S. copyright law grants Americans a right to statutory damages, for example, it must accord the same right to all Convention claimants; but to the extent that U.S. copyright law were to grant a privilege to Swedes, for example, that it denies to Americans, then it could similarly deny that privilege to Indians and other Convention claimants.⁹⁹ In actuality, Canadians and Mexicans enjoy a right to resurrection of certain unnoticed motion pictures, legislated incident to NAFTA adherence.¹⁰⁰ Under the Berne Convention, that same right need not be accorded other Berne members.

92. TRIPs, art. 3, para. 1.

93. *Id.*

94. *Id.* A provision parallel to the one previously encountered governs Rome Convention Contracting States that have elected out of certain provisions. *Id.*; see also *supra* note 86.

95. See generally, 2 NIMMER ON COPYRIGHT §9.01[D].

96. See David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal to the United States*, 55 L. & CONTEMP. PROBS. 211, 222-23, 233-34 (1992).

97. Such procedures include "the designation of an address for service or the appointment of an agent within the jurisdiction of a member." TRIPs, art. 3, para. 2.

98. TRIPs art. 3, para. 2. In addition, the entire obligations of national treatment and most-favored nation under TRIPs do not apply to "procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights." TRIPs art. 5. Note that the Berne Convention, but not the Universal Copyright Convention, falls under WIPO auspices.

99. See 3 NIMMER ON COPYRIGHT §17.01[B][1].

100. See *infra* part III.B.1.

TRIPs, by contrast, mandates that "any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."¹⁰¹ Thus, reverting to the previous example, one would imagine that citizens worldwide should be able to demand the same film resurrection as that accorded Canadians and Mexicans. Nonetheless, this most-favored nation requirement is subject to four exceptions:

- (a) privileges "deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property;"¹⁰²
- (b) privileges granted by the Berne Convention or Rome Convention "authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;"¹⁰³
- (c) privileges relating to rights of performers, producers of phonograms, and broadcasting organizations, which are not specifically accorded by TRIPs itself;¹⁰⁴ and
- (d) privileges deriving from pre-existing international agreements for the protection of intellectual property.¹⁰⁵ Such agreements must not constitute "an arbitrary or unjustifiable discrimination against nationals of other Members."¹⁰⁶

Given that NAFTA entered into force prior to the Agreement Establishing the WTO,¹⁰⁷ resurrection of Canadian and Mexican films meets exception (d). Therefore, American copyright law may legitimately confer this privilege solely upon Canadian and Mexicans, unless nationals of other countries successfully challenge that provision of U.S. law as "an arbitrary or unjustifiable discrimination."

101. TRIPs, art. 4.

102. TRIPs, art. 4, para. (a).

103. TRIPs, art. 4, para. (b).

104. TRIPs, art. 4, para. (c).

105. TRIPs, art. 4, para. (d). There must be notification to the Council for Trade-Related Aspects of Intellectual Property of such pre-existing agreements. *Id.*

106. TRIPs, art. 4, para. (d).

107. *See infra* part III.

b. Copyright Provisions

Six articles compromise TRIPs copyright provisions. As will be discussed in each instance, these provisions are largely harmonious with existing U.S. law, meaning that Congress need make few, if any, adjustments to bring our law into harmony with TRIPs in all particulars.

First, all members must comply with the Berne Convention.¹⁰⁸ That requirement is subject to the single exception,¹⁰⁹ however, that the moral rights provisions of the Berne Convention¹¹⁰ are not incorporated into TRIPs.¹¹¹ In light of the gross congruence between Berne Convention strictures and existing U.S. law — with a large question mark continuing to hover over the moral rights sphere¹¹² — this provision does not require any change to U.S. law.

Second, protection is mandated for computer programs, whether in source code or object code format, as literary works under the Berne Convention.¹¹³ Databases¹¹⁴ must also be protected, “which by reason of the selection or arrangement of their contents constitute intellectual creations”¹¹⁵ Copyright is limited to expression; its protection must not extend to “ideas, procedures, methods of operation or mathematical concepts as such.”¹¹⁶ Facts should also be outside the realm of protection; therefore, copyright protection for a creatively arranged selection of facts cannot protect “the data or material itself” contained in the database; of course, a database that is itself comprised of copyrightable elements does not prejudice extant rights in the underlying material.¹¹⁷ These provisions harmonize with existing U.S. law, and again require no change.

108. TRIPs, art. 9, para. 1.

109. Also excepted from TRIPs are articles 22-38 of the Berne Convention, which deal primarily with governance and structure rather than substantive copyright obligations and rights. TRIPs, art. 9, para. 1.

110. See 2 NIMMER ON COPYRIGHT § 8D.01 [B].

111. TRIPs, art. 9, para. 1. “The Agreement also obligates Members to comply with the provisions of the Berne Convention, the preeminent international copyright treaty, with the exception of that Convention’s requirements on moral rights.” 58 Fed. Reg. 67,263, 67,290 (Dec. 15, 1993).

112. See 2 NIMMER ON COPYRIGHT § 8D.02[D][1].

113. TRIPs, art. 10, para. 1.

114. The reference is to “[c]ompilations of data or other material, whether in machine readable or other form” TRIPs, art. 10, para. 2.

115. TRIPs, art. 10, para. 2.

116. TRIPs, art. 9, para. 2. See 1 NIMMER ON COPYRIGHT §§ 2.03-2.04.

117. The language used sagely preserves all options for Member states: “Such [database] protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.” TRIPs, art. 10, para. 2.

Third, Members must incorporate into their copyright laws a prohibition on the commercial rental to the public of copies of "at least computer programs and cinematographic works."¹¹⁸ U.S. law already prohibits rental of phonorecords¹¹⁹ and computer programs.¹²⁰ The former prohibition complies with a separate provision of TRIPs.¹²¹ The latter, although it exempts the rental of software embodied in certain machines,¹²² presumably complies with the TRIPs exception that the rental prohibition "does not apply to rentals where the program itself is not the essential object of the rental."¹²³

There remains the question of movie rentals. The profusion of video (and laser disk) rental shops in this country attests to no existing prohibition on that practice. Nonetheless, U.S. law is probably defensible under TRIPs, due to the gigantic exception, drafted into that protocol, with respect to the general requirement of prohibiting movie rentals: "A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has lead to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title."¹²⁴ Apart from the factual question whether material impairment of film owners' rights currently exists in the United States, it is doubtful that rental itself — as opposed to free television and cable telecasts, for example — can be established as the etiology. For these reasons, again, U.S. copyright law probably need not be altered to comply with TRIPs.

The question arises how to treat pre-existing originals or copies upon which a given country imposes a rental prohibition pursuant to TRIPs. For items purchased prior to TRIPs' effective date, Members need not prohibit such rental.¹²⁵

Fourth, TRIPs establishes minimum copyright duration for works other than a photographic work or a work of applied art.¹²⁶ If copyright

118. TRIPs, art. 11.

119. See 2 NIMMER ON COPYRIGHT § 8.12[B][7].

120. See 2 NIMMER ON COPYRIGHT § 8.12[B][8].

121. TRIPs, art. 14, para. 4. For nations, unlike the United States, that have in force as of April 15, 1994, "a system of equitable remuneration of right holders in respect of the rental of phonograms," TRIPs allows such system to continue, "provided that commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders." *Id.*

122. See 2 NIMMER ON COPYRIGHT § 8.12[B][8][b].

123. TRIPs, art. 11.

124. *Id.*

125. TRIPs, art. 70, para. 5.

126. TRIPs, art. 12.

protection is determined on a basis other than the life of a natural person, then the term must be "no less than fifty years from the end of the calendar year of authorized publication, or, failing such authorized publication within fifty years from the making of the work, fifty years from the end of the calendar year of making."¹²⁷ For all works currently created, U.S. copyright protection across all categories of copyrightable work subsists either based on the author's lifetime or, in the case of anonymous works, pseudonymous works, and works made for hire, for seventy-five years from first publication or one hundred years from creation, whichever expires first.¹²⁸ There is no conflict between current U.S. terms and TRIPs requirements.¹²⁹ Nonetheless, shorter protection extant under the U.S. 1909 Act with respect to works created before 1978 could lead to theoretical disparities in concrete cases. Such disparities would pose a problem¹³⁰ on the assumption that this TRIPs provision was deemed to apply retroactively to pre-existing works.¹³¹ In that event, modification of U.S. law would be in order.¹³² In all probability, that problem will likely prove more theoretical than live.

Fifth, U.S. copyright law, like most others, contains various exemptions from liability, and also certain compulsory licenses.¹³³ TRIPs requires Members to "confine limitations or exemptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."¹³⁴ That amorphous language could certainly give rise to GATT complaints against numerous provisions of existing U.S. law. Nonetheless, given the vetting of U.S. law incident to Berne Convention adherence, it is presumably Congress' opinion that all surviving exemptions and compulsory licenses are already legitimate.¹³⁵ It is accordingly doubtful that any changes will be effected pursuant to this provision.

127. *Id.*

128. *See* 2 NIMMER ON COPYRIGHT § 9.01[A].

129. Those TRIPs requirements differ from comparable Berne Convention terms, which are more disparate from U.S. standards. *See generally* David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal to the United States*, 55 L. & CONTEMP. PROBS. 211 (1992).

130. *Id.* at 224-25.

131. *See infra* part II.C.1.e.

132. *See supra* note 95, at 237.

133. *See generally* 2 NIMMER ON COPYRIGHT § 8.

134. TRIPs, art. 13.

135. *See, e.g.*, 2 NIMMER ON COPYRIGHT § 8.04[A] n.2; § 8.06[C] n. 38.

Last, various neighboring rights¹³⁶ are accorded to performers, producers of phonograms,¹³⁷ and broadcasting organizations. Performers must be granted the right of prohibiting unauthorized fixation of their unfixed performances and reproduction of such fixations.¹³⁸ Similarly, performers must be granted the right of prohibiting unauthorized "broadcasting by wireless means and the communication to the public of their live performances."¹³⁹ Inasmuch as these rights both relate to unfixed performances, they fall outside the constitutional definition of "writings"¹⁴⁰ and are hence outside U.S. statutory copyright laws.¹⁴¹ Nonetheless, many state laws provide relief under the contemplated circumstances. Accordingly, the question arises whether the United States can comply with TRIPs via state law under its federal system. To the extent an affirmative answer is given, no changes are required on this basis.¹⁴²

Continuing with the enumeration of neighboring rights, TRIPs mandates that producers of phonograms be given the right "to authorize or prohibit the direct or indirect reproduction of their phonograms."¹⁴³ Given the copyrightability of sound recordings under U.S. law, this provision apparently harmonizes with current U.S. copyright law.¹⁴⁴ Broadcasting organizations must be accorded the right to prohibit unauthorized fixations, reproductions of fixations, "and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same."¹⁴⁵ Given that television networks and other broadcasters are vested with standing under existing U.S. copyright law,¹⁴⁶ these provisions also should not necessitate Congressional action.¹⁴⁷

136. See *supra* part II.C.1.a.

137. This term corresponds with "phonorecords" in the context of U.S. copyright law. See 1 NIMMER ON COPYRIGHT § 2.03[C].

138. TRIPs, art. 14, para. 1.

139. *Id.*

140. See 1 NIMMER ON COPYRIGHT § 1.08[C][2].

141. See 1 NIMMER ON COPYRIGHT § 2.03[B].

142. See 2 NIMMER ON COPYRIGHT § 8D.02[D][2] n.75 and accompanying text.

143. TRIPs, art. 14, para. 2.

144. See 1 NIMMER ON COPYRIGHT § 2.10.

145. TRIPs, art. 14, para. 3.

146. See, e.g., *Silverman v. CBS Inc.*, 870 F.2d 40 (2d Cir. 1989); *National Broadcasting Co. v. Sonneborn*, 630 F. Supp. 524 (D. Conn. 1985).

147. For those nations that do not grant rights to broadcasting organizations, TRIPs requires that owners of copyright in the subject matter of broadcasts be accorded the possibility of preventing the foregoing acts, subject to provisions of the Berne Convention. TRIPs, art. 14, para. 3.

The foregoing neighboring rights provisions are subject to "any conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention."¹⁴⁸ However, TRIPs specifically requires that "the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*,¹⁴⁹ to the rights of performers and producers of phonograms in phonograms."¹⁵⁰ The referenced Article 18 details scope of coverage and retroactivity.¹⁵¹ As detailed in President Clinton's message to Congress, this provision benefits American recording interests by establishing protection for existing sound recordings.¹⁵²

The duration of neighboring rights must be at least fifty years from the end of the calendar year in which the subject fixation or performance took place.¹⁵³ For broadcasting organizations, the minimum term is twenty years from the end of the calendar year in which the subject broadcast took place.¹⁵⁴ As noted above, these durational terms are less demanding than those already accorded under U.S. copyright law, and hence require no implementing legislation.

c. Semiconductor Chip Provisions

As previously noted, Washington — along with the rest of the developed world — has declined to adhere to its eponymous treaty for protecting mask works. TRIPs now makes up for that deficiency. President Clinton's statement to Congress praises TRIPs for promulgating standards for protecting integrated circuits "that eliminate the deficiencies of the Washington Treaty."¹⁵⁵

First, all GATT Members now agree to provide protection to topographies of integrated circuits — which TRIPs labels "layout-designs" — in accordance with most provisions of the Washington Treaty.¹⁵⁶ In addition, provisions contained directly in TRIPs obligate members to

148. TRIPs, art. 14, para. 6.

149. "With the necessary changes in points of detail." BLACK'S LAW DICTIONARY 1019 (6th ed. 1990).

150. TRIPs, art. 14, para. 6.

151. See *infra* part II.C.1.e.

152. 58 Fed. Reg. 67,263, 67,290 (Dec. 15, 1993).

153. TRIPs, art. 14, para. 5.

154. *Id.*

155. 58 Fed. Reg. 67,263, 67,291 (Dec. 15, 1993).

156. TRIPs, art. 35. In particular, compliance is required with Articles 2-7 (other than Article 6, paragraph 3), Article 12, and Article 16, paragraph 3 of the Washington Treaty. *Id.* The non-included portions of the Washington Treaty set up the treaty administration procedures and provide for a "non-voluntary license" when negotiations fail.

prohibit unauthorized "importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit."¹⁵⁷ That last prohibition applies only to the extent that the subject article "continues to contain an unlawfully reproduced layout-design."¹⁵⁸

The foregoing enumerated acts are subject to a good faith exception. That exception applies "where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design."¹⁵⁹ In such circumstances, however, once notification is received that the layout-design in question was unlawfully reproduced, the law of each adhering country must provide that the defense applies only to stock on hand or ordered before such time. In addition, the affected persons "shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated license in respect of such a layout-design."¹⁶⁰ Presumably, sales beyond stock on hand and ordered, after notice of illegality, are subject to full sanctions.

The Washington Treaty provides that executive and judicial authorities of member nations, in order to safeguard their vital national purposes, may grant non-voluntary licenses to technology as to which consensual efforts to consummate a license are unsuccessful.¹⁶¹ TRIPs provides that specified procedures shall apply "in the event of any non-voluntary licensing of a layout-design or of its use by or for the government" that is undertaken without authorization.¹⁶² Those procedures are drawn from the patent provisions of TRIPs,¹⁶³ and include¹⁶⁴ considering each authorization on its individual merits,¹⁶⁵ exhausting commercial efforts at licensing (absent national emergency),¹⁶⁶ paying adequate remunera-

157. TRIPs, art. 36.

158. *Id.*

159. TRIPs, art. 37, para. 1.

160. *Id.*

161. Treaty on Intellectual Property in Respect of Integrated Circuits, art. 6, para. 3.

162. TRIPs, art. 37, para. 2.

163. "The conditions set out in sub-paragraphs (a)-(k) of Article 31 above shall apply *mutatis mutandis* . . ." TRIPs, art. 37, para. 2.

164. Note that Member states may suspend some of these provisions in order to combat anti-competitive practices. TRIPs, art. 31, para. (k).

165. TRIPs, art. 31, para. (a).

166. TRIPs, art. 31, para. (b).

tion¹⁶⁷ subject to judicial review¹⁶⁸ and making the use limited,¹⁶⁹ non-exclusive,¹⁷⁰ non-assignable,¹⁷¹ terminable,¹⁷² and predominantly for the domestic market.¹⁷³

Under TRIPs, the term of protection for layout-designs must not be less than ten years from the date of first commercial exploitation to occur anywhere in the world.¹⁷⁴ Under the laws of Members that require registration as a condition of protection for layout-designs, an alternative term of protection is ten years from the date of filing the registration application.¹⁷⁵ In either event, TRIPs contemplates that Members may provide protection for fifteen years from creation.¹⁷⁶

d. Anti-Competitive Practices

The participants in TRIPs collectively agree that "some licensing practices or conditions pertaining to intellectual property rights which may restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology."¹⁷⁷ Accordingly, Members may adopt appropriate measures — consistent with the other provisions of TRIPs¹⁷⁸ — to prevent or control such anti-competitive practices.¹⁷⁹ Explicitly enumerated as suspect practices are "exclusive grantback conditions, conditions preventing challenges to validity¹⁸⁰ and coercive package licensing."¹⁸¹

If country *X* has cause to believe that a national or domiciliary of country *Y* is engaging in anti-competitive practices in violation of country *X*'s laws, *X* and *Y* must enter into consultations to resolve the issue.¹⁸² Such consultations are without prejudice to subsequent actions at law.¹⁸³

167. TRIPs, art. 31, para. (h).

168. TRIPs, art. 31, para. (i), (j).

169. TRIPs, art. 31, para. (c).

170. TRIPs, art. 31, para. (d).

171. TRIPs, art. 31, para. (e).

172. TRIPs, art. 31, para. (g).

173. TRIPs, art. 31, para. (f).

174. TRIPs, art. 38, para. 2.

175. TRIPs, art. 38, para. 1.

176. TRIPs, art. 38, para. 3.

177. TRIPs, art. 40, para. 1.

178. TRIPs, art. 8, para. 2; art. 40, para. 2.

179. TRIPs, art. 40, para. 2.

180. See 3 NIMMER ON COPYRIGHT § 10.15[B].

181. TRIPs, art. 40, para. 2.

182. TRIPs, art. 40, para. 3. See also *id.* para. 4.

183. TRIPs, art. 40, para. 3.

e. Other Features

The Council for Trade-Related Aspects of Intellectual Property will review implementation of TRIPs as a whole at two year intervals. It may propose necessary modifications and amendments.¹⁸⁴

Given international sensitivities, it is explicitly provided that TRIPs will not require Members to reveal national security information.¹⁸⁵ Similar carve-outs apply to fissionable materials, arms traffic, and wartime emergencies.¹⁸⁶

TRIPs does not bar reasonable procedures and formalities as a condition to the acquisition and maintenance of intellectual property rights.¹⁸⁷ When registration is required as a condition to acquiring rights, Members must ensure that timely registration procedures be available.¹⁸⁸

Always of vital concern to intellectual property enactments is the issue of retroactivity. TRIPs explicitly provides that it "does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question."¹⁸⁹ It further specifies that "[t]here shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain."¹⁹⁰ For pre-existing works that are still subject to copyright protection, TRIPs does apply.¹⁹¹ Determinations for both copyrights and neighboring rights are to be made pursuant to Article 18 of the Berne Convention.¹⁹² In the event that pre-existing uses are rendered illegal through adoption of higher protection, a sell-off period may be implemented subject to equitable remuneration.

184. TRIPs, art. 71, para. 1. By consensus or through formal GATT means, higher level protections may be adopted; such might occur, for example, following revision of the Berne Convention to incorporate additional terms. *Id.* para. 2.

185. TRIPs, art. 73, para. (a).

186. TRIPs, art. 73, para. (b). *See also id.* para. (c).

187. TRIPs, art. 62, para. 1.

188. TRIPs, art. 62, para. 2. Note also the provision for amending registration applications that are pending at the time TRIPs enters into force. *Id.* art. 70, para. 7.

189. TRIPs, art. 70, para. 1.

190. TRIPs, art. 70, para. 3.

191. TRIPs, art. 70, para. 2.

192. *Id.* For a discussion of Article 18 of the Berne Convention, and its impact within U.S. copyright jurisprudence, see Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 L. & CONTEMP. PROBS. 211, 228-32 (1992).

2. Enforcement Mechanisms

a. In General

As important as affording intellectual property protection on paper is the actual ability to enforce those rights. U.S. objectives, generally, in the GATT negotiations included strengthening and increasing GATT dispute settlement procedures "and to ensure that all of the Uruguay Round Agreements were subject to a single effective dispute settlement system."¹⁹³ The Dispute Settlement Understanding ("DSU") ultimately implemented as part of the GATT provides for GATT panels to issue reports based on Members' complaints,¹⁹⁴ contemplates appellate review of panel rulings, mandates time limits within which Members must bring their law into conformity with panel rulings, and authorizes retaliation in the event that such conformity does not timely occur.¹⁹⁵ Such retaliation, based on non-compliance with TRIPs, for instance, may include tariff increases or other action.¹⁹⁶

Also beneficial to enforcement of the TRIPs protocol is the creation of a World Trade Organization ("WTO") — an organization to be of a stature commensurate with the World Bank and International Monetary Fund¹⁹⁷ — to replace¹⁹⁸ the GATT Secretariat.¹⁹⁹ "By bringing together disciplines on government practices affecting trade in goods and services and the protection of intellectual property rights under one institutional umbrella, the WTO Agreement also facilitates the 'cross-retaliation' mechanism of the integrated dispute settlement understanding."²⁰⁰

193. TRIPs, art. 70, para. 4. Note the parallel provision adopted in the NAFTA context. See *infra* part III.B.1.C.

194. 58 Fed. Reg. 67,263, 67,291 (Dec. 15, 1993) (Executive Summary appended to President's transmission to Congress).

195. *Id.* at 67,292.

196. *Id.* at 67,289, 67,292.

197. *Id.* at 67,293.

198. "The organization would not be different in character from that of the existing GATT Secretariat, however, nor is it expected to be a larger, more costly, Organization." *Id.*

199. A problem afflicting previous enforcement of GATT sanctions was that only a handful of countries adhered to the disciplines of the 1979 Tokyo Round; the bulk of the world, therefore, was a "free rider" in this sphere. *Id.* at 67,293.

200. *Id.* at 67,293.

Provisions of the GATT, such as TRIPs, are applicable to all Members.²⁰¹ “Thus, for example, India is precluded from not applying the TRIPs agreement to the United States.”²⁰² Under exceptional circumstances, a Member state can be granted a waiver by a vote of three-quarters of all Members present.²⁰³ However, “in the case of an obligation subject to phased-in implementation” — as in the case of TRIPs — that has not yet been fulfilled by the Member requesting waiver, such waiver can be granted only by general consensus.²⁰⁴

In terms of future modifications of the GATT, procedural modifications will bind all Members.²⁰⁵ Substantive amendments,²⁰⁶ by contrast, will bind the United States only upon American acceptance of their terms.²⁰⁷ As has been the case since inception of the GATT in 1947, decision-making will proceed by consensus, meaning that the U.S. (like any other member) can “prevent the application to us of a decision that we perceive to be contrary to our interest.”²⁰⁸

b. TRIPs Enforcement

Beyond the general enforcement provisions discussed above,²⁰⁹ TRIPs itself contains a large armamentarium of enforcement tools.²¹⁰ In fact, TRIPs stands unique among international copyright compacts in the sophistication of its enforcement mechanisms. Moreover, given that TRIPs requires participating members to affirm Berne Convention standards, but contains enforcement provisions far more efficacious than those extant

201. The WTO Agreement eliminates the prior practice “that had the effect of ‘grand-fathering’ certain existing legislation of contracting parties that are inconsistent with the GATT.” *Id.* at 67,295.

202. *Id.* at 67,294. By contrast, a Member can invoke “global non-application” with respect to states that accede to the WTO but are not GATT contracting parties. “Thus, with respect to the People’s Republic of China and possibly other acceding Members, the United States can choose not to apply the GATT and the Uruguay Round agreement to that country as a whole.” *Id.* at 67,295.

203. *Id.* at 67,294. Previously, waivers could be granted by a two-thirds vote. *Id.*

204. *Id.*

205. *Id.* at 67,294.

206. Note that rulings by GATT dispute settlement panel do not constitute authoritative interpretations binding on all the Members. “Only the Members themselves (acting through the Ministerial Conference or General Council) could adopt such an interpretation.” *Id.* at 67,294.

207. *Id.*

208. *Id.*

209. *See supra* part II.C.2.a.

210. *See supra* part II.C.1.

under Berne,²¹¹ it can be anticipated that TRIPs will set the international standard for enforcement.

TRIPs sets out its various remedial features in painstaking detail. Because U.S. law already contains a sophisticated array of civil and criminal remedies,²¹² those features should not require implementing amendments to American copyright law.²¹³ The discussion herein merely touches upon the general framework. American copyright owners who wish to safeguard their rights abroad are referred to the TRIPs articles themselves to determine the full scope of required protection.

In broad stroke, Members agree to ensure the existence in their national law of enforcement procedures adequate "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."²¹⁴ Those procedures must be fair and equitable, and not "unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delay."²¹⁵ Court decisions must be based on contested evidence and should preferably be in writing and state their reasons.²¹⁶ Appellate review should exist, apart from acquittals in criminal cases.²¹⁷

Telescoping many detailed provisions, TRIPs mandates fair and equitable procedures²¹⁸ in which counsel may participate,²¹⁹ confidentiality orders will protect the parties²²⁰ and courts will be armed with subpoena power to compel production of evidence.²²¹ Courts will have the power under appropriate circumstances to order an injunction,²²² to assess damages against "an infringer who knew or had reasonable grounds

211. See *supra* text accompanying note 8.

212. See 3 NIMMER ON COPYRIGHT, chs. 14, 15.

213. Note that TRIPs does not require special "copyright courts" and does not mandate distribution of resources towards copyright enforcement. TRIPs, art. 41, para. 5.

214. TRIPs, art. 41, para. 1.

215. TRIPs, art. 41, para. 2. Given the cost and delay incident to American civil litigation, it will be interesting to see if other nations allege U.S. violation of those terms.

216. TRIPs, art. 41, para. 3.

217. TRIPs, art. 41, para. 4.

218. Such may be administrative as well as judicial. TRIPs, art. 49.

219. TRIPs, art. 42.

220. *Id.*

221. TRIPs, art. 43, para. 1. Note the provision for default judgments against parties who fail to furnish requested discovery. *Id.* para. 2.

222. TRIPs, art. 44, para. 1. Note the possibility of ordering equitable remuneration instead under specified circumstances. *Id.* para. 2.

to believe that he was engaged in infringing activity,"²²³ to include in such award expenses, "which may include appropriate attorney's fees,"²²⁴ and to order seizure and other appropriate disposition of infringing articles.²²⁵ Prevailing plaintiffs may force adjudged infringers to reveal the identity of third parties involved in the production and distribution of the infringing goods, "unless this would be out of proportion to the seriousness of the infringement. . . ."²²⁶ Plaintiffs who obtain interim relief may be required to post a bond to indemnify a defendant who ultimately prevails.²²⁷

Provisional measures should comprise injunctions, including exclusion at the border,²²⁸ orders to preserve evidence,²²⁹ and *ex parte* procedures against those who might otherwise destroy evidence.²³⁰ Such measures should be revoked "if proceedings leading to a decision on the merits are not initiated within a reasonable period"²³¹

Members must also adopt procedures to exclude pirated copyright goods at the border²³² (except *de minimis* quantities in travellers' personal luggage).²³³ Such goods are defined as

any goods which are copies made without the consent of the right holder or person duly authorized by him 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 of importation.²³⁴

223. TRIPs, art. 45, para. 1. Even absent knowledge, Members may authorize recovery of profits or statutory damages. *Id.* para. 2.

224. TRIPs, art. 45, para. 2.

225. TRIPs, art. 46.

226. TRIPs, art. 47.

227. TRIPs, art. 48, para. 1. A good faith defense protects only public authorities and officials. *Id.* para. 2. See TRIPs, art. 50, paras. 3, 8.

228. TRIPs, art. 50, para. 1(a).

229. TRIPs, art. 50, para. 1(b).

230. TRIPs, art. 50, para. 2 ("provisional measures *inaudita altera parte* where appropriate"). The other party should be afforded a prompt hearing after execution of the ordered measures. *Id.* para. 4.

231. TRIPs, art. 50, para. 6 (if provided under national law, one month).

232. TRIPs, art. 51.

233. TRIPs, art. 60.

234. This definition applies to piratical, not grey market, goods. See 2 NIMMER ON COPYRIGHT § 8.12[B][6].

Fully ten articles of TRIPs minutely regulate the procedures that must govern in this context.²³⁵ Willful copyright piracy undertaken on a commercial scale must be subject to criminal prosecution.²³⁶

c. Dispute Prevention and Settlement

The goal of the United States in general throughout the Uruguay Round of GATT renegotiations has been to achieve transparency in national law schemes.²³⁷ Toward that goal, TRIPs contains several provisions, under the rubric of dispute prevention, that mandate publication (or public availability) of laws, regulations, final judicial decisions and administrative rulings.²³⁸ Members must respond to written requests from other Members about their laws, rulings, and treaty commitments.²³⁹

There is also a provision in TRIPs regarding dispute settlements which contains technical coordination between general dispute settlement procedures of the GATT²⁴⁰ and those that specifically govern in the intellectual property ambit.²⁴¹ It is further provided that for purposes of dispute settlement, nothing in TRIPs "shall be used to address the issue of exhaustion²⁴² of intellectual property rights."²⁴³

III. NAFTA

The GATT is a huge treaty with immense copyright significance. NAFTA is also a huge treaty; its copyright provisions, however, are more circumscribed. The instant discussion is therefore less detailed than the corresponding GATT treatment.²⁴⁴

235. TRIPs, arts. 51-60.

236. TRIPs, art. 61.

237. 58 Fed. Reg. 67,263, 67,296 (Dec. 15, 1993) (Executive Summary appended to President's transmission to Congress).

238. TRIPs, art. 63, para. 1. Members must also notify the Council for Trade-Related Aspects of Intellectual Property of their laws. *Id.* para. 2.

239. TRIPs, art. 63, para. 3. Note the confidentiality exception. *Id.* para. 4.

240. *See supra* part II.C.2.a.

241. TRIPs, art. 64. Basically, this provision makes applicable Articles XXII and XXIII of GATT 1994, *id.* para. 1, except that certain subparagraphs thereof will not enter into force for five years, *id.* para. 2, during which time the TRIPs Council will offer its input, *id.* para. 3.

242. The European doctrine of "exhaustion" corresponds to the U.S. "first sale doctrine." *See* 2 NIMMER ON COPYRIGHT § 8.12.

243. TRIPs, art. 6.

244. *See supra* part II. Now that the United States has entered two vast international trade frameworks, may a future lull be anticipated? Evidently not: "The USTR has indicated that once these two historic trade expansion tasks are concluded, the Administration would request a broader extension of 'fast track' negotiating authority to expand trade opportunities, to pursue

A. Treaty Provisions

On November 4, 1993, President Clinton transmitted to the Congress the North American Free Trade Agreement ("NAFTA").²⁴⁵ Parties to that compact are the United States, Mexico, and Canada. The Treaty entered into force on January 1, 1994.²⁴⁶ Congress characterizes the treaty as "the most comprehensive trade agreement ever negotiated [that] creates the world's largest integrated market for goods and services."²⁴⁷ Given that Canada and Mexico are the U.S.'s first and third largest trading partners, it is difficult to overestimate the significance of this \$6.5 trillion combined economy.²⁴⁸ Under NAFTA, all North American tariffs will be phased out over the next decade.²⁴⁹ Note that the GATT envisions and approves of such free trade areas as a deviation from most favored nation treatment.²⁵⁰

1. Protection

a. Scope of Application

The intellectual property provisions of NAFTA address encryption of satellite signals,²⁵¹ trademarks,²⁵² patents,²⁵³ trade secrets,²⁵⁴ geographical indications,²⁵⁵ and industrial designs.²⁵⁶ Of primary significance to present purposes are the copyright and related provisions, as well as their general implementation.

other export promotion and free trade agreements." H.R. REP. NO. 103-128(II), 103d Cong., 1st Sess. 4 (1993).

245. H.R. REP. NO. 103-361(I), 103d Cong., 1st Sess. 3 (1993).

246. *Id.* The sequence of events leading to NAFTA adherence are reviewed in *id.* at 5-8. Note the references therein to the Omnibus Trade and Competitiveness Act of 1988. *See supra* part II.B.

247. H.R. REP. NO. 103-361(I), 103d Cong., 1st Sess. 3, at 8 (1993).

248. *Id.*

249. *Id.*

250. H.R. REP. NO. 103-361(I), 103d Cong., 1st Sess. 9 (1993). *See supra* part II.C.1.a.

251. NAFTA, art. 1707.

252. NAFTA, art. 1708.

253. NAFTA, art. 1709.

254. NAFTA, art. 1711.

255. NAFTA, art. 1712.

256. NAFTA, art. 1713.

Under NAFTA, each contracting party agrees, at a minimum,²⁵⁷ "to provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."²⁵⁸ As in TRIPs,²⁵⁹ all three nations agree to adhere to the 1971 Paris text of the Berne Convention,²⁶⁰ certain provisions of the Washington Treaty relating to semiconductor chips,²⁶¹ and various non-copyright treaties.²⁶² Once again, the United States has avoided compliance with the moral rights provisions contained in Article 6*bis*²⁶³ of the Berne Convention.²⁶⁴

In the field of neighboring rights, TRIPs looks to the Rome Convention as its standard.²⁶⁵ Because neither the U.S. nor Canada adheres to Rome, NAFTA instead adopts the Geneva Convention²⁶⁶ as its benchmark.²⁶⁷

Like TRIPs, NAFTA requires national treatment.²⁶⁸ The sole exception is that performers' rights may be limited "in respect of secondary uses of sound recordings" to reciprocal treatment.²⁶⁹ Thus, because the

257. NAFTA, art. 1702.

258. NAFTA, art. 1701, para. 1.

259. See *supra* part II.C.1.a.

260. NAFTA, art. 1701, para. 2(b).

261. See *infra* note 291.

262. NAFTA, art. 1701, para. 2(c) (Paris Convention), para. 2(d) (Plant Variety Convention).

263. The moral rights of Article 6*bis* require that the legislature of member nations protect the author's moral rights. Those moral rights are that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." The moral rights extend beyond the author's life, at least until the economic rights expire. Edward W. Ploman and L. Clark Hamilton, COPYRIGHT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE, at 77 (1980).

264. NAFTA, Annex 1701.3, para. 2, made applicable by NAFTA, art. 1701, para. 3. Note that this exemption is specific to the United States; no comparable provision excuses Canada or Mexico from observing moral rights protection.

265. See *supra* part II.C.1.a.

266. The Geneva Phonogram Convention of 1971 set out to legislate against piracy of gramophone records and sound tapes. The Geneva Convention's goal "was to establish an international instrument which would be as simple as possible and open to all states, so as to receive quickly a wide acceptance. Thus, the Geneva Convention provides minimum standards, while leaving it to adhering states to flesh out, through domestic legislation or regulation, the skeletal framework." EDWARD W. PLOMAN AND L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 77 (1980).

267. NAFTA, art. 1701, para. 2(a). See 6 NIMMER ON COPYRIGHT, Appendix 2a.

268. NAFTA, art. 1703, para. 1.

269. *Id.*

United States recognizes no performance right in sound recordings,²⁷⁰ under national treatment it need accord no such right to Mexican singers. Mexico may, in return, afford American singers no performing rights in their sound recordings.

NAFTA, like the Berne Convention, largely bars formalities as a condition for asserting national treatment.²⁷¹ It also allows nations to continue their antitrust laws.²⁷²

b. Substantive Rights

NAFTA obligates parties to extend protection to all types of copyrightable works, specifically including computer programs and data compilations.²⁷³ This enumeration parallels TRIPs.²⁷⁴ So does a duration provision for works not calculated based on the life of a natural person.²⁷⁵ NAFTA also provides that rights are transferable²⁷⁶ and spells out specific rights for authors and their successors, such as importation, first public distribution, and communication to the public.²⁷⁷ That last is presumably equivalent to performance in the context of U.S. copyright law.²⁷⁸ Included in the enumeration of rights is the right to authorize or prohibit commercial rental of computer programs.²⁷⁹ The latter is qualified with the provision that: "Each Party shall provide that putting the original or a copy of a computer program on the market with the right holder's consent shall not exhaust the rental right."²⁸⁰

Exceptions to the foregoing enumeration of rights must be confined to "certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."²⁸¹ Although the Berne Convention contemplates compulso-

270. See 2 NIMMER ON COPYRIGHT § 8.14[A].

271. NAFTA, art. 1703, para. 2. Exceptions exist regarding appointing an agent for service of process within each nation, *id.* at para. 3, and exceptions required under WIPO treaties, *id.* at para. 4.

272. NAFTA, art. 1704. *Cf. supra* part II.C.1.d.

273. NAFTA, art. 1705, para. 1.

274. See *supra* part II.C.1.b.

275. NAFTA, art. 1705, para. 4. See *supra* part II.C.1.b.

276. NAFTA, art. 1705, para. 3.

277. NAFTA, art. 1705, para. 2.

278. See 2 NIMMER ON COPYRIGHT § 8.14.

279. NAFTA, art. 1705, para. 2(d). Like TRIPs, an exception applies "where the copy of the computer program is not itself an essential object of the rental." See *supra* part II.C.1.b.

280. NAFTA, art. 1705, para. 2.

281. NAFTA, art. 1705, para. 5.

ry translation rights under specified circumstances,²⁸² NAFTA disallows such translations "where legitimate needs in that Party's territory for copies or translations of the work could be met by the right holder's voluntary actions but for obstacles created by the Party's measures."²⁸³

On the subject of neighboring rights,²⁸⁴ NAFTA separately accords rights to sound recordings, including reproduction, importation, and public distribution.²⁸⁵ These rights, like the computer rights specified above,²⁸⁶ must include a ban on commercial rental "except where expressly otherwise provided in a contract between the producer of the sound recording and the authors of the work fixed therein."²⁸⁷ The term for sound recordings must endure for fifty years.²⁸⁸ As with copyrights in general, exceptions to the sound recording rights must be confined to "certain special cases that do not conflict with a normal exploitation of the sound recording and do not unreasonably prejudice the legitimate interests of the right holder."²⁸⁹

With respect to semiconductor chips, NAFTA mirrors the provisions of TRIPs discussed above²⁹⁰ with respect to subject matter,²⁹¹ prohibited acts,²⁹² good faith defense,²⁹³ sell-off period,²⁹⁴ and duration.²⁹⁵ In addition, NAFTA bars compulsory licenses of layout designs.²⁹⁶ Mexico has agreed to implement chip protection consistent with NAFTA "as soon as possible and . . . no later than three years after the date of signature of this Agreement."²⁹⁷

282. Berne Convention (Paris text), Appendix arts. II, IV.

283. NAFTA, art. 1705, para. 6.

284. *See supra* part II.C.1.a.

285. NAFTA, art. 1706, para. 1.

286. Similarly to the computer context, it is provided: "Each Party shall provide that putting the original or a copy of a sound recording on the market with the right holder's consent shall not exhaust the rental right." NAFTA, art. 1706, para. 1.

287. NAFTA, art. 1706, para. 1(d).

288. NAFTA, art. 1706, para. 2.

289. NAFTA, art. 1706, para. 3.

290. *See supra* part II.C.1.c.

291. NAFTA, art. 1710, para. 1. NAFTA requires compliance with the same provisions of the Washington Treaty as does TRIPs. *See supra* note 156.

292. NAFTA, art. 1709, para. 2.

293. NAFTA, art. 1710, para. 3.

294. NAFTA, art. 1710, para. 4.

295. NAFTA, art. 1710, paras. 6-8.

296. NAFTA, art. 1710, para. 5.

297. NAFTA, Annex 1710.9, made applicable by NAFTA, art. 1710, para. 9.

2. Enforcement

NAFTA specifies that the domestic law of each Party must "permit effective action to be taken against any act of infringement . . . , including expeditious remedies to prevent infringements and remedies to deter further infringements."²⁹⁸ Particular provisions mandate fairness,²⁹⁹ decisions based on the evidence,³⁰⁰ and appeal.³⁰¹ Judicial procedures should include notice, representation by counsel, and other safeguards.³⁰² Trials should include the features noted above under TRIPs, including remedies to be ordered by courts.³⁰³ Also similar to TRIPs are provisions mandating provisional measures³⁰⁴ and criminal penalties.³⁰⁵ Very detailed specifications govern enforcement of intellectual property rights at the border.³⁰⁶ With respect to all of these enforcement provisions, Mexico has agreed to comply with their requirements "as soon as possible and shall do so no later than three years after the date of signature of this Agreement."³⁰⁷

As always, the question of retroactivity is posed. NAFTA contains a specific requirement for resurrection of certain public domain movies.³⁰⁸ Except in that particular, the detailed provisions for phase-in³⁰⁹ mirror those undertaken in TRIPs,³¹⁰ including incorporation of Article 18 of the Berne Convention.³¹¹

298. NAFTA, art. 1714, para. 1. *Cf. supra* part II.C.2.b.

299. NAFTA, art. 1714, para. 2.

300. NAFTA, art. 1714, para. 3.

301. NAFTA, art. 1714, para. 4. These provisions are similar to those explored above under TRIPs. *See supra* part II.C.2.b.

302. NAFTA, art. 1715, para. 1.

303. NAFTA, art. 1715.

304. NAFTA, art. 1716.

305. NAFTA, art. 1717.

306. NAFTA, art. 1718.

307. NAFTA, Annex 1718.4, made applicable by NAFTA, art. 1718, para. 14.

308. NAFTA, art. 1720, para. 1. *See infra* part III.B.1.

309. NAFTA, art. 1720.

310. *See supra* part II.C.1.e.

311. NAFTA, art. 1720, para. 2.

B. Implementation into U.S. Copyright Statute

On December 8, 1993, the North American Free Trade Agreement Implementation Act went into effect.³¹² This massive law contains only two copyright provisions.³¹³

1. Resurrection of Certain Movies

An annex to NAFTA provides as follows:

The United States shall provide protection to motion pictures produced in another Party's territory that have been declared to be in the public domain pursuant to 17 U.S.C. § 405. This obligation shall apply to the extent that it is consistent with the Constitution of the United States, and is subject to budgetary constraints.³¹⁴

To implement that provision, Congress added Section 104A to the Copyright Act.³¹⁵

a. Conditions for Eligibility

That section applies to "any motion picture that is first fixed or published in the territory of a NAFTA country as defined"³¹⁶ Following the subject definition through, the sole territories implicated are Canada and Mexico. Although in some colloquial sense, the United States too is a NAFTA country, it falls outside the statutory definition.³¹⁷ It also applies to constituent elements "included in such motion picture" — such as songs on the sound track, for example.³¹⁸

To be eligible for resurrection, such motion pictures or constituent elements must have entered the U.S. public domain by virtue of publication

312. Pub. L. No. 103-82, 107 Stat. 2057 (Dec. 8, 1993).

313. *Id.* §§ 332, 334. Also concerning intellectual property rights are § 331, concerning inventions made abroad, and § 333, mandating nonregistrability of misleading geographic indications.

314. NAFTA, Annex 1705.7, made applicable through NAFTA, art. 1705, para. 7.

315. Pub. L. No. 103-82, 107 Stat. 2057 (Dec. 8, 1993) § 334. Note that this provision takes effect on the date that NAFTA itself enters into force with respect to the United States. *Id.* § 335(a). As noted above, that date is January 1, 1994.

316. 17 U.S.C. § 104A(a)(1).

317. See NAFTA *Implementation Act* § 2(4).

318. 17 U.S.C. § 104A(a)(2).

with a defective copyright notice³¹⁹ during the decennial era,³²⁰ i.e., from January 1, 1978 through March 1, 1989.³²¹ Of course, such works would never have entered the public domain if timely registered within five years of unnoticed publication.³²² The effect of the 1994 resurrection is that, even if such curing registration were never undertaken, the subject work nonetheless benefits from a full copyright term. That term would last for the period that the film would have been protected under U.S. law had it been published with proper notice.³²³

The annex quoted above requires the United States to resurrect films only to the extent permitted by the Constitution. Congress' action implicitly contends that such resurrection passes muster, notwithstanding that it cannot serve to promote the progress of science and the useful arts, as the constitutional grant to enact copyright legislation anticipates.³²⁴ Nonetheless, given Congress' coordinate authority to enter treaties, it is submitted that the resurrection is defensible on that basis.³²⁵

b. Required Formalities

In order to benefit from the film resurrection provision, the relevant copyright owner must file with the Copyright Office a "statement of intent to have copyright protection restored" under the NAFTA Implementation Act.³²⁶ That filing must have occurred within one year after NAFTA enters into force, i.e., during the calendar year of 1994.³²⁷ Protection for registered films will commence as of January 1, 1995.³²⁸ Promptly thereafter, the law directs the Copyright Office to publish in the Federal Register catalog of resurrected titles.³²⁹

What happens to non-registered films? Imagine a Mexican film first published in 1980 in Monterrey (or Monterey, for that matter) without valid copyright notice. Imagine further that the copyright owner neglected to register the work with the United States Copyright Office by 1985. By law, it was thereafter part of the U.S. public domain. A filing in 1994 will

319. See 2 NIMMER ON COPYRIGHT §§ 7.02-.15.

320. See 1 NIMMER ON COPYRIGHT Overview.

321. 17 U.S.C. § 104A(a).

322. See 2 NIMMER ON COPYRIGHT § 7.12[B].

323. 17 U.S.C. § 104A(a).

324. See 1 NIMMER ON COPYRIGHT § 1.03.

325. See 1 NIMMER ON COPYRIGHT § 1.05[A][2].

326. 17 U.S.C. § 104A(b).

327. *Id.*

328. *Id.*

329. *Id.*

rescue it and restore protection of the film until 2055.³³⁰ Failure to file as of January 1, 1995 means that the film will continue to languish in the public domain.

c. Sell-Off Right

Finally, what is to become of the hapless jobber who in 1992 pressed 10,000 videotapes of the aforementioned 1980 Mexican film, relying on the fact that it was in the public domain? Similarly, what fate awaits the theater owner who has announced a gala screening in August 1994 of the subject movie, without payment of any licensing fee? The 1994 amendment allows nationals or domiciliaries of the United States who made or acquired copies of motion pictures (or constituents thereof) prior to NAFTA adherence to "sell or distribute such copies or continue to perform publicly such motion picture or other work without liability for such sale, distribution, or performance. . . ."³³¹ This right lasts for only one year following publication of the "Lazarus List" in the Federal Register.³³²

2. Rental Rights

The second provision of the NAFTA Implementation Act to address copyright implements the prohibition of sound recording rentals.³³³ The Record Rental Amendment of the 1984 already implemented that feature into U.S. law, but subject to a sunset.³³⁴ The new law strikes that termination, meaning that the record rental prohibition of the U.S. law now becomes a permanent feature of the statutory landscape.³³⁵

330. See 2 NIMMER ON COPYRIGHT § 9.01[A][4]. This calculation relies on the assumption that the subject motion picture was made as a work for hire.

331. 17 U.S.C. § 104A(c).

332. *Id.* See also *supra* part III.B.1.b.

333. See *supra* part III.A.1.b.

334. See 2 NIMMER ON COPYRIGHT § 8.12[B][7][d]. As amended in 1988, the expiration date falls in 1997. *Id.*

335. Pub. L. No. 103-82, 107 Stat. 2057 (Dec. 8, 1993) § 332.

II.
**Agreement on Trade-
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**AGREEMENT ON TRADE-RELATED ASPECTS OF
INTELLECTUAL PROPERTY RIGHTS, INCLUDING
TRADE IN COUNTERFEIT GOODS**

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of the GATT 1994 and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and

(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

***Emphasizing* the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;**

***Desiring* to establish a mutually supportive relationship between the MTO and the World Intellectual Property Organization (WIPO) as well as other relevant international organisations;**

***Hereby agree* as follows:**

PART I: GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 to 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.¹ In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the MTO members of those conventions.² Any Member availing itself of

¹ When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the MTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

² In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989.

the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights.

Article 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1–12 and 19 of the Paris Convention (1967).

2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection³ of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention and paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights.

2. Members may avail themselves of the exceptions permitted under paragraph 1 above in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a

³ For the purposes of Articles 3 and 4 of this Agreement, protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the Agreement Establishing the MTO, provided that such agreements are notified to the Council for Trade-Related Aspects of Intellectual Property Rights and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Article 5

Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 above do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

Article 6

Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article 7

Objectives

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

Article 8

Principles

1. Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

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

PART II: STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: COPYRIGHT AND RELATED RIGHTS

Article 9

Relation to Berne Convention

1. Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971). However, Members shall not have rights or obligations under this Agreement in respect of the

Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Article 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in domestic law. If, on the date of the Ministerial Meeting concluding the Uruguay Round of Multilateral Trade Negotiations, a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

rights conferred under Article *6bis* of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Article 12

Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than fifty years from the end of the calendar year of authorized publication, or, failing such authorised publication within fifty years from the making of the work, fifty years from the end of the calendar year of making.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of fifty years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 above shall last for at least twenty years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1–3 above, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

SECTION 2: TRADEMARKS

Article 15

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 above shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Article 16

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, account shall be taken of the knowledge of the trademark in the relevant sector of the public, including knowledge in that Member obtained as a result of the promotion of the trademark.

3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

Article 17

Exceptions

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

Article 18

Term of Protection

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

Article 19

Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Article 21

Licensing and Assignment

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign his trademark with or without the transfer of the business to which the trademark belongs.

SECTION 3: GEOGRAPHICAL INDICATIONS

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

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

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The provisions of the preceding paragraphs of this Article shall apply to a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits

not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like.⁴

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if domestic legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22 above. Each Member shall determine the practical conditions under which the homonymous indications in question 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. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for Trade-Related Aspects of Intellectual Property Rights concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24

International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4–8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for Trade-Related Aspects of Intellectual Property Rights shall keep under review the application of the

⁴ Notwithstanding the first sentence of Article 42. Members may, with respect to these obligations, instead provide for enforcement by administrative action.

provisions of this Section; the first such review shall take place within two years of the entry into force of the Agreement Establishing the MTO. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the Agreement Establishing the MTO.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least ten years preceding the date of the Ministerial Meeting concluding the Uruguay Round of Multilateral Trade Negotiations or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI below; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant

indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the Agreement Establishing the MTO.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, his name or the name of his predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

SECTION 4: INDUSTRIAL DESIGNS

Article 25

Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the

opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

Article 26

Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having his consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

3. The duration of protection available shall amount to at least ten years.

SECTION 5: PATENTS

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3 below, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.⁵ Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid

⁵ For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by domestic law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this sub-paragraph shall be reviewed four years after the entry into force of the Agreement Establishing the MTO.

Article 28

Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having his consent from the acts of: making, using, offering for sale, selling, or importing⁶ for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having his consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Article 29

Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art

⁶ This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6 above.

and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning his corresponding foreign applications and grants.

Article 30

Exceptions to Rights Conferred

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

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use⁷ of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will

⁷ "Other use" refers to use other than that allowed under Article 30.

be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semiconductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive.

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in sub-paragraphs (b) and (f) above where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of

authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

Article 32

Revocation/Forfeiture

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

Article 33

Term of Protection

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.⁸

Article 34

Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28 above, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following

⁸ It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

(a) if the product obtained by the patented process is new;

(b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in sub-paragraph (a) is fulfilled or only if the condition referred to in sub-paragraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of the defendant in protecting his manufacturing and business secrets shall be taken into account.

SECTION 6: LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

Article 35

Relation to IPIC Treaty

Members agree to provide protection to the layout-designs (topographies) of integrated circuits (hereinafter referred to as "layout-designs") in accordance with Articles 2-7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

Article 36

Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37 below, Members shall consider unlawful the following acts if performed without the authorization of the right holder:⁹ importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only insofar as it continues to contain an unlawfully reproduced layout-design.

⁹ The term "right holder" in this Section shall be understood as having the same meaning as the term "holder of the right" in the IPIC Treaty.

Article 37

Acts not Requiring the Authorization of the Right Holder

1. Notwithstanding Article 36 above, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, he may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

2. The conditions set out in sub-paragraphs (a)-(k) of Article 31 above shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government without the authorization of the right holder.

Article 38

Term of Protection

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of ten years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than ten years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2 above, a Member may provide that protection shall lapse fifteen years after the creation of the layout-design.

**SECTION 7: PROTECTION OF UNDISCLOSED
INFORMATION**

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 below and data submitted to governments or governmental agencies in accordance with paragraph 3 below.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices¹⁰ so long as such information:

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

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

¹⁰ For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

**SECTION 8: CONTROL OF ANTI-COMPETITIVE
PRACTICES
IN CONTRACTUAL LICENCES**

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall co-operate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter

of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3 above.

***PART III: ENFORCEMENT OF INTELLECTUAL
PROPERTY RIGHTS***

SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their national laws 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 concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in national laws concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of Members to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement

of intellectual property rights and the enforcement of laws in general.

**SECTION 2: CIVIL AND ADMINISTRATIVE
PROCEDURES AND REMEDIES**

Article 42

Fair and Equitable Procedures

Members shall make available to right holders¹¹ civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43

Evidence of Proof

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject

¹¹ For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

to providing the parties an opportunity to be heard on the allegations or evidence.

Article 44

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia*, to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with sub-paragraph (h) of Article 31 above. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with national law, declaratory judgments and adequate compensation shall be available.

Article 45

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of his intellectual property right by an infringer who knew or had reasonable grounds to know that he was engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not know or had no reasonable grounds to know that he was engaged in infringing activity.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. 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.

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48

Indemnification of the Defendant

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

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights,

Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of such laws.

Article 49

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 this Section.

SECTION 3: PROVISIONAL MEASURES

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

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

2. The judicial authorities shall 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.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that his 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.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period

after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4 above, provisional measures taken on the basis of paragraphs 1 and 2 above shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where national law so permits or, in the absence of such a determination, not to exceed twenty working days or thirty-one calendar days, whichever is the longer.

7. 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 or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES¹²

Article 51

Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures¹³ to enable a right holder, who has valid

¹² Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

¹³ It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods¹⁴ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 52

Application

Any right holder initiating the procedures under Article 51 above shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of his intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and

¹⁴ For the purposes of this Agreement:

- counterfeit trademark goods shall mean 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 of importation;
- pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorized by him 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 of importation.

to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue his right of action within a reasonable period of time.

Article 54

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51 above.

Article 55

Duration of Suspension

If, within a period not exceeding ten working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another ten working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release

of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of Article 50, paragraph 6 above shall apply.

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55 above.

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any product detained by the customs authorities inspected in order to substantiate his claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such product inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58

***Ex Officio* Action**

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

(a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;

(b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55 above;

(c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46 above. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60

De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5: CRIMINAL PROCEDURES

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

**PART IV: ACQUISITION AND MAINTENANCE OF
INTELLECTUAL PROPERTY RIGHTS
AND RELATED INTER-PARTES PROCEDURES**

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2–6 of Part II of this Agreement, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

3. Article 4 of the Paris Convention (1967) shall apply *mutatis mutandis* to service marks.

4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where the national law provides for such procedures, administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.

5. Final administrative decisions in any of the procedures referred to under paragraph 4 above shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

PART V: DISPUTE PREVENTION AND SETTLEMENT

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by any Member pertaining to the subject matter of this Agreement

(the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of any Member and the government or a governmental agency of any other Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 above to the Council for Trade-Related Aspects of Intellectual Property Rights in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with the World Intellectual Property Organization on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1 above. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1 to 3 above shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64

Dispute Settlement

1. The provisions of Articles XXII and XXIII of the General Agreement on Tariffs and Trade 1994 as elaborated and applied

by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Sub-paragraphs XXIII:1(b) and XXIII:1(c) of the General Agreement on Tariffs and Trade 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the entry into force of the Agreement establishing the Multilateral Trade Organization.

3. During the time period referred to in paragraph 2, the TRIPS Council shall examine the scope and modalities for Article XXIII:1(b) and Article XXIII:1(c)-type complaints made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

PART VI: TRANSITIONAL ARRANGEMENTS

Article 65

Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4 below, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the Agreement Establishing the MTO.

2. Any developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1 above, of the provisions of this Agreement other than Articles 3, 4 and 5 of Part I.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws, may also benefit from a period of delay as foreseen in paragraph 2 above.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas

of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2 above, it may delay the application of the provisions on product patents of Section 5 of Part II of this Agreement to such areas of technology for an additional period of five years.

5. Any Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 above shall ensure that any changes in its domestic laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article 66

Least-Developed Country Members

1. In view of their special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, least-developed country Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65 above. The Council shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Article 67

Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of domestic legislation on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

**PART VII: INSTITUTIONAL ARRANGEMENTS:
FINAL PROVISIONS**

Article 68

**Council for Trade-Related Aspects
of Intellectual Property Rights**

The Council for Trade-Related Aspects of Intellectual Property Rights shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council may consult with and seek information from any source it deems appropriate. In consultation with the World Intellectual Property Organization, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

Article 69

International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their national administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

Article 70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on

the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4 below, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the Agreement Establishing the MTO by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of the Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the Agreement Establishing the MTO patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(i) notwithstanding the provisions of Part VI above, provide as from the date of entry into force of the Agreement Establishing the MTO a means by which applications for patents for such inventions can be filed;

(ii) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application;

(iii) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (ii) above.

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(i) above, exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI above, for a period of five years after obtaining market approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the Agreement Establishing the MTO, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Article 71

Review and Amendment

1. The Council for Trade-Related Aspects of Intellectual Property Rights shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65 above. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new

developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the MTO may be referred to the Ministerial Conference for action in accordance with Article X, paragraph 6, of the Agreement Establishing the MTO on the basis of a consensus proposal from the Council for Trade-Related Aspects of Intellectual Property Rights.

Article 72

Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

III.
Selected Sections from
the Trade Act of 1974
and the Omnibus Trade
and Competitiveness
Act of 1988

TITLE 19—CUSTOMS DUTIES

* * *

Chapter 12

TRADE ACT OF 1974

* * *

SUBCHAPTER III

ENFORCEMENT OF UNITED STATES RIGHTS UNDER
TRADE AGREEMENTS AND RESPONSE TO CERTAIN
FOREIGN TRADE PRACTICES

Sec.

2411. Actions by United States Trade Representative.

- (a) Mandatory action.**
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- 2419. Administration.
- 2420. Identification of trade liberalization priorities.
 - (a) Identification.
 - (b) Initiation of investigations.
 - (c) Agreements for elimination of barriers.
 - (d) Annual reports.

§ 2411. Actions by United States Trade Representative.**(a) Mandatory action**

(1) If the United States Trade Representative determines under section 2414(a)(1) of this title that—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action authorized in subsection (c) of this section subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.

(2) The Trade Representative is not required to take action under paragraph (1) in any case in which—

(A) the Contracting Parties to the General Agreement on Tariffs and Trade have determined, a panel of experts has reported to the Contracting Parties, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds, that—

(i) the rights of the United States under a trade agreement are not being denied, or

(ii) the act, policy, or practice—

(I) is not a violation of, or inconsistent with, the rights of the United States, or

(II) does not deny, nullify, or impair benefits to the United States under any trade agreement; or

(B) the Trade Representative finds that—

(i) the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement,

(ii) the foreign country has—

(I) agreed to eliminate or phase out the act, policy, or practice, or

(II) agreed to an imminent solution to the burden or restriction on United States commerce that is satisfactory to the Trade Representative,

(iii) it is impossible for the foreign country to achieve the results described in clause (i) or (ii), as appropriate, but the foreign country agrees to provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative,

(iv) in extraordinary cases, where the taking of action under this subsection would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this subchapter, or

(v) the taking of action under this subsection would cause serious harm to the national security of the United States.

(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.

(b) Discretionary action

If the Trade Representative determines under section 2414(a)(1) of this title that—

(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the

Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.

(c) Scope of authority

(1) For purposes of carrying out the provisions of subsection (a) or (b) of this section, the Trade Representative is authorized to—

(A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection;

(B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate; or

(C) enter into binding agreements with such foreign country that commit such foreign country to—

(i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section,

(ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or

(iii) provide the United States with compensatory trade benefits that—

(I) are satisfactory to the Trade Representative, and

(II) meet the requirements of paragraph (4).

(2)(A) Notwithstanding any other provision of law governing any service sector access authorization, and in addition to the authority conferred in paragraph (1), the Trade Representative may, for purposes of carrying out the provisions of subsection (a) or (b) of this section—

(i) restrict, in the manner and to the extent the Trade Representative determines appropriate, the terms and conditions of any such authorization, or

(ii) deny the issuance of any such authorization.

(B) Actions described in subparagraph (A) may only be taken under this section with respect to service sector access authorizations granted, or applications therefor pending, on or after the date on which—

(i) a petition is filed under section 2412(a) of this title, or

(ii) a determination to initiate an investigation is made by the Trade Representative under section 2412(b) of this title.

(C) Before the Trade Representative takes any action under this section involving the imposition of fees or other restrictions on the services of a foreign country, the Trade Representative shall, if the services involved are subject to regulation by any agency of the Federal Government or of any State, consult, as appropriate, with the head of the agency concerned.

(3) The actions the Trade Representative is authorized to take under subsection (a) or (b) of this section may be taken against any goods or economic sector—

(A) on a nondiscriminatory basis or solely against the foreign country described in such subsection, and

(B) without regard to whether or not such goods or economic sector were involved in the act, policy, or practice that is the subject of such action.

(4) Any trade agreement described in paragraph (1)(C)(iii) shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b) of this section, or benefit the economic sector as closely related as possible to such economic sector, unless—

(A) the provision of such trade benefits is not feasible, or

(B) trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits.

(5) In taking actions under subsection (a) or (b) of this section, the Trade Representative shall—

(A) give preference to the imposition of duties over the imposition of other import restrictions, and

(B) if an import restriction other than a duty is imposed, consider substituting, on an incremental basis, an equivalent duty for such other import restriction.

(6) Any action taken by the Trade Representative under this section with respect to export targeting shall, to the extent possible, reflect the full benefit level of the export targeting to the beneficiary over the period during which the action taken has an effect.

(d) Definitions and special rules

For purposes of this chapter—

(1) The term “commerce” includes, but is not limited to—

(A) services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and

(B) foreign direct investment by United States persons with implications for trade in goods or services.

(2) An act, policy, or practice of a foreign country that burdens or restricts United States commerce may include the provision, directly or indirectly, by that foreign country of subsidies for the construction of vessels used in the commercial transportation by water of goods between foreign countries and the United States.

(3)(A) An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.

(B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which—

(i) denies fair and equitable—

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights, or

(III) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by private firms or among private firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms,

(ii) constitutes export targeting, or

(iii) constitutes a persistent pattern of conduct that—

(I) denies workers the right of association,

(II) denies workers the right to organize and bargain collectively,

(III) permits any form of forced or compulsory labor,

(IV) fails to provide a minimum age for the employment of children, or

(V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

(C)(i) Acts, policies, and practices of a foreign country described in subparagraph (B)(iii) shall not be treated as being unreasonable if the Trade Representative determines that—

(I) the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country (including any designated zone within the foreign country) the rights and other standards described in the subclauses of subparagraph (B)(iii), or

(II) such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country.

(ii) The Trade Representative shall publish in the Federal Register any determination made under clause (i), together with a description of the facts on which such determination is based.

(D) For purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account, to the extent appropriate.

(E) The term “export targeting” means any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.

(4)(A) An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States.

(B) Acts, policies, and practices that are unjustifiable include, but are not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favored-nation treatment or the right of establishment or protection of intellectual property rights.

(5) Acts, policies, and practices that are discriminatory include, when appropriate, any act, policy, and practice which denies national or most-favored-nation treatment to United States goods, services, or investment.

(6) The term “service sector access authorization” means any license, permit, order, or other authorization, issued under the authority of Federal law, that permits a foreign supplier of services access to the United States market in a service sector concerned.

(7) The term “foreign country” includes any foreign instrumentality. Any possession or territory of a foreign country that is administered separately for customs purposes shall be treated as a separate foreign country.

(8) The term “Trade Representative” means the United States Trade Representative.

(9) The term “interested persons”, only for purposes of sections 2412(a)(4)(B), 2414(b)(1)(A), 2416(c)(2), and 2417(a)(2) of this title, includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of

any goods or services that may be affected by actions taken under subsection (a) or (b) of this section.

(Pub. L. 93-618, Title III, § 301, as added Pub. L. 96-39, Title IX, § 901, July 26, 1979, 93 Stat. 295; Pub. L. 98-573, Title III, § 304(a)-(c), (f), Oct. 30, 1984, 98 Stat. 3002, 3005; Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1164.)

* * *

§ 2412. Initiation of investigations

(a) Petitions

(1) Any interested person may file a petition with the Trade Representative requesting that action be taken under section 2411 of this title and setting forth the allegations in support of the request.

(2) The Trade Representative shall review the allegations in any petition filed under paragraph (1) and, not later than 45 days after the date on which the Trade Representative received the petition, shall determine whether to initiate an investigation.

(3) If the Trade Representative determines not to initiate an investigation with respect to a petition, the Trade Representative shall inform the petitioner of the reasons therefor and shall publish notice of the determination, together with a summary of such reasons, in the Federal Register.

(4) If the Trade Representative makes an affirmative determination under paragraph (2) with respect to a petition, the Trade Representative shall initiate an investigation regarding the issues raised in the petition. The Trade Representative shall publish a summary of the petition in the Federal Register and shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing—

(A) within the 30-day period beginning on the date of the affirmative determination (or on a date after such period if agreed to by the petitioner) if a public hearing within such period is requested in the petition, or

(B) at such other time if a timely request therefor is made by the petitioner or by any interested person.

(b) Initiation of investigation by means other than petition

(1)(A) If the Trade Representative determines that an investigation should be initiated under this subchapter with respect to any matter in order to determine whether the matter is actionable under section 2411 of this title, the Trade Representative shall publish such determination in the Federal Register and shall initiate such investigation.

(B) The Trade Representative shall, before making any determination under subparagraph (A), consult with appropriate committees established pursuant to section 2155 of this title.

(2)(A) By no later than the date that is 30 days after the date on which a country is identified under section 2242(a)(2) of this title, the Trade Representative shall initiate an investigation under this subchapter with respect to any act, policy, or practice of that country that—

(i) was the basis for such identification, and

(ii) is not at that time the subject of any other investigation or action under this subchapter.

(B) The Trade Representative is not required under subparagraph (A) to initiate an investigation under this subchapter with respect to any act, policy, or practice of a foreign country if the Trade Representative determines that the initiation of the investigation would be detrimental to United States economic interests.

(C) If the Trade Representative makes a determination under subparagraph (B) not to initiate an investigation, the Trade Representative shall submit to the Congress a written report setting forth, in detail—

(i) the reasons for the determination, and

(ii) the United States economic interests that would be adversely affected by the investigation.

(D) The Trade Representative shall, from time to time, consult with the Register of Copyrights, the Commissioner of Patents and Trademarks, and other appropriate officers of the Federal Government, during any investigation initiated under this chapter by reason of subparagraph (A).

(c) Discretion

In determining whether to initiate an investigation under subsection (a) or (b) of this section of any act, policy, or practice that is enumerated in any provision of section 2411(d) of this title, the Trade Representative shall have discretion to determine whether action under section 2411 of this title would be effective in addressing such act, policy, or practice.

(Pub. L. 93-618, Title III, § 302, as added Pub. L. 96-39, Title IX, § 901, July 26, 1979, 93 Stat. 296, and amended Pub. L. 98-573, Title III, § 304(d)(1), Oct. 30, 1984, 98 Stat. 3003; Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1168.)

* * *

§ 2413. Consultation upon initiation of investigation**(a) In general**

(1) On the date on which an investigation is initiated under section 2412 of this title, the Trade Representative, on behalf of the United States, shall request consultations with the foreign country concerned regarding the issues involved in such investigation.

(2) If the investigation initiated under section 2412 of this title involves a trade agreement and a mutually acceptable resolution is not reached before the earlier of—

(A) the close of the consultation period, if any, specified in the trade agreement, or

(B) the 150th day after the day on which consultation was commenced,

the Trade Representative shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement.

(3) The Trade Representative shall seek information and advice from the petitioner (if any) and the appropriate committees established pursuant to section 2155 of this title in preparing United States presentations for consultations and dispute settlement proceedings.

(b) Delay of request for consultations

(1) Notwithstanding the provisions of subsection (a) of this section—

(A) the United States Trade Representative may, after consulting with the petitioner (if any), delay for up to 90 days any request for consultations under subsection (a) of this section for the purpose of verifying or improving the petition to ensure an adequate basis for consultation, and

(B) if such consultations are delayed by reason of subparagraph (A), each time limitation under section 2414 of this title shall be extended for the period of such delay.

(2) The Trade Representative shall—

(A) publish notice of any delay under paragraph (1) in the Federal Register, and

(B) report to Congress on the reasons for such delay in the report required under section 2419(a)(3) of this title.

(Pub. L. 93-618, Title III, § 303, as added Pub. L. 96-39, Title IX, § 901, July 26, 1979, 93 Stat. 297, and amended Pub. L. 98-573, Title III, §§ 304(d)(2)(B), (e), 306(c)(2)(C)(ii), Oct. 30, 1984, 98 Stat. 3004, 3005, 3012; Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1170.)

* * *

§ 2414. Determinations by the Trade Representative**(a) In general**

(1) On the basis of the investigation initiated under section 2412 of this title and the consultations (and the proceedings, if applicable) under section 2413 of this title, the Trade Representative shall—

(A) determine whether—

(i) the rights to which the United States is entitled under any trade agreement are being denied, or

(ii) any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 2411 of this title exists, and

(B) if the determination made under subparagraph (A) is affirmative, determine what action, if any, the Trade

Representative should take under subsection (a) or (b) of section 2411 of this title.

(2) The Trade Representative shall make the determinations required under paragraph (1) on or before—

(A) in the case of an investigation involving a trade agreement (other than the agreement on subsidies and countervailing measures described in section 2503(c)(5) of this title, the earlier of—

(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or

(ii) the date that is 18 months after the date on which the investigation is initiated, or

(B) in all cases not described in subparagraph (A) or paragraph (3), the date that is 12 months after the date on which the investigation is initiated.

(3)(A) If an investigation is initiated under this subchapter by reason of section 2412(b)(2) of this title and the Trade Representative does not make a determination described in subparagraph (B) with respect to such investigation, the Trade Representative shall make the determinations required under paragraph (1) with respect to such investigation by no later than the date that is 6 months after the date on which such investigation is initiated.

(B) If the Trade Representative determines with respect to any investigation initiated by reason of section 2412(b)(2) of this title that—

(i) complex or complicated issues are involved in the investigation that require additional time,

(ii) the foreign country involved in the investigation is making substantial progress in drafting or implementing legislative or administrative measures that will provide adequate and effective protection of intellectual property rights, or

(iii) such foreign country is undertaking enforcement measures to provide adequate and effective protection of intellectual property rights, the Trade Representative shall publish in the Federal Register notice of such

determination and shall make the determinations required under paragraph (1) with respect to such investigation by no later than the date that is 9 months after the date on which such investigation is initiated.

(4) In any case in which a dispute is not resolved before the close of the minimum dispute settlement period provided for in a trade agreement (other than the agreement on subsidies and countervailing measures described in section 2503(c)(5) of this title), the Trade Representative, within 15 days after the close of such dispute settlement period, shall submit a report to Congress setting forth the reasons why the dispute was not resolved within the minimum dispute settlement period, the status of the case at the close of the period, and the prospects for resolution. For purposes of this paragraph, the minimum dispute settlement period provided for under any such trade agreement is the total period of time that results if all stages of the formal dispute settlement procedures are carried out within the time limitations specified in the agreement, but computed without regard to any extension authorized under the agreement at any stage.

(b) Consultation before determinations

(1) Before making the determinations required under subsection (a)(1) of this section, the Trade Representative, unless expeditious action is required—

(A) shall provide an opportunity (after giving not less than 30 days notice thereof) for the presentation of views by interested persons, including a public hearing if requested by any interested person,

(B) shall obtain advice from the appropriate committees established pursuant to section 2155 of this title, and

(C) may request the views of the United States International Trade Commission regarding the probable impact on the economy of the United States of the taking of action with respect to any goods or service.

(2) If the Trade Representative does not comply with the requirements of subparagraphs (A) and (B) of paragraph (1) because expeditious action is required, the Trade Representative shall, after making the determinations under subsection (a)(1) of this section, comply with such subparagraphs.

(c) Publication

The Trade Representative shall publish in the Federal Register any determination made under subsection (a)(1) of this section, together with a description of the facts on which such determination is based.

(Pub. L. 93-618, Title III, § 304, as added Pub. L. 96-39, Title IX, § 901, July 26, 1979, 93 Stat. 297, and amended Pub. L. 98-573, Title III, §§ 304(d)(2)(C), 306(c)(2)(C)(ii), Oct. 30, 1984, 98 Stat. 3005, 3012; Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1170.)

* * *

§ 2415. Implementation of actions**(a) Actions to be taken under section 2411**

(1) Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 2413(a)(1)(B) of this title to take under section 2411 of this title, subject to the specific direction, if any, of the President regarding any such action, by no later than the date that is 30 days after the date on which such determination is made.

(2)(A) Except as otherwise provided in this paragraph, the Trade Representative may delay, by not more than 180 days, the implementation of any action that is to be taken under section 2411 of this title—

(i) if—

(I) in the case of an investigation initiated under section 2412(a) of this title, the petitioner requests a delay, or

(II) in the case of an investigation initiated under section 2412(b)(1) of this title or to which section 2414(a)(3)(B) of this title applies, a delay is requested by a majority of the representatives of the domestic industry that would benefit from the action, or

(ii) if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a

satisfactory solution with respect to the acts, policies, or practices that are the subject of the action.

(B) The Trade Representative may not delay under subparagraph (A) the implementation of any action that is to be taken under section 2411 of this title with respect to any investigation to which section 2414(a)(3)(A) of this title applies.

(C) The Trade Representative may not delay under subparagraph (A) the implementation of any action that is to be taken under section 2411 of this title with respect to any investigation to which section 2414(a)(3)(B) of this title applies by more than 90 days.

(b) Alternative actions in certain cases of export targeting

(1) If the Trade Representative makes an affirmative determination under section 2414(a)(1)(A) of this title involving export targeting by a foreign country and determines to take no action under section 2411 of this title with respect to such affirmation determination, the Trade Representative—

(A) shall establish an advisory panel to recommend measures which will promote the competitiveness of the domestic industry affected by the export targeting,

(B) on the basis of the report of such panel submitted under paragraph (2)(B) and subject to the specific direction, if any, of the President, may take any administrative actions authorized under any other provision of law, and, if necessary, propose legislation to implement any other actions, that would restore or improve the international competitiveness of the domestic industry affected by the export targeting, and

(C) shall, by no later than the date that is 30 days after the date on which the report of such panel is submitted under paragraph (2)(B), submit a report to the Congress on the administrative actions taken, and legislative proposals made, under subparagraph (B) with respect to the domestic industry affected by the export targeting.

(2)(A) The advisory panels established under paragraph (1)(A) shall consist of individuals appointed by the Trade Representative who—

(i) earn their livelihood in the private sector of the economy, including individuals who represent management and labor in the domestic industry affected by the export targeting that is the subject of the affirmative determination made under section 2414(a)(1)(A) of this title, and

(ii) by education or experience, are qualified to serve on the advisory panel.

(B) By no later than the date that is 6 months after the date on which an advisory panel is established under paragraph (1)(A), the advisory panel shall submit to the Trade Representative and to the Congress a report on measures that the advisory panel recommends be taken by the United States to promote the competitiveness of the domestic industry affected by the export targeting that is the subject of the affirmative determination made under section 2414(a)(1)(A) of this title.

(Pub. L. 93-618, Title III, § 305, as added Pub. L. 96-39, Title IX, § 901, July 26, 1979, 93 Stat. 299, and amended Pub. L. 98-573, Title III, § 304(g), Oct. 30, 1984, 98 Stat. 3006; Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1172.)

* * *

§ 2416. Monitoring of foreign compliance

(a) In general

The Trade Representative shall monitor the implementation of each measure undertaken, or agreement of a kind described in clause (i), (ii), or (iii) of section 2411(a)(2)(B) of this title that is entered into under subsection (a) or (b) of section 2411 of this title, by a foreign country—

(1) to enforce the rights of the United States under any trade agreement, or

(2) to eliminate any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 2411 of this title.

(b) Further action

If, on the basis of the monitoring carried out under subsection (a) of this section, the Trade Representative considers

that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a) of this section, the Trade Representative shall determine what further action the Trade Representative shall take under section 2411(a) of this title. For purposes of section 2411 of this title, any such determination shall be treated as a determination made under section 2414(a)(1) of this title.

(c) Consultations

Before making any determination under subsection (b) of this section, the Trade Representative shall—

- (1) consult with the petitioner, if any, involved in the initial investigation under this subchapter and with representatives of the domestic industry concerned; and
- (2) provide an opportunity for the presentation of views by interested persons.

(Pub. L. 93-618, Title III, § 306, as added Pub. L. 96-39, Title IX, § 901, July 26, 1979, 93 Stat. 299, and amended Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988. 102 Stat. 1173.)

* * *

§ 2417. Modification and termination of actions

(a) In general

(1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—

(A) any of the conditions described in section 2411(a)(2) of this title exist,

(B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or

(C) such action is being taken under section 2411 of this title and is no longer appropriate.

(2) Before taking any action under paragraph (1) to modify or terminate any action taken under section 2411 of this title,

the Trade Representative shall consult with the petitioner, if any, and with representatives of the domestic industry concerned, and shall provide opportunity for the presentation of views by other interested persons affected by the proposed modification or termination concerning the effects of the modification or termination and whether any modification or termination of the action is appropriate.

(b) Notice; report to Congress

The Trade Representative shall promptly publish in the Federal Register notice of, and report in writing to the Congress with respect to, any modification or termination of any action taken under section 2411 of this title and the reasons therefor.

(c) Review of necessity

(1) If—

(A) a particular action has been taken under section 2411 of this title during any 4-year period, and

(B) neither the petitioner nor any representative of the domestic industry which benefits from such action has submitted to the Trade Representative during the last 60 days of such 4-year period a written request for the continuation of such action, such action shall terminate at the close of such 4-year period.

(2) The Trade Representative shall notify by mail the petitioner and representatives of the domestic industry described in paragraph (1)(B) of any termination of action by reason of paragraph (1) at least 60 days before the date of such termination.

(3) If a request is submitted to the Trade Representative under paragraph (1)(B) to continue taking a particular action under section 2411 of this title, the Trade Representative shall conduct a review of—

(A) the effectiveness in achieving the objectives of section 2411 of this title of—

(i) such action, and

(ii) other actions that could be taken (including actions against other products or services), and

(B) the effects of such actions on the United States economy, including consumers.

(Pub. L. 93-618, Title III, § 307, as added Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1174.)

* * *

§ 2418. Request for information

(a) In general

Upon receipt of written request therefor from any person, the Trade Representative shall make available to that person information (other than that to which confidentiality applies) concerning—

- (1) the nature and extent of a specific trade policy or practice of a foreign country with respect to particular goods, services, investment, or intellectual property rights, to the extent that such information is available to the Trade Representative or other Federal agencies;
- (2) United States rights under any trade agreement and the remedies which may be available under that agreement and under the laws of the United States; and
- (3) past and present domestic and international proceedings or actions with respect to the policy or practice concerned.

(b) If information not available

If information that is requested by a person under subsection (a) of this section is not available to the Trade Representative or other Federal agencies, the Trade Representative shall, within 30 days after receipt of the request—

- (1) request the information from the foreign government; or
- (2) decline to request the information and inform the person in writing of the reasons for refusal.

(c) Certain business information not made available

- (1) Except as provided in paragraph (2), and notwithstanding any other provision of law (including section 552 of Title 5), no information requested and received by the Trade

Representative in aid of any investigation under this subchapter shall be made available to any person if—

(A) the person providing such information certifies that—

- (i) such information is business confidential,
- (ii) the disclosure of such information would endanger trade secrets or profitability, and
- (iii) such information is not generally available;

(B) the Trade Representative determines that such certification is well- founded; and

(C) to the extent required in regulations prescribed by the Trade Representative, the person providing such information provides an adequate nonconfidential summary of such information.

(2) The Trade Representative may—

(A) use such information, or make such information available (in his own discretion) to any employee of the Federal Government for use, in any investigation under this chapter, or

(B) may make such information available to any other person in a form which cannot be associated with, or otherwise identify, the person providing the information.

(Pub. L. 93-618, Title III, § 308, as added Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1175.)

* * *

§ 2419. Administration

The Trade Representative shall—

(1) issue regulations concerning the filing of petitions and the conduct of investigations and hearings under this subchapter,

(2) keep the petitioner regularly informed of all determinations and developments regarding the investigation conducted with respect to the petition under this subchapter, including the reasons for any undue delays, and

(3) submit a report to the House of Representatives and the Senate semiannually describing—

- (A) the petitions filed and the determinations made (and reasons therefor) under section 2412 of this title,
- (B) developments in, and the current status of, each investigation or proceeding under this subchapter,
- (C) the actions taken, or the reasons for no action, by the Trade Representative under section 2411 of this title with respect to investigations conducted under this chapter, and
- (D) the commercial effects of actions taken under section 2411 of this title.

(Pub. L. 93-618, Title III, § 309, as added Pub. L. 100-418, Title I, § 1301(a), Aug. 23, 1988, 102 Stat. 1175.)

* * *

§ 2420. Identification of trade liberalization priorities

(a) Identification

(1) By no later than the date that is 30 days after the date in calendar year 1989, and also the date in calendar year 1990, on which the report required under section 2241(b) of this title is submitted to the appropriate Congressional committees, the Trade Representative shall identify United States trade liberalization priorities, including—

- (A) priority practices, including major barriers and trade distorting practices, the elimination of which are likely to have the most significant potential to increase United States exports, either directly or through the establishment of a beneficial precedent;
- (B) priority foreign countries that, on the basis of such report, satisfy the criteria in paragraph (2);
- (C) estimate the total amount by which United States exports of goods and services to each foreign country identified under subparagraph (B) would have increased during the preceding calendar year if the priority practices of such country identified under subparagraph (A) did not exist; and
- (D) submit to the Committee on Finance of the Senate, the Committee on Ways and Means of the House of

Representatives, and publish in the Federal Register, a report which lists—

- (i) the priority foreign countries identified under subparagraph (B),
- (ii) the priority practices identified under subparagraph (A) with respect to each of such priority foreign countries, and
- (iii) the amount estimated under subparagraph (C) with respect to each of such priority foreign countries.

(2) In identifying priority foreign countries under paragraph (1)(B), the Trade Representative shall take into account—

- (A) the number and pervasiveness of the acts, policies, and practices described in section 2241(a)(1)(A) of this title, and
- (B) the level of United States exports of goods and services that would be reasonably expected from full implementation of existing trade agreements to which that foreign country is a party, based on the international competitive position and export potential of such products and services.

(3) In identifying priority practices under paragraph (1)(A), the Trade Representative shall take into account—

- (A) the international competitive position and export potential of United States products and services,
- (B) circumstances in which the sale of a small quantity of a product or service may be more significant than its value, and
- (C) the measurable medium-term and long-term implications of government procurement commitments to United States exporters.

(b) Initiation of investigations

By no later than the date that is 21 days after the date on which a report is submitted to the appropriate Congressional committees under subsection (a)(1)(D) of this section, the Trade Representative shall initiate under section 2412(b)(1) of this title investigations under this subchapter with respect to all of those priority practices identified in such report by reason of subsection

(a)(1)(D) of this section for each of the priority foreign countries. The Trade Representative may initiate investigations under section 2412(b)(1) of this title with respect to all other priority practices identified under subsection (a)(1)(A) of this section.

(c) Agreements for the elimination of barriers

(1) In the consultations with a priority foreign country identified under subsection (a)(1) of this section that the Trade Representative is required to request under section 2413(a) of this title with respect to an investigation initiated by reason of subsection (b) of this section, the Trade Representative shall seek to negotiate an agreement which provides for—

(A) the elimination of, or compensation for, the priority practices identified under subsection (a)(1)(A) of this section by no later than the close of the 3-year period beginning on the date on which such investigation is initiated, and

(B) the reduction of such practices over a 3-year period with the expectation that United States exports to the foreign country will, as a result, increase incrementally during each year within such 3-year period.

(2) Any investigation initiated under this subchapter by reason of subsection (b) of this section shall be suspended if an agreement described in subparagraphs (A) and (B) of paragraph (1) is entered into with the foreign country before the date on which any action under section 2411 of this title with respect to such investigation may be required under section 2415(a) of this title to be implemented.

(3) If an agreement described in paragraph (1) is entered into with a foreign country before the date on which any action under section 2411 of this title with respect to such investigation may be required under section 2415(a) of this title to be implemented and the Trade Representative determines that the foreign country is not in compliance with such agreement, the Trade Representative shall continue the investigation that was suspended by reason of such agreement as though such investigation had not been suspended.

(d) Annual reports

(1) On the date on which the report the Trade Representative is required to submit under subsection (a)(1)(D) of this section in calendar year 1990, and on the anniversary of such date in the succeeding calendar years, the Trade Representative shall submit a report which includes—

(A) revised estimates of the total amount determined under subsection (a)(1)(C) of this section for each priority foreign country that has been identified under subsection (a)(1)(B) of this section,

(B) evidence that demonstrates, in the form of increased United States exports to each of such priority foreign countries during the previous calendar year—

(i) in the case of a priority foreign country that has entered into an agreement described in subsection (c)(1) of this section, substantial progress during each year within the 3-year period described in subsection (c)(1)(A) of this section toward the goal of eliminating the priority practices identified under subsection (a)(1)(A) of this section by the close of such 3-year period, and

(ii) in the case of a country which has not entered into (or has not complied with) an agreement described in subsection (c)(1) of this section, the elimination of such practices, and

(C) to the extent that the evidence described in subparagraph (B) cannot be provided, any actions that have been taken by the Trade Representative under section 2411 of this title with respect to such priority practices of each of such foreign countries.

(2) The Trade Representative may exclude from the requirements of paragraph (1) in any calendar year beginning after 1993 any foreign country that has been identified under subsection (a)(1)(A) of this section if the evidence submitted under paragraph (1)(B) in the 2 previous reports demonstrated that all the priority practices identified under subsection (a)(1)(A) of this section with respect to such foreign country have been eliminated.

(Pub. L. 93-618, Title III, § 310, as added Pub. L. 100-418, Title I, § 1302(a), Aug. 23, 1988, 102 Stat. 1176.)

* * *

Chapter 17

NEGOTIATION AND IMPLEMENTATION OF TRADE AGREEMENTS

Sec.

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§ 2901. Overall and principal trade negotiating objectives of the United States

(a) Overall trade negotiating objectives

The overall trade negotiating objectives of the United States are to obtain—

- (1) more open, equitable, and reciprocal market access;
- (2) the reduction or elimination of barriers and other trade-distorting policies and practices; and
- (3) a more effective system of international trading disciplines and procedures.

(b) Principal trade negotiating objectives

(1) Dispute settlement

The principal negotiating objectives of the United States with respect to dispute settlement are—

- (A) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and
- (B) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.

(2) Improvement of the GATT and multilateral trade negotiation agreements

The principal negotiating objectives of the United States regarding the improvement of GATT and multilateral trade negotiation agreements are—

- (A) to enhance the status of the GATT;
- (B) to improve the operation and extend the coverage of the GATT and such agreements and arrangements to products, sectors, and conditions of trade not adequately covered; and
- (C) to expand country participation in particular agreements or arrangements, where appropriate.

(3) Transparency

The principal negotiating objective of the United States regarding transparency is to obtain broader application of the principle

of transparency and clarification of the costs and benefits of trade policy actions through the observance of open and equitable procedures in trade matters by Contracting Parties to the GATT.

(4) Developing countries

The principal negotiating objectives of the United States regarding developing countries are—

(A) to ensure that developing countries promote economic development by assuming the fullest possible measure of responsibility for achieving and maintaining an open international trading system by providing reciprocal benefits and assuming equivalent obligations with respect to their import and export practices; and

(B) to establish procedures for reducing nonreciprocal trade benefits for the more advanced developing countries.

(5) Current account surpluses

The principal negotiating objective of the United States regarding current account surpluses is to develop rules to address large and persistent global current account imbalances of countries, including imbalances which threaten the stability of the international trading system, by imposing greater responsibility on such countries to undertake policy changes aimed at restoring current account equilibrium, including expedited implementation of trade agreements where feasible and appropriate.

(6) Trade and monetary coordination

The principal negotiating objective of the United States regarding trade and monetary coordination is to develop mechanisms to assure greater coordination, consistency, and cooperation between international trade and monetary systems and institutions.

(7) Agriculture

The principal negotiating objectives of the United States with respect to agriculture are to achieve, on an expedited basis to the maximum extent feasible, more open and fair conditions of trade in agricultural commodities by—

(A) developing, strengthening, and clarifying rules for agricultural trade, including disciplines on restrictive or trade-distorting import and export practices;

(B) increasing United States agricultural exports by eliminating barriers to trade (including transparent and non-transparent barriers) and reducing or eliminating the subsidization of agricultural production consistent with the United States policy of agricultural stabilization in cyclical and unpredictable markets;

(C) creating a free and more open world agricultural trading system by resolving questions pertaining to export and other trade-distorting subsidies, market pricing and market access and eliminating and reducing substantially other specific constraints to fair trade and more open market access, such as tariffs, quotas, and other nontariff practices, including unjustified phytosanitary and sanitary restrictions; and

(D) seeking agreements by which the major agricultural exporting nations agree to pursue policies to reduce excessive production of agricultural commodities during periods of oversupply, with due regard for the fact that the United States already undertakes such policies, and without recourse to arbitrary schemes to divide market shares among major exporting countries.

(8) Unfair trade practices

The principal negotiating objectives of the United States with respect to unfair trade practices are—

(A) to improve the provisions of the GATT and nontariff measure agreements in order to define, deter, discourage the persistent use of, and otherwise discipline unfair trade practices having adverse trade effects, including forms of subsidy and dumping and other practices not adequately covered such as resource input subsidies, diversionary dumping, dumped or subsidized inputs, and export targeting practices;

(B) to obtain the application of similar rules to the treatment of primary and nonprimary products in the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT (relating to subsidies and countervailing measures); and

(C) to obtain the enforcement of GATT rules against—

- (i) state trading enterprises, and
- (ii) the acts, practices, or policies of any foreign government which, as a practical matter, unreasonably require that—

- (I) substantial direct investment in the foreign country be made,

- (II) intellectual property be licensed to the foreign country or to any firm of the foreign country, or

- (III) other collateral concessions be made, as a condition for the importation of any product or service of the United States into the foreign country or as a condition for carrying on business in the foreign country.

(9) Trade in services

(A) The principal negotiating objectives of the United States regarding trade in services are—

- (i) to reduce or to eliminate barriers to, or other distortions of, international trade in services, including barriers that deny national treatment and restrictions on establishment and operation in such markets; and

- (ii) to develop internationally agreed rules, including dispute settlement procedures, which—

- (I) are consistent with the commercial policies of the United States, and

- (II) will reduce or eliminate such barriers or distortions, and help ensure fair, equitable opportunities for foreign markets.

(B) In pursuing the negotiating objectives described in subparagraph (A), United States negotiators shall take into account legitimate United States domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, environmental, consumer or employment opportunity interests and the law and regulations related thereto.

(10) Intellectual property

The principal negotiating objectives of the United States regarding intellectual property are—

(A) to seek the enactment and effective enforcement by foreign countries of laws which—

- (i) recognized and adequately protect intellectual property, including copyrights, patents, trademarks, semiconductor chip layout designs, and trade secrets, and
- (ii) provide protection against unfair competition,

(B) to establish in the GATT obligations—

(i) to implement adequate substantive standards based on—

(I) the standards in existing international agreements that provide adequate protection, and

(II) the standards in national laws if international agreement standards are inadequate or do not exist,

(ii) to establish effective procedures to enforce, both internally and at the border, the standards implemented under clause (i), and

(iii) to implement effective dispute settlement procedures that improve on existing GATT procedures;

(C) to recognize that the inclusion in the GATT of—

(i) adequate and effective substantive norms and standards for the protection and enforcement of intellectual property rights, and

(ii) dispute settlement provisions and enforcement procedures, is without prejudice to other complementary initiatives undertaken in other international organizations; and

(D) to supplement and strengthen standards for protection and enforcement in existing international intellectual property conventions administered by other international organizations, including their expansion to cover new and emerging technologies and elimination of discrimination or unreasonable exceptions or preconditions to protection.

(11) Foreign direct investment

(A) The principal negotiating objectives of the United States regarding foreign direct investment are—

(i) to reduce or to eliminate artificial or trade-distorting barriers to foreign direct investment, to expand the

principle of national treatment, and to reduce unreasonable barriers to establishment; and

(ii) to develop internationally agreed rules, including dispute settlement procedures, which—

(I) will help ensure a free flow of foreign direct investment, and

(II) will reduce or eliminate the trade distortive effects of certain trade-related investment measures.

(B) In pursuing the negotiating objectives described in subparagraph (A), United States negotiators shall take into account legitimate United States domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, environmental, consumer or employment opportunity interests and the law and regulations related thereto.

(12) Safeguards

The principal negotiating objectives of the United States regarding safeguards are—

(A) to improve and expand rules and procedures covering safeguard measures;

(B) to ensure that safeguard measures are—

(i) transparent,

(ii) temporary,

(iii) degressive, and

(iv) subject to review and termination when no longer necessary to remedy injury and to facilitate adjustment; and

(C) to require notification of, and to monitor the use by, GATT Contracting Parties of import relief actions for their domestic industries.

(13) Specific barriers

The principal negotiating objective of the United States regarding specific barriers is to obtain competitive opportunities for United States exports in foreign markets substantially equivalent to the competitive opportunities afforded foreign exports to United States markets, including

the reduction or elimination of specific tariff and nontariff trade barriers, particularly—

(A) measures identified in the annual report prepared under section 2241 of this title, and

(B) foreign tariffs and nontariff barriers on competitive United States exports when like or similar products enter the United States at low rates of duty or are duty-free, and other tariff disparities that impede access to particular export markets.

(14) Worker rights

The principal negotiating objectives of the United States regarding worker rights are—

(A) to promote respect for worker rights;

(B) to secure a review of the relationship of worker rights to GATT articles, objectives, and related instruments with a view to ensuring that the benefits of the trading system are available to all workers; and

(C) to adopt, as a principle of the GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade.

(15) Access to high technology

(A) The principal negotiating objective of the United States regarding access to high technology is to obtain the elimination or reduction of foreign barriers to, and acts, policies, or practices by foreign governments which limit, equitable access by United States persons to foreign-developed technology, including barriers, acts, policies, or practices which have the effect of—

(i) restricting the participation of United States persons in government-supported research and development projects;

(ii) denying equitable access by United States persons to government-held patents;

(iii) requiring the approval or agreement of government entities, or imposing other forms of government interventions, as a condition for the granting of licenses to

United States persons by foreign persons (except for approval or agreement which may be necessary for national security purposes to control the export of critical military technology); and

(iv) otherwise denying equitable access by United States persons to foreign- developed technology or contributing to the inequitable flow of technology between the United States and its trading partners.

(B) In pursuing the negotiating objective described in subparagraph (A), the United States negotiators shall take into account United States Government policies in licensing or otherwise making available to foreign persons technology and other information developed by United States laboratories.

(16) **Border taxes**

The principal negotiating objective of the United States regarding border taxes is to obtain a revision of the GATT with respect to the treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily for revenue on direct taxes rather than indirect taxes.

(Pub. L. 100-418, Title I, § 1101, Aug. 23, 1988, 102 Stat. 1121.)

* * *

§ 2902. Trade agreement negotiating authority

(a) Agreements regarding tariff barriers

(1) Whenever the President determines that one or more existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes, policies, and objectives of this title will be promoted thereby, the President—

(A) before June 1, 1993, may enter into trade agreements with foreign countries; and

(B) may, subject to paragraphs (2) through (5), proclaim—

(i) such modification or continuance of any existing duty,

(ii) such continuance of existing duty-free or excise treatment, or

(iii) such additional duties;

as he determines to be required or appropriate to carry out any such trade agreement.

(2) No proclamation may be made under subsection (a) of this section that—

(A) reduces any rate of duty (other than a rate of duty that does not exceed 5 percent ad valorem on August 23, 1988) to a rate which is less than 50 percent of the rate of such duty that applies on such date; or

(B) increases any rate of duty above the rate that applies on such date of enactment.

(3)(A) Except as provided in subparagraph (B), the aggregate reduction in the rate of duty on any article which is in effect on any day pursuant to a trade agreement entered into under paragraph (1) shall not exceed the aggregate reduction which would have been in effect on such day if a reduction of 3 percent ad valorem or a reduction of one-tenth of the total reduction, whichever is greater, had taken effect on the effective date of the first reduction proclaimed in paragraph (1) to carry out such agreement with respect to such article.

(B) No staging under subparagraph (A) is required with respect to a rate reduction that is proclaimed under paragraph (1) for an article of a kind that is not produced in the United States. The United States International Trade Commission shall advise the President of the identity of articles that may be exempted from staging under this subparagraph.

(4) If the President determines that such action will simplify the computation of reductions under paragraph (3), the President may round an annual reduction by the lesser of—

(A) the difference between the reduction without regard to this paragraph and the next lower whole number; or

(B) one-half of 1 percent ad valorem.

(5) No reduction in a rate of duty under a trade agreement entered into under subsection (a) of this section on any article may take effect more than 10 years after the effective date

of the first reduction under paragraph (1) that is proclaimed to carry out the trade agreement with respect to such article.

(6) A rate of duty reduction or increase that may not be proclaimed by reason of paragraph (2) may take effect only if a provision authorizing such reduction or increase is included within an implementing bill provided for under section 2903 of this title and that bill is enacted into law.

(b) Agreements regarding nontariff barriers

(1) Whenever the President determines that any barrier to, or other distortion of, international trade—

(A) unduly burdens or restricts the foreign trade of the United States or adversely affects the United States economy; or

(B) the imposition of any such barrier or distortion is likely to result in a burden, restriction, or effect;

and that the purposes, policies, and objectives of this title will be promoted thereby, the President may, before June 1, 1993, enter into a trade agreement with foreign countries providing for—

(i) the reduction or elimination of such barrier or other distortion; or

(ii) the prohibition of, or limitations on the imposition of, such barrier or other distortion.

(2) A trade agreement may be entered into under this subsection only if such agreement makes progress in meeting the applicable objectives described in section 2901 of this title.

(c) Bilateral agreements regarding tariff and nontariff barriers

(1) Before June 1, 1993, the President may enter into bilateral trade agreements with foreign countries that provide for the elimination or reduction of any duty imposed by the United States. A trade agreement entered into under this paragraph may also provide for the reduction or elimination of barriers to, or other distortions of, the international trade of the foreign country or the United States.

- (2) Notwithstanding any other provision of law, no trade benefit shall be extended to any country by reason of the extension of any trade benefit to another country under a trade agreement entered into under paragraph (1) with such other country.
- (3) A trade agreement may be entered into under paragraph (1) with any foreign country only if—
- (A) the agreement makes progress in meeting the applicable objectives described in section 2901 of this title;
 - (B) such foreign country requests the negotiation of such an agreement; and
 - (C) the President, at least 60 days before the date notice is provided under section 2903(a)(1)(A) of this title—
 - (i) provides written notice of such negotiations to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, and
 - (ii) consults with such committees regarding the negotiation of such agreement.
- (4) The 60-day period of time described in paragraph (3)(C) shall be computed in accordance with section 2903(e) of this title.
- (5) In any case in which there is an inconsistency between any provision of this Act and any bilateral free trade area agreement that entered into force and effect with respect to the United States before January 1, 1987, the provision shall not apply with respect to the foreign country that is party to that agreement.
- (d) Consultation with Congress before agreements entered into
- (1) Before the President enters into any trade agreement under subsection (b) or (c) of this section, the President shall consult with—
 - (A) the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate; and

(B) each other committee of the House and the Senate, and each joint committee of the Congress, which has jurisdiction over legislation involving subject matters which would be affected by the trade agreement.

(2) The consultation under paragraph (1) shall include—

(A) the nature of the agreement;

(B) how and to what extent the agreement will achieve the applicable purposes, policies, and objectives of this title; and

(C) all matters relating to the implementation of the agreement under section 2903 of this title.

(3) If it is proposed to implement two or more trade agreements in a single implementing bill under section 2903 of this title, the consultation under paragraph (1) shall include the desirability and feasibility of such proposed implementation.

(e) Special provisions regarding Uruguay Round trade negotiations

(1) In general

Notwithstanding the time limitations in subsections (a) and (b) of this section, if the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade has not resulted in trade agreements by May 31, 1993, the President may, during the period after May 31, 1993, and before April 16, 1994, enter into, under subsections (a) and (b) of this section, trade agreements resulting from such negotiations.

(2) Application of tariff proclamation authority

No proclamation under subsection (a) of this section to carry out the provisions regarding tariff barriers of a trade agreement that is entered into pursuant to paragraph (1) may take effect before the effective date of a bill that implements the provisions regarding nontariff barriers of a trade agreement that is entered into under such paragraph.

(3) Application of implementing and "fast track" procedures

Section 2903 of this title applies to any trade agreement negotiated under subsection (b) of this section pursuant to paragraph (1), except that—

(A) in applying subsection (a)(1)(A) of section 2903 of this title to any such agreement, the phrase “at least 120 calendar days before the day on which he enters into the trade agreement (but not later than December 15, 1993),” shall be substituted for the phrase “at least 90 calendar days before the day on which he enters into the trade agreement;” and

(B) no provision of subsection (b) of section 2903 of this title other than paragraph (1)(A) applies to any such agreement and in applying such paragraph, “April 16, 1994;” shall be substituted for “June 1, 1991;”.

(4) Advisory committee reports

The report required under section 2155(e)(1) of this title regarding any trade agreement provided for under paragraph (1) shall be provided to the President, the Congress, and the United States Trade Representative not later than 30 days after the date on which the President notifies the Congress under section 2903(a)(1)(A) of this title of his intention to enter into the agreement (but before January 15, 1994).

(Pub. L. 100-418, Title I, § 1102, Aug. 23, 1988, 102 Stat. 1126; Pub. L. 101-382, Title I, § 139(b), Aug. 20, 1990, 104 Stat. 653; Pub. L. 103-49, § 1, July 2, 1993, 107 Stat. 239.)

* * *

§ 2903. Implementation of trade agreements

(a) In general

(1) Any agreement entered into under section 2902(b) or (c) of this title shall enter into force with respect to the United States if (and only if)—

(A) the President, at least 90 calendar days before the day on which he enters into the trade agreement, notifies the House of Representatives and the Senate of his intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(B) after entering into the agreement, the President submits a document to the House of Representatives and to the Senate containing a copy of the final legal text of the agreement, together with—

- (i) a draft of an implementing bill,
- (ii) a statement of any administrative action proposed to implement the trade agreement, and
- (iii) the supporting information described in paragraph (2); and

(C) the implementing bill is enacted into law.

(2) The supporting information required under paragraph (1)(B)(iii) consists of—

(A) an explanation as to how the implementing bill and proposed administrative action will change or affect existing law; and

(B) a statement—

(i) asserting that the agreement makes progress in achieving the applicable purposes, policies, and objectives of this title,

(ii) setting forth the reasons of the President regarding—

(I) how and to what extent the agreement makes progress in achieving the applicable purposes, policies, and objectives referred to in clause (i), and why and to what extent the agreement does not achieve other applicable purposes, policies, and objectives,

(II) how the agreement serves the interests of United States commerce, and

(III) why the implementing bill and proposed administrative action is required or appropriate to carry out the agreement;

(iii) describing the efforts made by the President to obtain international exchange rate equilibrium and any effect the agreement may have regarding increased international monetary stability; and

(iv) describing the extent, if any, to which—

(I) each foreign country that is a party to the agreement maintains non-commercial state trading enterprises that may adversely affect, nullify, or impair the benefits to the United States under the agreement, and

(II) the agreement applies to or affects purchases and sales by such enterprises.

(3) To ensure that a foreign country which receives benefits under a trade agreement entered into under section 2902(b) or (c) of this title is subject to the obligations imposed by such agreement, the President shall recommend to Congress in the implementing bill and statement of administrative action submitted with respect to such agreement that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of such agreement. The President may also recommend with respect to any such agreement that the benefits and obligations of such agreement not apply uniformly to all parties to such agreement, if such application is consistent with the terms of such agreement.

(b) Application of Congressional “fast track” procedures to implementing bills

(1) Except as provided in subsection (c) of this section—

(A) the provisions of section 2191 of this title (hereinafter in this section referred to as “fast track procedures”) apply to implementing bills submitted with respect to trade agreements entered into under section 2902(b) or (c) of this title before June 1, 1991; and

(B) such fast track procedures shall be extended to implementing bills submitted with respect to trade agreements entered into under section 2902 of this title after May 31, 1991, and before June 1, 1993, if (and only if)—

(i) the President requests such extension under paragraph (2); and

(ii) neither House of the Congress adopts and extension disapproval resolution under paragraph (5) before June 1, 1991.

(2) If the President is of the opinion that the fast track procedures should be extended to implementing bills described in paragraph (1)(B), the President must submit to the Congress, no later than March 1, 1991, a written report that contains a request for such extension, together with—

(A) a description of all trade agreements that have been negotiated under section 2902(b) or (c) of this title and the

anticipated schedule for submitting such agreements to the Congress for approval;

(B) a description of the progress that has been made in multilateral and bilateral negotiations to achieve the purposes, policies, and objectives of this title, and a statement that such progress justifies the continuation of negotiations; and

(C) a statement of the reasons why the extension is needed to complete the negotiations.

(3) The President shall promptly inform the Advisory Committee for Trade Policy and Negotiations established under section 2155 of this title of his decision to submit a report to Congress under paragraph (2). The Advisory Committee shall submit to the Congress as soon as practicable, but not later than March 1, 1991, a written report that contains—

(A) its views regarding the progress that has been made in multilateral and bilateral negotiations to achieve the purposes, policies, and objectives of this title; and

(B) a statement of its views, and the reasons therefor, regarding whether the extension requested under paragraph (2) should be approved or disapproved.

(4) The reports submitted to the Congress under paragraphs (2) and (3), or any portion of the reports, may be classified to the extent the President determines appropriate.

(5)(A) For purposes of this subsection, the term “extension disapproval resolution” means a resolution of either House of the Congress, the sole matter after the resolving clause of which is as follows: “That the [] disapproves the request of the President for the extension, under section 1103(b)(1)(B)(i) of the Omnibus Trade and Competitiveness Act of 1988, of the provisions of section 151 of the Trade Act of 1974 to any implementing bill submitted with respect to any trade agreement entered into under section 1102(b) or (c) of such Act after May 31, 1991, because sufficient tangible progress has not been made in trade negotiations.”, with the blank space being filled with the name of the resolving House of the Congress.

(B) Extension disapproval resolutions—

(i) may be introduced in either House of the Congress by any member of such House; and

(ii) shall be jointly referred, in the House of Representatives, to the Committee on Ways and Means and the Committee on Rules.

(C) The provisions of section 2192(d) and (e) of this title (relating to the floor consideration of certain resolutions in the House and Senate) apply to extension disapproval resolutions.

(D) It is not in order for—

(i) the Senate to consider any extension disapproval resolution not reported by the Committee on Finance;

(ii) the House of Representatives to consider any extension disapproval resolution not reported by the Committee on Ways and Means and the Committee on Rules; or

(iii) either House of the Congress to consider an extension disapproval resolution that is reported to such House after May 15, 1991.

(c) Limitations on use of “fast track” procedures

(1)(A) The fast track procedures shall not apply to any implementing bill submitted with respect to a trade agreement entered into under section 2902(b) or (c) of this title if both Houses of the Congress separately agree to procedural disapproval resolutions within any 60-day period.

(B) Procedural disapproval resolutions—

(i) in the House of Representatives—

(I) shall be introduced by the chairman or ranking minority member of the Committee on Ways and Means or the chairman or ranking minority member of the Committee on Rules,

(II) shall be jointly referred to the Committee on Ways and Means and the Committee on Rules, and

(III) may not be amended by either Committee; and

(ii) in the Senate shall be original resolutions of the Committee on Finance.

(C) The provisions of section 2192(d) and (e) of this title (relating to the floor consideration of certain resolutions in the House and Senate) apply to procedural disapproval resolutions.

(D) It is not in order for the House of Representatives to consider any procedural disapproval resolution not reported by the Committee on Ways and Means and the Committee on Rules.

(E) For purposes of this subsection, the term "procedural disapproval resolution" means a resolution of either House of the Congress, the sole matter after the resolving clause of which is as follows: "That the President has failed or refused to consult with Congress on trade negotiations and trade agreements in accordance with the provisions of the Omnibus Trade and Competitiveness Act of 1988, and, therefore, the provisions of section 151 of the Trade Act of 1974 shall not apply to any implementing bill submitted with respect to any trade agreement entered into under section 1102(b) or (c) of such Act of 1988, if, during the 60-day period beginning on the date on which this resolution is agreed to by the [], the [] agrees to a procedural disapproval resolution (within the meaning of section 1103(c)(1)(E) of such Act of 1988).", with the first blank space being filled with the name of the resolving House of the Congress and the second blank space being filled with the name of the other House of the Congress.

(2) The fast track procedures shall not apply to any implementing bill that contains a provision approving of any trade agreement which is entered into under section 2902(c) of this title with any foreign country if either—

(A) the requirements of section 2902(c)(3) of this title are not met with respect to the negotiation of such agreement; or

(B) the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives disapproves of the negotiation of such agreement before the close of the 60-day period which begins on the date notice is provided under section 2902(c)(3)(C)(i) of this title with respect to the negotiation of such agreement.

(d) Rules of House of Representatives and Senate

Subsections (b) and (c) of this section are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such is deemed a part of the rules of each House, respectively, and such procedures supersede other rules only to the extent that they are inconsistent with such other rules; and

(2) with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House.

(e) Computation of certain periods of time

Each period of time described in subsection (c)(1)(A) and (E) and (2) of this section shall be computed without regard to—

(1) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die; and

(2) any Saturday and Sunday, not excluded under paragraph (1), when either House of the Congress is not in session.

(Pub. L. 100-418, Title I, § 1103, Aug. 23, 1988, 102 Stat. 1128.)

* * *

§ 2904. Termination and reservation authority; reciprocal non-discriminatory treatment**(a) In general**

For purposes of applying sections 2135, 2136(a), and 2137 of this title—

(1) any trade agreement entered into under section 2902 of this title shall be treated as an agreement entered into under section 2111 or 2112 of this title, as appropriate; and

(2) any proclamation or Executive order issued pursuant to a trade agreement entered into under section 2902 of this title shall be treated as a proclamation or Executive order

issued pursuant to a trade agreement entered into under section 2112 of this title.

(b) Reciprocal nondiscriminatory treatment

(1) The President shall determine, before June 1, 1993, whether any major industrial country has failed to make concessions under trade agreements entered into under section 2902(a) and (b) of this title which provide competitive opportunities for the commerce of the United States in such country substantially equivalent to the competitive opportunities, provided by concessions made by the United States under trade agreements entered into under section 2902(a) and (b) of this title, for the commerce of such country in the United States.

(2) If the President determines under paragraph (1) that a major industrial country has not made concessions under trade agreements entered into under section 2902(a) and (b) of this title which provide substantially equivalent competitive opportunities for the commerce of the United States, the President shall, either generally with respect to such country or by article produced by such country, in order to restore equivalence of competitive opportunities, recommended to the Congress—

(A) legislation providing for the termination or denial of the benefits of concessions of trade agreements entered into under section 2902(a) and (b) of this title that have been made with respect to rates of duty or other import restrictions imposed by the United States, and

(B) legislation providing that any law necessary to carry out any trade agreement under section 2902(a) or (b) of this title not apply to such country.

(3) For purposes of this subsection, the term “major industrial country” means Canada, the European Communities, the individual member countries of the European Communities, Japan, and any other foreign country designated by the President for purposes of this subsection.

(Pub. L. 100-418, Title I, § 1105, Aug. 23, 1988, 102 Stat. 1132.)

§ 2905. Accession of state trading regimes to the General Agreement on Tariffs and Trade

(a) In general

Before any major foreign country accedes, after August 23, 1988, to the GATT the President shall determine—

(1) whether state trading enterprises account for a significant share of—

(A) the exports of such major foreign country, or

(B) the goods of such major foreign country that are subject to competition from goods imported into such foreign country; and

(2) whether such state trading enterprises—

(A) unduly burden and restrict, or adversely affect, the foreign trade of the United States or the United States economy, or

(B) are likely to result in such a burden, restriction, or effect.

(b) Effects of affirmative determination

If both of the determinations made under paragraphs (1) and (2) of subsection (a) of this section with respect to a major foreign country are affirmative—

(1) the President shall reserve the right of the United States to withhold extension of the application of the GATT, between the United States and such major foreign country, and

(2) the GATT shall not apply between the United States and such major foreign country until—

(A) such foreign country enters into an agreement with the United States providing that the state trading enterprises of such foreign country—

(i) will—

(I) make purchases which are not for the use of such foreign country, and

(II) make sales in international trade,

in accordance with commercial considerations (including price, quality, availability, marketability, and transportation), and

(ii) will afford United States business firms adequate opportunity, in accordance with customary practice, to compete for participation in such purchases or sales; or

(B) a bill submitted under subsection (c) of this section which approves of the extension of the application of the GATT between the United States and such major foreign country is enacted into law.

(c) Expedited consideration of bill to approve extension

(1) The President may submit to the Congress any draft of a bill which approves of the extension of the application of the GATT between the United States and a major foreign country.

(2) Any draft of a bill described in paragraph (1) that is submitted by the President to the Congress shall—

(A) be introduced by the majority leader of each House of the Congress (by request) on the first day on which such House is in session after the date such draft is submitted to the Congress; and

(B) shall be treated as an implementing bill of purposes of subsections (d), (e), (f), and (g) of section 2191 of this title.

(d) Publication

The President shall publish in the Federal Register each determination made under subsection (a) of this section.

(Pub. L. 100-418, Title I, § 1106, Aug. 23, 1988, 102 Stat. 1133.)

* * *

§ 2906. Definitions

For purposes of this chapter:

(1) The term “distortion” includes, but is not limited to, a subsidy.

- (2) The term “foreign country” includes any foreign instrumentality. Any territory or possession of a foreign country that is administered separately for customs purposes, shall be treated as a separate foreign country.
- (3) The term “GATT” means the General Agreement on Tariffs and Trade.
- (4) The term “implementing bill” has the meaning given such term in section 2191(b)(1) of this title.
- (5) The term “international trade” includes, but is not limited to—
- (A) trade in both goods and services, and
 - (B) foreign direct investment by United States persons, especially if such investment has implications for trade in goods and services.
- (6) The term “state trading enterprise” means—
- (A) any agency, instrumentality, or administrative unit of a foreign country which—
 - (i) purchases goods or services in international trade for any purpose other than the use of such goods or services by such agency, instrumentality, administrative unit, or foreign country, or
 - (ii) sells goods or services in international trade; or
 - (B) any business firm which—
 - (i) is substantially owned or controlled by a foreign country or any agency, instrumentality, or administrative unit thereof,
 - (ii) is granted (formally or informally) any special or exclusive privilege by such foreign country, agency, instrumentality, or administrative unit, and
 - (iii) purchases goods or services in international trade for any purpose other than the use of such goods or services by such foreign country, agency, instrumentality, or administrative unit, or which sells goods or services in international trade.

(Pub. L. 100-418, Title I, § 1107(a), Aug. 23, 1988, 102 Stat. 1134.)

* * *

**IV.
TRIPs Portions from
the Memorandum for
the United States Trade
Representative from President
William J. Clinton
Transmitting the
Trade Agreements
Resulting from the
Uruguay Round of Multilateral
Trade Negotiations¹**

¹ 58 Fed. Reg. 67,263 (Dec. 20, 1993).

* * *

THE WHITE HOUSE

* * *

WASHINGTON

* * *

December 15, 1993

**MEMORANDUM FOR THE UNITED STATES TRADE
REPRESENTATIVE**

**SUBJECT: Trade Agreements Resulting from the Uruguay
Round of Multilateral Trade Negotiations**

**I have today sent the attached letters to the Speaker of the U.S.
House of Representatives and the President of the Senate.**

**You are authorized and directed to publish this memorandum
and its attachments in the Federal Register.**

/s/

William J. Clinton

THE WHITE HOUSE
WASHINGTON

December 15, 1993

The Honorable Al Gore
President of the Senate
Office of the Vice President
S212 Capitol Building
Washington, D. C. 20510

Dear Mr. President:

I believe that we have created a unique opportunity to build an international trading system that will ensure the orderly and equitable expansion of world trade and contribute to the prosperity of the United States in coming generations. After seven long years the conclusion of the Uruguay Round of multilateral trade negotiations is at hand. The Round will result in the largest, most comprehensive set of trade agreements in history. With the conclusion of the Round, we will have successfully achieved the objectives that Congress set for the United States in the negotiations.

In accordance with section 1103(a)(1) of the Omnibus Trade and Competitiveness Act of 1988, as amended ("Act"), I am pleased to notify the House of Representatives and the Senate of my intent to enter into the trade agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade. These agreements are listed and identified below and are more fully described in an attachment to this letter.

The United States can and must compete in the global economy. In many areas of economic activity we are already world leaders and we are taking measures at home to strengthen further our ability to compete. In section 1101 of the Act the Congress set as the first overall U.S. negotiating objective for the Uruguay Round more open, equitable and reciprocal market access. I am particularly pleased to advise you that the Uruguay Round results will provide an unprecedented level of new market access opportunities for U.S. goods and services exports. In the attachment

to this letter is a summary description of the agreements on market access for goods and services that we have achieved in the Round. Of special note are the number of areas where we and our major trading partners have each agreed to reduce tariffs on goods to zero. The schedules of commitments reflecting market access in services cover a wide range of service sectors that are of great interest to our exporting community.

[2]The Agreement on Agriculture will achieve, as Congress directed, more open and fair conditions of trade in agricultural commodities by establishing specific commitments to reduce foreign export subsidies, tariffs and non-tariff barriers and internal supports.

The Agreement on Textiles and Clothing provides for trade in textiles and apparel to be fully integrated into the GATT for the first time. As a result, trade in textiles will be subject to the same disciplines as other sectors. This transition will take place gradually over an extended period. At the same time, the agreement provides an improved safeguards mechanism. It also requires apparel exporting countries to lower specific tariff and non-tariff barriers, providing new market opportunities for U.S. exporters of textile and apparel goods. The agreement contributes to the achievement of the U.S. negotiating objectives of expanding the coverage of the GATT while getting developing countries to provide reciprocal benefits.

In fulfillment of the second overall U.S. negotiating objective, the reduction or elimination of barriers and other trade-distorting policies and practices, the Uruguay Round package includes a number of agreements to reduce or eliminate non-tariff barriers to trade. These agreements, which are described in the attachment, address **Safeguards, Antidumping, Subsidies and Countervailing Measures, Trade-Related Investment Measures, Import Licensing Procedures, Customs Valuation, Preshipment Inspection, Rules of Origin, Technical Barriers to Trade, and Sanitary and Phytosanitary Measures**. The agreements strengthen existing GATT rules and, for the first time in the GATT, discipline non-tariff barriers in the areas of investment, rules of origin and preshipment inspection. The agreements preserve the ability of the United States to impose measures necessary to protect the health and safety of our citizens and our environment and to enforce vigorously our laws on unfair trade practices.

The Agreement on Government Procurement will provide new opportunities for U.S. exporters as a result of the decision to expand the coverage of the agreement to government procurement of services and construction; we will, however, only extend the full benefits of the agreement to those countries that provide satisfactory coverage of their own procurement. Negotiations on improvements in the Agreement on Trade in Civil Aircraft and on a Multilateral Steel Agreement are continuing. These agreements should provide for more effective disciplines and reduce or eliminate trade-distorting policies and practices in two industries of importance to our economy. I will fully consult with the Congress throughout these negotiations, and plan to enter into these agreements if the negotiations produce results that are acceptable to the United States.

[3]As a result of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS), we will now have for the first time internationally agreed rules covering areas of trade of enormous importance to the United States. These agreements represent a major step forward in establishing a more effective system of international trading disciplines and procedures. GATS contains legally enforceable provisions dealing with both cross-border trade and investment in services and sectoral annexes on financial services, labor movement, telecommunications and aviation services. More than 50 countries have submitted schedules of commitments on market access for services. The TRIPs agreement provides for the establishment of standards for the protection of a full range of intellectual property rights and for the enforcement of those standards both internationally and at the border.

The Uruguay Round has produced a number of other agreements that will create a more effective system of international trading disciplines and procedures.

The Understanding on Rules and Procedures Governing the Settlement of Disputes will provide for a more effective and expeditious dispute resolution mechanism and procedures which will enable better enforcement of United States rights. Congress identified the establishment of such a system as the first principal U.S. trade negotiating objective for the Round. The procedures complement U.S. laws for dealing with foreign unfair trade practices such as section 301 of the Trade Act of 1974.

The **Agreement Establishing the World Trade Organization** will facilitate the implementation of the trade agreements reached in the Uruguay Round by bringing them under one institutional umbrella, requiring full participation of all countries in the new trading system and providing a permanent forum to address new issues facing the international trading system. The WTO text recognizes the importance of protecting the environment while expanding world trade; negotiators have also agreed to develop a work program on trade and the environment and will recommend an appropriate institutional structure to carry out this work program. Creation of the WTO will contribute to the achievement of the second principal U.S. negotiating objective of improving the operation of the GATT and multilateral trade agreements.

The U.S. objective of improving the operation of the GATT is also furthered by a number of understandings, decisions and declarations regarding the GATT and its operations. The **Trade Policy Review Mechanism** will enhance surveillance of members' trade policies. The **Understandings Concerning Interpretation of Specific Articles of the General Agreement on Tariffs and Trade 1994 (GATT 1994)** concern the Interpretation of Articles II:1(b), [4]XVII, XXIV, XXVIII and XXXV, and Balance-of-Payments Provisions. There is also an **Understanding in respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994**.

The **Ministerial Decisions and Declarations** state the views and objectives of Uruguay Round participants on a number of issues relating to the operation of the global trading system, provide for the continuation of the improvements to the dispute settlement system that became effective in 1989 and deal with other matters concerning the dispute settlement system. The Ministerial Decisions and Declarations that are now proposed for adoption are described in the attachment. At this time, implementing legislation does not appear to be necessary for these instruments.

I will continue to consult closely with the Congress as we conclude the Round. There are a few areas of significance that we were unable to resolve at this time. In order to ensure more open, equitable and reciprocal market access, in certain agreements we have made U.S. obligations contingent on receiving satisfactory commitments from other countries, and we will continue to work

to ensure that the best possible agreement for the United States is achieved. I will not enter into any agreement unless I am satisfied that U.S. interest are protected. With regard to entertainment issues, we were unable to overcome our differences with our major trading partners, and we agreed to disagree. We will continue to negotiate, however, and until we reach a satisfactory agreement, we think we can best advance the interests of our entertainment industry by reserving all our legal rights to respond to policies that discriminate in these areas.

In accordance with the procedures in the Act, the United States will not enter into the agreements outlined above until April 15, 1994. After the agreements have been signed, they will be submitted for Congressional approval, together with whatever legislation and administrative actions may be necessary or appropriate to implement the agreements in the United States. The agreements will not take effect with respect to the United States, and will have no domestic legal force, until the Congress has approved them and enacted any appropriate implementing legislation.

Sincerely,

/s/

William J. Clinton

Editorial note: An identical letter was sent to the Honorable Thomas S. Foley, Speaker of the House of Representatives.

[1] EXECUTIVE SUMMARY
RESULTS OF THE GATT URUGUAY ROUND OF
MULTILATERAL TRADE NEGOTIATIONS

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* * *

**[22]15. TRADE-RELATED INTELLECTUAL
PROPERTY RIGHTS**

U.S. Objectives

The principle negotiating objectives of the United States with respect to trade-related intellectual property rights (TRIPS) were to:

- implement adequate standards for the protection of copyrights, patents, trademarks, semiconductor chip layout designs, trade secrets and to prohibit unfair competition,
- establish effective enforcement procedures internally and at the border, and

- implement effective dispute settlement procedures that improve on existing GATT procedures.

Results

The TRIPS agreement establishes improved standards for the protection of a full range of intellectual property rights and the enforcement of those standards both internally and at the border. The intellectual property rights covered by the agreement are: copyrights, patents, trademarks, industrial designs, trade secrets, integrated circuits (semiconductor chips) and geographical indications.

The TRIPs text is covered by the Dispute Settlement Understanding, thus ensuring application of the improved dispute settlement procedures, including the possibility of imposing trade sanctions, such as increasing tariffs, if another Member violates TRIPs obligations.

The TRIPs agreement achieves improved standards of protection in the areas of key interest to the United States. In the area of protection of geographic indications, the U.S. wine industry and trademark owners are safeguarded and we will simply make permanent existing regulations.

The agreement also includes strong enforcement provisions that are critical to obtaining effective enforcement of the agreed standards. Members must also enforce copyrights and trademarks at their borders against counterfeiting and piracy.

[23]Key Provisions

Copyrights: The text resolves some key trade problems for U.S. software, motion picture and recording interests by:

- protecting computer programs as literary works and databases as compilations under copyright;
- imposing an obligation on Members to grant owners of computer programs and sound recordings the right to authorize or prohibit the rental of their products;
- establishing a term of 50 years for the protection of sound recordings as well as requiring Members to provide protection for existing sound recordings; and
- setting a minimum term of 50 years for the protection of motion pictures and other works where companies may be the author.

The Agreement also obligates Members to comply with the provisions of the Berne Convention, the preeminent international copyright treaty, with the exception of that Convention's requirements on moral rights.

Patents: The Agreement resolves long-standing trade irritants for U.S. patent interests, especially pharmaceutical and agricultural chemical companies. Key benefits provided under the Agreement are:

- product and process patents for virtually all types of inventions, including pharmaceuticals and agricultural chemicals;
- meaningful limitations on the ability to impose compulsory licensing;
- a patent term of 20 years from the date the application is filed; and
- prompt implementation of procedures to permit the filing of patent applications covering pharmaceuticals and agricultural chemicals upon the entry into force of the agreement.

Trademarks: The Agreement:

- requires Parties to register service marks in addition to trademarks;
- enhances protection for internationally well-known marks;

[24]

- prohibits the mandatory linking of trademarks;
- prohibits the compulsory licensing of marks.

Other Protections: The Agreement also provides rules for protecting:

- trade secrets which enable owners to prevent unauthorized use or disclosure of confidential information;
- integrated circuits that eliminate the deficiencies of the Washington Treaty;
- industrial designs consistent with existing U.S. laws; and
- non-generic geographical indications used to identify wines and spirits.

Finally, the Agreement contains obligations to provide effective enforcement for these intellectual property rights, both internally and at the border (including safeguards to prevent abuses), and specific provisions on injunctions damages and obtaining evidence.

* * *

VI.

Chapter 17 of the North American Free Trade Agreement

**NORTH AMERICAN FREE TRADE AGREEMENT
BETWEEN THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,
THE GOVERNMENT OF CANADA
AND THE GOVERNMENT OF THE
UNITED MEXICAN STATES**

* * *

**PART SIX—INTELLECTUAL PROPERTY
CHAPTER SEVENTEEN: INTELLECTUAL PROPERTY**

Article 1701

Nature and Scope of Obligations

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

2. To provide adequate and effective protection and enforcement of intellectual property rights, each Party shall, at a minimum, give effect to this Chapter and to the substantive provisions of:

(a) the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms*, 1971 (Geneva Convention);

(b) the *Berne Convention for the Protection of Literary and Artistic Works*, 1971 (Berne Convention);

(c) the *Paris Convention for the Protection of Industrial Property*, 1967 (Paris Convention); and

(d) the *International Convention for the Protection of New Varieties of Plants*, 1978 (UPOV Convention), or the *International Convention for the Protection of New Varieties of Plants*, 1991 (UPOV Convention).

If a Party has not acceded to the specified text of any such Conventions on or before the date of entry into force of this Agreement, it shall make every effort to accede.

3. Annex 1701.3 applies to the Parties specified in that Annex.

Article 1702

More Extensive Protection

A Party may implement in its domestic law more extensive protection of intellectual property rights than is required under this Agreement, provided that such protection is not inconsistent with this Agreement.

Article 1703

National Treatment

1. Each Party shall accord to nationals of another Party treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights. In respect of sound recordings, each Party shall provide such treatment to producers and performers of another Party, except that a Party may limit rights of performers of another Party in respect of secondary uses of sound recordings to those rights its nationals are accorded in the territory of such other Party.

2. No Party may, as a condition of according national treatment under this Article, require right holders to comply with any formalities or conditions in order to acquire rights in respect of copyright and related rights.

3. A Party may derogate from paragraph 1 in relation to its judicial and administrative procedures for the protection or enforcement of intellectual property rights, including any procedure requiring a national of another Party to designate for service of process an address in the Party's territory or to appoint an agent in the Party's territory, if the derogation is consistent with

the relevant Convention listed in Article 1701(2), provided that such derogation:

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

4. No Party shall have any obligation under this Article with respect to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.

Article 1704

Control of Abusive or Anticompetitive Practices or Conditions

Nothing in this Chapter shall prevent a Party from specifying in its domestic law licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. A Party may adopt or maintain, consistent with the other provisions of this Agreement, appropriate measures to prevent or control such practices or conditions.

Article 1705

Copyright

1. Each Party shall protect the works covered by Article 2 of the Berne Convention, including any other works that embody original expression within the meaning of that Convention. In particular:

- (a) all types of computer programs are literary works within the meaning of the Berne Convention and each Party shall protect them as such; and
- (b) compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such.

The protection a Party provides under subparagraph (b) shall not extend to the data or material itself, or prejudice any copyright subsisting in that data or material.

2. Each Party shall provide to authors and their successors in interest those rights enumerated in the Berne Convention in

respect of works covered by paragraph 1, including the right to authorize or prohibit:

- (a) the importation into the Party's territory of copies of the work made without the right holder's authorization;
- (b) the first public distribution of the original and each copy of the work by sale, rental or otherwise;
- (c) the communication of a work to the public; and
- (d) the commercial rental of the original or a copy of a computer program.

Subparagraph (d) shall not apply where the copy of the computer program is not itself an essential object of the rental. Each Party shall provide that putting the original or a copy of a computer program on the market with the right holder's consent shall not exhaust the rental right.

3. Each Party shall provide that for copyright and related rights:

- (a) any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee; and
- (b) any person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and sound recordings, shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.

4. Each Party shall provide that, where the term of protection of a work, other than a photographic work or a work of applied art, is to be calculated on a basis other than the life of a natural person, the term shall be not less than 50 years from the end of the calendar year of the first authorized publication of the work or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

5. Each Party shall confine limitations or exceptions to the rights provided for in this Article to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

6. No Party may grant translation and reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in that Party's territory for copies or translations

of the work could be met by the right holder's voluntary actions but for obstacles created by the Party's measures.

7. Annex 1705.7 applies to the Parties specified in that Annex.

Article 1706

Sound Recordings

1. Each Party shall provide to the producer of a sound recording the right to authorize or prohibit:

- (a) the direct or indirect reproduction of the sound recording;
- (b) the importation into the Party's territory of copies of the sound recording made without the producer's authorization;
- (c) the first public distribution of the original and each copy of the sound recording by sale, rental or otherwise; and
- (d) the commercial rental of the original or a copy of the sound recording, except where expressly otherwise provided in a contract between the producer of the sound recording and the authors of the works fixed therein.

Each Party shall provide that putting the original or a copy of a sound recording on the market with the right holder's consent shall not exhaust the rental right.

2. Each Party shall provide a term of protection for sound recordings of at least 50 years from the end of the calendar year in which the fixation was made.

3. Each Party shall confine limitations or exceptions to the rights provided for in this Article to certain special cases that do not conflict with a normal exploitation of the sound recording and do not unreasonably prejudice the legitimate interests of the right holder.

Article 1707

Protection of Encrypted Program-Carrying Satellite Signals

Within one year from the date of entry into force of this Agreement, each Party shall make it:

- (a) a criminal offense to manufacture, import, sell, lease or otherwise make available a device or system that is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal; and

(b) a civil offense to receive, in connection with commercial activities, or further distribute, an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal or to engage in any activity prohibited under subparagraph (a).

Each Party shall provide that any civil offense established under subparagraph (b) shall be actionable by any person that holds an interest in the content of such signal.

Article 1708

Trademarks

1. For purposes of this Agreement, a trademark consists of any sign, or any combination of signs, capable of distinguishing the goods or services of one person from those of another, including personal names, designs, letters, numerals, colors, figurative elements, or the shape of goods or of their packaging. Trademarks shall include service marks and collective marks, and may include certification marks. A Party may require, as a condition for registration, that a sign be visually perceptible.

2. Each Party shall provide to the owner of a registered trademark the right to prevent all persons not having the owner's consent from using in commerce identical or similar signs for goods or services that are identical or similar to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any prior rights, nor shall they affect the possibility of a Party making rights available on the basis of use.

3. A Party may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. No Party may refuse an application solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application for registration.

4. Each Party shall provide a system for the registration of trademarks, which shall include:

(a) examination of applications;

(b) notice to be given to an applicant of the reasons for the refusal to register a trademark;

(c) a reasonable opportunity for the applicant to respond to the notice;

(d) publication of each trademark either before or promptly after it is registered; and

(e) a reasonable opportunity for interested persons to petition to cancel the registration of a trademark.

A Party may provide for a reasonable opportunity for interested persons to oppose the registration of a trademark.

5. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to the registration of the trademark.

6. Article 6^{bis} of the Paris Convention shall apply, with such modifications as may be necessary, to services. In determining whether a trademark is well-known, account shall be taken of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Party's territory obtained as a result of the promotion of the trademark. No Party may require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

7. Each Party shall provide that the initial registration of a trademark be for a term of at least 10 years and that the registration be indefinitely renewable for terms of not less than 10 years when conditions for renewal have been met.

8. Each Party shall require the use of a trademark to maintain a registration. The registration may be canceled for the reason of non-use only after an uninterrupted period of at least two years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Each Party shall recognize, as valid reasons for non-use, circumstances arising independently of the will of the trademark owner that constitute an obstacle to the use of the trademark, such as import restrictions on, or other government requirements for, goods or services identified by the trademark.

9. Each Party shall recognize use of a trademark by a person other than the trademark owner, where such use is subject to the owner's control, as use of the trademark for purposes of maintaining the registration.

10. No Party may encumber the use of a trademark in commerce by special requirements, such as a use that reduces the trademark's function as an indication of source or a use with another trademark.

11. A Party may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign its trademark with or without the transfer of the business to which the trademark belongs.

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

13. Each Party shall prohibit the registration as a trademark of words, at least in English, French or Spanish, that generically designate goods or services or types of goods or services to which the trademark applies.

14. Each Party shall refuse to register trademarks that consist of or comprise immoral, deceptive or scandalous matter, or matter that may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs or any Party's national symbols, or bring them into contempt or disrepute.

Article 1709

Patents

1. Subject to paragraphs 2 and 3, each Party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application. For purposes of this Article, a Party may deem the terms "inventive step" and "capable of industrial application" to be synonymous with the terms "non-obvious" and "useful", respectively.

2. A Party may exclude from patentability inventions if preventing in its territory the commercial exploitation of the inventions is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to nature or the environment, provided that the exclusion is not based solely on the ground that the Party

prohibits commercial exploitation in its territory of the subject matter of the patent.

3. A Party may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than microorganisms; and

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

Notwithstanding subparagraph (b), each Party shall provide for the protection of plant varieties through patents, an effective scheme of sui generis protection, or both.

4. If a Party has not made available product patent protection for pharmaceutical or agricultural chemicals commensurate with paragraph 1:

(a) as of January 1, 1992, for subject matter that relates to naturally occurring substances prepared or produced by, or significantly derived from, microbiological processes and intended for food or medicine, and

(b) as of July 1, 1991, for any other subject matter,

that Party shall provide to the inventor of any such product or its assignee the means to obtain product patent protection for such product for the unexpired term of the patent for such product granted in another Party, as long as the product has not been marketed in the Party providing protection under this paragraph and the person seeking such protection makes a timely request.

5. Each Party shall provide that:

(a) where the subject matter of a patent is a product, the patent shall confer on the patent owner the right to prevent other persons from making, using or selling the subject matter of the patent, without the patent owner's consent; and

(b) where the subject matter of a patent is a process, the patent shall confer on the patent owner the right to prevent other persons from using that process and from using, selling, or importing at least the product obtained directly by that process, without the patent owner's consent.

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

7. Subject to paragraphs 2 and 3, patents shall be available and patent rights enjoyable without discrimination as to the field of technology, the territory of the Party where the invention was made and whether products are imported or locally produced.

8. A Party may revoke a patent only when:

(a) grounds exist that would have justified a refusal to grant the patent; or

(b) the grant of a compulsory license has not remedied the lack of exploitation of the patent.

9. Each Party shall permit patent owners to assign and transfer by succession their patents, and to conclude licensing contracts.

10. Where the law of a Party allows for use of the subject matter of a patent, other than that use allowed under paragraph 6, without the authorization of the right holder, including use by the government or other persons authorized by the government, the Party shall respect the following provisions:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time. The requirement to make such efforts may be waived by a Party in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill that enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the Party's domestic market;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances that led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, on motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization shall be subject to judicial or other independent review by a distinct higher authority;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial or other independent review by a distinct higher authority;

(k) the Party shall not be obliged to apply the conditions set out in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anticompetitive. The need to correct anticompetitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions that led to such authorization are likely to recur;

(l) the Party shall not authorize the use of the subject matter of a patent to permit the exploitation of another patent except as a remedy for an adjudicated violation of domestic laws regarding anticompetitive practices.

11. Where the subject matter of a patent is a process for obtaining a product, each Party shall, in any infringement

proceeding, place on the defendant the burden of establishing that the allegedly infringing product was made by a process other than the patented process in one of the following situations:

- (a) the product obtained by the patented process is new; or
- (b) a substantial likelihood exists that the allegedly infringing product was made by the process and the patent owner has been unable through reasonable efforts to determine the process actually used.

In the gathering and evaluation of evidence, the legitimate interests of the defendant in protecting its trade secrets shall be taken into account.

12. Each Party shall provide a term of protection for patents of at least 20 years from the date of filing or 17 years from the date of grant. A Party may extend the term of patent protection, in appropriate cases, to compensate for delays caused by regulatory approval processes.

Article 1710

Layout Designs of Semiconductor Integrated Circuits

1. Each Party shall protect layout designs (topographies) of integrated circuits ("layout designs") in accordance with Articles 2 through 7, 12 and 16(3), other than Article 6(3), of the *Treaty on Intellectual Property in Respect of Integrated Circuits* as opened for signature on 26 May 1989.

2. Subject to paragraph 3, each Party shall make it unlawful for any person without the right holder's authorization to import, sell or otherwise distribute for commercial purposes any of the following:

- (a) a protected layout design;
- (b) an integrated circuit in which a protected layout design is incorporated; or
- (c) an article incorporating such an integrated circuit, only insofar as it continues to contain an unlawfully reproduced layout design.

3. No Party may make unlawful any of the acts referred to in paragraph 2 performed in respect of an integrated circuit that incorporates an unlawfully reproduced layout design, or any article that incorporates such an integrated circuit, where the

person performing those acts or ordering those acts to be done did not know and had no reasonable ground to know, when it acquired the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout design.

4. Each Party shall provide that, after the person referred to in paragraph 3 has received sufficient notice that the layout design was unlawfully reproduced, such person may perform any of the acts with respect to the stock on hand or ordered before such notice, but shall be liable to pay the right holder for doing so an amount equivalent to a reasonable royalty such as would be payable under a freely negotiated license in respect of such a layout design.

5. No Party may permit the compulsory licensing of layout designs of integrated circuits.

6. Any Party that requires registration as a condition for protection of a layout design shall provide that the term of protection shall not end before the expiration of a period of 10 years counted from the date of:

(a) filing of the application for registration; or

(b) the first commercial exploitation of the layout design, wherever in the world it occurs.

7. Where a Party does not require registration as a condition for protection of a layout design, the Party shall provide a term of protection of not less than 10 years from the date of the first commercial exploitation of the layout design, wherever in the world it occurs.

8. Notwithstanding paragraphs 6 and 7, a Party may provide that the protection shall lapse 15 years after the creation of the layout design.

9. Annex 1710.9 applies to the Parties specified in that Annex.

Article 1711

Trade Secrets

1. Each Party shall provide the legal means for any person to prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the person lawfully in control of the information in a manner contrary to honest commercial practices, in so far as:

(a) the information is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally deal with the kind of information in question;

(b) the information has actual or potential commercial value because it is secret; and

(c) the person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret.

2. A Party may require that to qualify for protection a trade secret must be evidenced in documents, electronic or magnetic means, optical discs, microfilms, films or other similar instruments.

3. No Party may limit the duration of protection for trade secrets, so long as the conditions in paragraph 1 exist.

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

5. If a Party requires, as a condition for approving the marketing of pharmaceutical or agricultural chemical products that utilize new chemical entities, the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective, the Party shall protect against disclosure of the data of persons making such submissions, where the origination of such data involves considerable effort, except where the disclosure is necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

6. Each Party shall provide that for data subject to paragraph 5 that are submitted to the Party after the date of entry into force of this Agreement, no person other than the person that submitted them may, without the latter's permission, rely on such data in support of an application for product approval during a reasonable period of time after their submission. For this purpose, a reasonable period shall normally mean not less than five years from the date on which the Party granted approval to the person that produced the data for approval to market its product, taking account of the nature of the data and the person's efforts and expenditures in producing them. Subject to this provision, there

shall be no limitation on any Party to implement abbreviated approval procedures for such products on the basis of bioequivalence and bioavailability studies.

7. Where a Party relies on a marketing approval granted by another Party, the reasonable period of exclusive use of the data submitted in connection with obtaining the approval relied on shall begin with the date of the first marketing approval relied upon.

Article 1712

Geographical Indications

1. Each Party shall provide, in respect of geographical indications, the legal means for interested persons to prevent:

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

(b) any use that constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention.

2. Each Party shall, on its own initiative if its domestic law so permits or at the request of an interested person, refuse to register, or invalidate the registration of, a trademark containing or consisting of a geographical indication with respect to goods that do not originate in the indicated territory, region or locality, if use of the indication in the trademark for such goods is of such a nature as to mislead the public as to the geographical origin of the good.

3. Each Party shall also apply paragraphs 1 and 2 to a geographical indication that, although correctly indicating the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory, region or locality.

4. Nothing in this Article shall be construed to require a Party to prevent continued and similar use of a particular geographical indication of another Party in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to

the same or related goods or services in that Party's territory, either:

- (a) for at least 10 years, or
- (b) in good faith, before the date of signature of this Agreement.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith, either:

- (a) before the date of application of these provisions in that Party, or
- (b) before the geographical indication is protected in its Party of origin,

no Party may adopt any measure to implement this Article that prejudices eligibility for, or the validity of, the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. No Party shall be required to apply this Article to a geographical indication if it is identical to the customary term in common language in that Party's territory for the goods or services to which the indication applies.

7. A Party may provide that any request made under this Article in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Party or after the date of registration of the trademark in that Party, provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Party, provided that the geographical indication is not used or registered in bad faith.

8. No Party shall adopt any measure implementing this Article that would prejudice any person's right to use, in the course of trade, its name or the name of its predecessor in business, except where such name forms all or part of a valid trademark in existence before the geographical indication became protected and with which there is a likelihood of confusion, or such name is used in such a manner as to mislead the public.

9. Nothing in this Chapter shall be construed to require a Party to protect a geographical indication that is not protected, or has fallen into disuse, in the Party of origin.

Article 1713

Industrial Designs

1. Each Party shall provide for the protection of independently created industrial designs that are new or original. A Party may provide that:

(a) designs are not new or original if they do not significantly differ from known designs or combinations of known design features; and

(b) such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Party shall ensure that the requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair a person's opportunity to seek and obtain such protection. A Party may comply with this obligation through industrial design law or copyright law.

3. Each Party shall provide the owner of a protected industrial design the right to prevent other persons not having the owner's consent from making or selling articles bearing or embodying a design that is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

4. A Party may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking into account the legitimate interests of other persons.

5. Each Party shall provide a term of protection for industrial designs of at least 10 years.

Article 1714

Enforcement of Intellectual Property Rights: General Provisions

1. Each Party shall ensure that enforcement procedures, as specified in this Article and Articles 1715 through 1718, are

available under its domestic law so as to permit effective action to be taken against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies to deter further infringements. Such enforcement procedures shall be applied so as to avoid the creation of barriers to legitimate trade and to provide for safeguards against abuse of the procedures.

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

3. Each Party shall provide that decisions on the merits of a case in judicial and administrative enforcement proceedings shall:

(a) preferably be in writing and preferably state the reasons on which the decisions are based;

(b) be made available at least to the parties in a proceeding without undue delay; and

(c) be based only on evidence in respect of which such parties were offered the opportunity to be heard.

4. Each Party shall ensure that parties in a proceeding have an opportunity to have final administrative decisions reviewed by a judicial authority of that Party and, subject to jurisdictional provisions in its domestic laws concerning the importance of a case, to have reviewed at least the legal aspects of initial judicial decisions on the merits of a case. Notwithstanding the above, no Party shall be required to provide for judicial review of acquittals in criminal cases.

5. Nothing in this Article or Articles 1715 through 1718 shall be construed to require a Party to establish a judicial system for the enforcement of intellectual property rights distinct from that Party's system for the enforcement of laws in general.

6. For the purposes of Articles 1715 through 1718, the term "right holder" includes federations and associations having legal standing to assert such rights.

Article 1715

Specific Procedural and Remedial Aspects of Civil and Administrative Procedures

1. Each Party shall make available to right holders civil judicial procedures for the enforcement of any intellectual property right provided in this Chapter. Each Party shall provide that:

(a) defendants have the right to written notice that is timely and contains sufficient detail, including the basis of the claims;

(b) parties in a proceeding are allowed to be represented by independent legal counsel;

(c) the procedures do not include imposition of overly burdensome requirements concerning mandatory personal appearances;

(d) all parties in a proceeding are duly entitled to substantiate their claims and to present relevant evidence; and

(e) the procedures include a means to identify and protect confidential information.

2. Each Party shall provide that its judicial authorities shall have the authority:

(a) where a party in a proceeding has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to the substantiation of its claims that is within the control of the opposing party, to order the opposing party to produce such evidence, subject in appropriate cases to conditions that ensure the protection of confidential information;

(b) where a party in a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide relevant evidence under that party's control within a reasonable period, or significantly impedes a proceeding relating to an enforcement action, to make preliminary and final determinations, affirmative or negative, on the basis of the evidence presented, including the complaint or the allegation presented by the party adversely affected by the denial of access to evidence, subject to providing the parties an opportunity to be heard on the allegations or evidence;

(c) to order a party in a proceeding to desist from an infringement, including to prevent the entry into the channels of

commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, which order shall be enforceable at least immediately after customs clearance of such goods;

(d) to order the infringer of an intellectual property right to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of the infringement where the infringer knew or had reasonable grounds to know that it was engaged in an infringing activity;

(e) to order an infringer of an intellectual property right to pay the right holder's expenses, which may include appropriate attorney's fees; and

(f) to order a party in a proceeding at whose request measures were taken and who has abused enforcement procedures to provide adequate compensation to any party wrongfully enjoined or restrained in the proceeding for the injury suffered because of such abuse and to pay that party's expenses, which may include appropriate attorney's fees.

3. With respect to the authority referred to in subparagraph 2(c), no Party shall be obliged to provide such authority in respect of protected subject matter that is acquired or ordered by a person before that person knew or had reasonable grounds to know that dealing in that subject matter would entail the infringement of an intellectual property right.

4. With respect to the authority referred to in subparagraph 2(d), a Party may, at least with respect to copyrighted works and sound recordings, authorize the judicial authorities to order recovery of profits or payment of pre-established damages, or both, even where the infringer did not know or had no reasonable grounds to know that it was engaged in an infringing activity.

5. Each Party shall provide that, in order to create an effective deterrent to infringement, its judicial authorities shall have the authority to order that:

(a) goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any injury caused to the right holder or, unless this would be contrary to existing constitutional requirements, destroyed; and

(b) materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements.

In considering whether to issue such an order, judicial authorities shall take into account the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of other persons. In regard to counterfeit 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.

6. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, each Party shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of such laws.

7. Notwithstanding the other provisions of Articles 1714 through 1718, where a Party is sued with respect to an infringement of an intellectual property right as a result of its use of that right or use on its behalf, that Party may limit the remedies available against it to the payment to the right holder of adequate remuneration in the circumstances of each case, taking into account the economic value of the use.

8. Each Party shall provide that, where a 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 out in this Article.

Article 1716

Provisional Measures

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

(a) to prevent an infringement of any intellectual property right, and in particular to prevent the entry into the channels of commerce in their jurisdiction of allegedly infringing goods, including measures to prevent the entry of imported goods at least immediately after customs clearance; and

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

2. Each Party shall provide that its judicial authorities shall have the authority to require any applicant for provisional measures to provide to the judicial authorities any evidence reasonably available to that applicant that the judicial authorities consider necessary to enable them to determine with a sufficient degree of certainty whether:

(a) the applicant is the right holder;

(b) the applicant's right is being infringed or such infringement is imminent; and

(c) any delay in the issuance of such measures is likely to cause irreparable harm to the right holder, or there is a demonstrable risk of evidence being destroyed.

Each Party shall provide that its judicial authorities shall have the authority to require the applicant to provide a security or equivalent assurance sufficient to protect the interests of the defendant and to prevent abuse.

3. Each Party shall provide that its judicial authorities shall have the authority to require an applicant for provisional measures to provide other information necessary for the identification of the relevant goods by the authority that will execute the provisional measures.

4. Each Party shall provide that its judicial authorities shall have the authority to order provisional measures on an ex parte basis, 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.

5. Each Party shall provide that where provisional measures are adopted by that Party's judicial authorities on an ex parte basis:

(a) a person affected shall be given notice of those measures without delay but in any event no later than immediately after the execution of the measures:

(b) a defendant shall, on request, have those measures reviewed by that Party's judicial authorities for the purpose of deciding, within a reasonable period after notice of those measures is given, whether the measures shall be modified,

revoked or confirmed, and shall be given an opportunity to be heard in the review proceedings.

6. Without prejudice to paragraph 5, each Party shall provide that, on the request of the defendant, the Party's judicial authorities shall revoke or otherwise cease to apply the provisional measures taken on the basis of paragraphs 1 and 4 if proceedings leading to a decision on the merits are not initiated:

(a) within a reasonable period as determined by the judicial authority ordering the measures where the Party's domestic law so permits; or

(b) in the absence of such a determination, within a period of no more than 20 working days or 31 calendar days, whichever is longer.

7. Each Party shall provide that, where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where the judicial authorities subsequently find that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, on request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. Each Party shall provide that, where a provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set out in this Article.

Article 1717

Criminal Procedures and Penalties

1. Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Each Party shall provide that penalties available include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.

2. Each Party shall provide that, in appropriate cases, its judicial authorities may order the seizure, forfeiture and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offense.

3. A Party may provide criminal procedures and penalties to be applied in cases of infringement of intellectual property rights, other than those in paragraph 1, where they are committed wilfully and on a commercial scale.

Article 1718

Enforcement of Intellectual Property Rights at the Border

1. Each Party shall, in conformity with this Article, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark goods or pirated copyright goods may take place, to lodge an application in writing with its competent authorities, whether administrative or judicial, for the suspension by the customs administration of the release of such goods into free circulation. No Party shall be obligated to apply such procedures to goods in transit. A Party may permit such an application to be made in respect of goods that involve other infringements of intellectual property rights, provided that the requirements of this Article are met. A Party may also provide for corresponding procedures concerning the suspension by the customs administration of the release of infringing goods destined for exportation from its territory.

2. Each Party shall require any applicant who initiates procedures under paragraph 1 to provide adequate evidence:

(a) to satisfy that Party's competent authorities that, under the domestic laws of the country of importation, there is prima facie an infringement of its intellectual property right; and

(b) to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs administration.

The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, if so, the period for which the customs administration will take action.

3. Each Party shall provide that its competent authorities shall have the authority to require an applicant under paragraph 1 to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities, and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

4. Each Party shall provide that, where pursuant to an application under procedures adopted pursuant to this Article, its customs administration suspends the release of goods involving industrial designs, patents, integrated circuits or trade secrets into free circulation on the basis of a decision other than by a judicial or other independent authority, and the period provided for in paragraphs 6 through 8 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder against any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue its right of action within a reasonable period of time.

5. Each Party shall provide that its customs administration shall promptly notify the importer and the applicant when the customs administration suspends the release of goods pursuant to paragraph 1.

6. Each Party shall provide that its customs administration shall release goods from suspension if within a period not exceeding 10 working days after the applicant under paragraph 1 has been served notice of the suspension, the customs administration has not been informed that:

(a) a party other than the defendant has initiated proceedings leading to a decision on the merits of the case, or

(b) a competent authority has taken provisional measures prolonging the suspension,

provided that all other conditions for importation or exportation have been met. Each Party shall provide that, in appropriate cases, the customs administration may extend the suspension by another 10 working days.

7. Each Party shall provide that if proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place on request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed.

8. Notwithstanding paragraphs 6 and 7, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, Article 1716(6) shall apply.

9. Each Party shall provide that its competent authorities shall have the authority to order the applicant under paragraph 1 to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to paragraph 6.

10. Without prejudice to the protection of confidential information, each Party shall provide that its competent authorities shall have the authority to give the right holder sufficient opportunity to have any goods detained by the customs administration inspected in order to substantiate the right holder's claims. Each Party shall also provide that its competent authorities have the authority to give the importer an equivalent opportunity to have any such goods inspected. Where the competent authorities have made a positive determination on the merits of a case, a Party may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee, and of the quantity of the goods in question.

11. Where a Party requires its competent authorities to act on their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that an intellectual property right is being infringed:

(a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;

(b) the importer and the right holder shall be promptly notified of the suspension by the Party's competent authorities, and where the importer lodges an appeal against the suspension with competent authorities, the suspension shall be subject to the conditions, with such modifications as may be necessary, set out in paragraphs 6 through 8; and

(c) the Party shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

12. Without prejudice to other rights of action open to the right holder and subject to the defendant's right to seek judicial review, each Party shall provide that its competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 1715(5). In regard to counterfeit goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

13. A Party may exclude from the application of paragraphs 1 through 12 small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments that are not repetitive.

14. Annex 1718.14 applies to the Parties specified in that Annex.

Article 1719

Cooperation and Technical Assistance

1. The Parties shall provide each other on mutually agreed terms with technical assistance and shall promote cooperation between their competent authorities. Such cooperation shall include the training of personnel.

2. The Parties shall cooperate with a view to eliminating trade in goods that infringe intellectual property rights. For this purpose, each Party shall establish and notify the other Parties by January 1, 1994 of contact points in its federal government and shall exchange information concerning trade in infringing goods.

Article 1720

Protection of Existing Subject Matter

1. Except as required under Article 1705(7), this Agreement does not give rise to obligations in respect of acts that occurred before the date of application of the relevant provisions of this Agreement for the Party in question.

2. Except as otherwise provided for in this Agreement, each Party shall apply this Agreement to all subject matter existing on the date of application of the relevant provisions of this Agreement for the Party in question and that is protected in a Party on such date, or that meets or subsequently meets the criteria for protection under the terms of this Chapter. In respect of this

paragraph and paragraphs 3 and 4, a Party's obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention and with respect to the rights of producers of sound recordings in existing sound recordings shall be determined solely under Article 18 of that Convention, as made applicable under this Agreement.

3. Except as required under Article 1705(7), and notwithstanding the first sentence of paragraph 2, no Party may be required to restore protection to subject matter that, on the date of application of the relevant provisions of this Agreement for the Party in question, has fallen into the public domain in its territory.

4. In respect of any acts relating to specific objects embodying protected subject matter that become infringing under the terms of laws in conformity with this Agreement, and that were begun or in respect of which a significant investment was made, before the date of entry into force of this Agreement for that Party, any Party may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Party. In such cases, the Party shall, however, at least provide for payment of equitable remuneration.

5. No Party shall be obliged to apply Article 1705(2)(d) or 1706(1)(d) with respect to originals or copies purchased prior to the date of application of the relevant provisions of this Agreement for that Party.

6. No Party shall be required to apply Article 1709(10), or the requirement in Article 1709(7) that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the text of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations became known.

7. In the case of intellectual property rights for which protection is conditional on registration, applications for protection that are pending on the date of application of the relevant provisions of this Agreement for the Party in question shall be permitted to be amended to claim any enhanced protection provided under this Agreement. Such amendments shall not include new matter.

Article 1721

Definitions

1. For purposes of this Chapter:

confidential information includes trade secrets, privileged information and other materials exempted from disclosure under the Party's domestic law.

2. For purposes of this Agreement:

encrypted program-carrying satellite signal means a program-carrying satellite signal that is transmitted in a form whereby the aural or visual characteristics, or both, are modified or altered for the purpose of preventing the unauthorized reception, by persons without the authorized equipment that is designed to eliminate the effects of such modification or alteration, of a program carried in that signal;

geographical indication means any indication that identifies a good as originating in the territory of a Party, or a region or locality in that territory, where a particular quality, reputation or other characteristic of the good is essentially attributable to its geographical origin;

in a manner contrary to honest commercial practices means at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by other persons who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition;

intellectual property rights refers to copyright and related rights, trademark rights, patent rights, rights in layout designs of semiconductor integrated circuits, trade secret rights, plant breeders' rights, rights in geographical indications and industrial design rights;

nationals of another Party means, in respect of the relevant intellectual property right, persons who would meet the criteria for eligibility for protection provided for in the *Paris Convention* (1967), the *Berne Convention* (1971), the *Geneva Convention* (1971), the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961), the *UPOV Convention* (1978), the *UPOV Convention* (1991) or the *Treaty on Intellectual Property in Respect of*

Integrated Circuits, as if each Party were a party to those Conventions, and with respect to intellectual property rights that are not the subject of these Conventions, "nationals of another Party" shall be understood to be at least individuals who are citizens or permanent residents of that Party and also includes any other natural person referred to in Annex 201.1;

public includes, with respect to rights of communication and performance of works provided for under Articles 11, 11^{bis} (1) and 14(1)(ii) of the *Berne Convention*, with respect to dramatic, dramatico-musical, musical and cinematographic works, at least, any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works, regardless of whether they can do so at the same or different times or in the same or different places, provided that such an aggregation is larger than a family and its immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of works; and

secondary uses of sound recordings means the use directly for broadcasting or for any other public communication of a sound recording.

Annex 1701.3

Intellectual Property Conventions

1. Mexico shall:

(a) make every effort to comply with the substantive provisions of the 1978 or 1991 *UPOV Convention* as soon as possible and shall do so no later than two years after the date of signature of this Agreement; and

(b) accept from the date of entry into force of this Agreement applications from plant breeders for varieties in all plant genera and species and grant protection, in accordance with such substantive provisions, promptly after complying with subparagraph (a).

2. Notwithstanding Article 1701(2)(b), this Agreement confers no rights and imposes no obligations on the United States with respect to Article 6^{bis} of the *Berne Convention*, or the rights derived from that Article.

Annex 1705.7**Copyright**

The United States shall provide protection to motion pictures produced in another Party's territory that have been declared to be in the public domain pursuant to 17 U.S.C. section 405. This obligation shall apply to the extent that it is consistent with the Constitution of the United States, and is subject to budgetary considerations.

Annex 1710.9**Layout Designs**

Mexico shall make every effort to implement the requirements of Article 1710 as soon as possible, and shall do so no later than four years after the date of entry into force of this Agreement.

Annex 1718.14**Enforcement of Intellectual Property Rights**

Mexico shall make every effort to comply with the requirements of Article 1718 as soon as possible and shall do so no later than three years after the date of signature of this Agreement.

VII.
North American
Free Trade Agreement
Implementation Act,
Subtitle C—
Intellectual Property

The Act of December 8, 1993, Public Law 103-182, 107 Stat. 2057.

An Act

To Implement the North American Free Trade Agreement.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SEC. 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “North American Free Trade Agreement Implementation Act.”

(b) **TABLE OF CONTENTS.**

Sec.

1. Short title and table of contents.
2. Definitions.

* * *

**TITLE III—APPLICATION OF AGREEMENT TO
SECTORS AND SERVICES**

* * *

Subtitle C—Intellectual Property

Sec.

331. Treatment of inventive activity.

332. Rental rights in sound recordings.

333. Nonregistrability of misleading geographic indications.

334. Motion pictures in the public domain.

335. Effective dates.

* * *

SEC. 331. TREATMENT OF INVENTIVE ACTIVITY.

SEC. 104 of title 35, United States Code, is amended to read as follows:

“§ 104. Invention made abroad

“(a) **IN GENERAL.**—In proceedings in the Patent and Trademark Office, in the courts, and before any other competent authority, an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a foreign country other than a NAFTA country, except as provided in sections 119 and 365 of this title. Where an invention was made by a person, civil or military, while domiciled in the United States or a NAFTA country and serving in any other country in connection with operations by or on behalf of the United States or a NAFTA country, the person shall be entitled to the same rights of priority in the United States with respect to such invention as if such invention had been made in the United States or a NAFTA country. To the extent that any information in a NAFTA country concerning knowledge, use, or other activity relevant to proving or disproving a date of invention has not been made available for use in a proceeding in the Office, a court, or any other competent authority to the same extent as such information could be made available in the United States, the Commissioner, court, or such other authority shall draw appropriate inferences, or take other action permitted by statute, rule, or regulation, in favor of the party that requested the information in the proceeding.

“(b) **DEFINITION.**—As used in this section, the term ‘NAFTA country’ has the meaning given that term in section 2(4) of the North American Free Trade Agreement Implementation Act.”

SEC. 332. RENTAL RIGHTS IN SOUND RECORDINGS.

SEC. 4 of the Record Rental Amendment of 1984 (17 U.S.C. 109 note) is amended by striking out subsection (c).

SEC. 333. NONREGISTRABILITY OF MISLEADING GEOGRAPHIC INDICATIONS.

(a) **MARKS NOT REGISTRABLE ON THE PRINCIPAL REGISTER.**—Section 2 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes”, approved July 5, 1946, commonly referred to as the Trademark Act of 1946 (15 U.S.C. 1052(e)), is amended—

(1) by amending subsection (e) to read as follows:

“(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 4, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, or (4) is primarily merely a surname;” and

(2) in subsection (f)—

(A) by striking out “and (d)” and inserting “(d), and (e)(3);” and

(B) by adding at the end the following new sentence: “Nothing in this section shall prevent the registration of a mark which, when used on or in connection with the goods of the applicant, is primarily geographically deceptively misdescriptive of them, and which became distinctive of the applicant’s goods in commerce before the date of the enactment of the North American Free Trade Agreement Implementation Act.”

(b) **SUPPLEMENTAL REGISTER.**—Section 23(a) of the Trademark Act of 1946 (15 U.S.C. 1091(a)) is amended—

(1) by striking out “and (d)” and inserting “(d), and (e)(3);” and

(2) by adding at the end the following new sentence: “Nothing in this section shall prevent the registration on the supplemental register of a mark, capable of distinguishing the applicant’s goods or services and not registrable on the principal register under this Act, that is declared to be unregistrable

under section 2(e)(3), if such mark has been in lawful use in commerce by the owner thereof, on or in connection with any goods or services, since before the date of the enactment of the North American Free Trade Agreement Implementation Act.”.

SEC. 334. MOTION PICTURES IN THE PUBLIC DOMAIN.

(a) **IN GENERAL.**—Chapter 1 of title 17, United States Code, is amended by inserting after section 104 the following new section:

“§ 104A. **Copyright in certain motion pictures**

“(a) **RESTORATION OF COPYRIGHT.**—Subject to subsections (b) and (c)—

“(1) any motion picture that is first fixed or published in the territory of a NAFTA country as defined in section 2(4) of the North American Free Trade Agreement Implementation Act to which Annex 1705.7 of the North American Free Trade Agreement applies, and

“(2) any work included in such motion picture that is first fixed in or published with such motion picture,

that entered the public domain in the United States because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by section 401, 402, or 403 of this title, the absence of which has not been excused by the operation of section 405 of this title, as such sections were in effect during that period, shall have copyright protection under this title for the remainder of the term of copyright protection to which it would have been entitled in the United States had it been published with such notice.

“(b) **EFFECTIVE DATE OF PROTECTION.**—The protection provided under subsection (a) shall become effective, with respect to any motion picture or work included in such motion picture meeting the criteria of that subsection, 1 year after the date on which the North American Free Trade Agreement enters into force with respect to, and the United States applies the Agreement to, the country in whose territory the motion picture was first fixed or published if, before the end of that 1-year period, the copyright owner in the motion picture or work files with the Copyright Office a statement of intent to have copyright protection restored under subsection (a). The Copyright Office shall publish in the Federal Register promptly after that effective date

a list of motion pictures, and works included in such motion pictures, for which protection is provided under subsection (a).

“(c) USE OF PREVIOUSLY OWNED COPIES.—A national or domiciliary of the United States who, before the date of the enactment of the North American Free Trade Agreement Implementation Act, made or acquired copies of a motion picture, or other work included in such motion picture, that is subject to protection under subsection (a), may sell or distribute such copies or continue to perform publicly such motion picture and other work without liability for such sale, distribution, or performance, for a period of 1 year after the date on which the list of motion pictures, and works included in such motion pictures, that are subject to protection under subsection (a) is published in the Federal Register under subsection (b).”

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 104 the following new item:

“104A. Copyright in certain motion pictures.”

SEC. 335. EFFECTIVE DATES.

(a) IN GENERAL.—Subject to subsections (b) and (c), the amendments made by this subtitle take effect on the date the Agreement enters into force with respect to the United States.

(b) SECTION 331.—The amendments made by section 331 shall apply to all patent applications that are filed on or after the date of the enactment of this Act: *Provided*, That an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a NAFTA country, except as provided in sections 119 and 365 of title 35, United States Code, that is earlier than the date of the enactment of this Act.

(c) SECTION 333.—The amendments made by section 333 shall apply only to trademark applications filed on or after the date of the enactment of this Act.

* * *

VIII. NAFTA Interim Regulations 37 CFR Part 201¹

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 93-13A]

Procedures for Copyright Restoration of Certain Motion Pictures and Their Contents in Accordance With the North American Free Trade Agreement

AGENCY: Copyright Office, Library of Congress

ACTION: Interim regulation with request for comments.

SUMMARY: The Copyright Office is issuing interim regulations to establish procedures governing the filing of Statements of Intent for the restoration of copyright protection in the United States for certain motion pictures and their contents in accordance with the North American Free Trade Agreement (NAFTA) and the statute implementing it. The NAFTA Implementation Act authorizes the Copyright Office to establish procedures whereby potential copyright owners of eligible works who file a complete and timely Statement of Intent with the Copyright Office on or before December 31, 1994, will have copyright protection restored effective January 1, 1995.

DATES: These interim regulations are effective March 16, 1994. Comments should be in writing and received on or before May 16, 1994.

¹ 59 Fed. Reg. 12,162 (Mar. 16, 1994).

ADDRESSES: If sent by mail, fifteen copies of written comments should be addressed to: Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. If hand delivered, fifteen copies should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, room 407, First and Independence Avenue SE., Washington, D.C. 20024. In order to ensure prompt receipt of these time sensitive documents, the Office recommends that the comments be delivered by private messenger service.

FOR FURTHER INFORMATION CONTACT: Eric Schwartz, Policy Planning Advisor, Copyright Office, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8350. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: On January 10, 1994, the Copyright Office notified the public of the provisions in NAFTA with regard to the restoration of copyright protection for certain works, 59 FR 1408 (1994). To be eligible for copyright restoration, a motion picture or any work included in a motion picture either:

1. Must have been first fixed in Mexico or Canada and entered the public domain in the United States because of first publication anywhere on or after January 1, 1978, and before March 1, 1989, without the required copyright notice;
2. Or, regardless of where it was fixed, must have entered the public domain in the United States because of first publication in Mexico or Canada on or after January 1, 1978, and before March 1, 1989, without the required copyright notice.

Further, for copyright to be restored in an eligible work, a complete and timely Statement of Intent must be filed with the Copyright Office by the potential copyright owner or an authorized agent.

These interim regulations set out the procedures that potential copyright owners must follow if they wish to have copyright protection for their works restored in the United States. To restore copyright, potential copyright owners must file Statements of Intent with the Copyright Office on or before December 31, 1994, and these Statements must contain the information set out in these regulations. The regulations also detail the procedures the Copyright Office will use to process Statements of Intent and create a record for the public.

I. Background

The North American Free Trade Agreement entered into force on January 1, 1994. The NAFTA Agreement and the NAFTA Implementation Act (Pub. L. 103-182) provide for the restoration of copyright for certain works that are currently in the public domain in the United States. New section 104 sets out the conditions for restoring protection:

Classes of works eligible. Two types of works are eligible for copyright restoration: (1) Motion pictures; and (2) works included in motion pictures (such as an underlying work—a novel or play on which a motion picture was based—or the original screenplay or original musical score of a motion picture).

Dates of publication and public domain status. To be eligible for restoration, the motion picture, or the work included in a motion picture, must meet two criteria: (1) The work must have been first published on or after January 1, 1978, and before March 1, 1989; and (2) the work must have fallen into the public domain in the United States because, at the time of its first publication, it failed to meet the requirements of the U.S. copyright law for publication with notice of copyright (17 U.S.C. 401, 402, 403, 405) as they existed at that time.

Place of first fixation or publication. Assuming they meet the other criteria, the following two kinds of works are eligible for copyright restoration: (1) Published works that were first fixed in Canada or Mexico, regardless of where they were first published; and (2) works first published in Mexico or Canada, regardless of where they were first fixed. A motion picture, or a work included in a motion picture, meeting these requirements is entitled to receive copyright protection under title 17 for the remainder of the term of copyright protection to which it would have been entitled in the United States had it been published with the required notice. 17 U.S.C. 104A(a)[](1993).

Potential copyright owners of qualifying works must file a Statement of Intent with the Copyright Office between January 1, 1994 (the date on which the Agreement entered into force), and December 31, 1994, to notify the public of their intent to restore copyright protection for these works in the United States. After January 1, 1995, the Copyright Office will publish in the Federal Register a list of the works which are determined to be

properly qualified for protection and for which complete Statements of Intent have been filed. The restoration of copyright protection for eligible works will be effective on January 1, 1995.

The new section 17 U.S.C. 104A(c) created by the NAFTA Implementation Act gives a one year exemption to U.S. nationals or domiciliaries who made or acquired copies of a motion picture or its contents before December 8, 1993, the date of enactment of the implementing act. These individuals or entities may continue to sell, distribute, or perform publicly such works without liability for a period of one year following the Copyright Office's publication in the *Federal Register* of the list of works for which Statements of Intent have been received.

The copyright restoration provisions apply to a "motion picture" or any work included in a motion picture. Section 101 of title 17 defines motion pictures to include audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. Thus, for example, the restoration provisions apply to feature films, short films, documentaries, silent films, television films, television series, and television programs, as well as works contained in these "motion pictures."

To be eligible for copyright restoration, a motion picture or any work included in a motion picture either:

1. Must have been first fixed¹ in Mexico or Canada and entered the public domain in the United States because of first publication² anywhere on or after January 1, 1978, and before March 1, 1989, without the required copyright notice;

¹ See 17 U.S.C. 101. For example, a "fixed" motion picture would be completed and embodied in a copy, such as on film stock or videotape. Also see the definitions provided in these interim regulations.

² See 17 U.S.C. 101. The place of first publication would be the place where copies were first sold, leased, loaned or offered for sale, by for example, the distribution of videotape copies or film prints. Also. see the definitions provided in these interim regulations.

Also, see Article 3(4) of the Berne Convention for the Protection of Literary and Artistic Works which permits simultaneous publication, that is, within 30 days of its first publication if published in two or more countries. For example, if a motion picture was first published (between January 1, 1978 and March 1, 1989) within 30 days in two countries, and one of these countries is Mexico or Canada, it would be eligible for the NAFTA copyright restoration.

2. Or, regardless of where it was fixed, must have entered the public domain in the United States because of first publication in Mexico or Canada on or after January 1, 1978, and before March 1, 1989, without the required copyright notice.

Further, for copyright to be restored in an eligible work, a complete and timely Statement of Intent must be filed with the Copyright Office by the potential copyright owner or an authorized agent.

Although the Copyright Office has authority to charge a fee for the processing of NAFTA Statements of Intent under 17 U.S.C. 708, it has decided not to do so at this time. However, it reserves the right to charge a fee in the future if the Office's duties are broadened under the NAFTA or a similar agreement.

The filing of an effective Statement of Intent will not give any of the legal benefits or presumptions that a voluntary copyright registration now provides under U.S. copyright law. The Statement of Intent is submitted only for the purposes of the NAFTA copyright restoration provisions. Any work for which copyright is restored may be registered on and after January 1, 1995, in accordance with title 17, upon the submission of the proper copyright application, filing fee, and an appropriate deposit of the work. The Copyright Office will not accept applications for copyright registration for these works before January 1, 1995; only Statements of Intent may be filed before then.

After January 1, 1995, the Copyright Office encourages potential copyright owners to make a voluntary copyright registration to obtain the legal and commercial advantages made available by registration. These include certain evidentiary benefits; availability of statutory damages; and the creation of a complete registration record in the Copyright Office's online database.

II. Explanation of Interim Regulations

Procedures for Filing an Effective Statement of Intent

Potential copyright owners or their agents must file Statements of Intent with the Copyright Office on or before December 31, 1994, in order for a Statement to be effective. No fee is required. The Statement of Intent must be in English and should be typed or clearly printed by hand on 8 1/2-inch by 11-inch white paper. To be complete, a Statement of Intent must contain all of the information required in items 1 through 6 below, including the

entire "certification statement" and the signature of the potential copyright owner or authorized agent.

A complete Statement should clearly indicate at the top of the first page that the potential copyright owner is submitting: A Statement of Intent to restore copyright protection in the United States in accordance with the North American Free Trade Agreement (NAFTA). All statements must be mailed to the Copyright Office at: Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024.

All of the information required in items 1 through 6 below must be contained in a Statement of Intent. Otherwise the Copyright Office will correspond with the party submitting the Statement to correct omissions. Should that party continue to fail to include any of the required items (1 through 6), copyright restoration cannot be effected for that particular work. In addition to the required information, the Office encourages the potential copyright owner to provide other "optional" information that should be useful in providing information to the public about any work for which copyright is restored.

The required and optional information for a Statement of Intent is:

(1) *Title* (Required Information)

The title of the work or works for which copyright restoration is sought. If multiple works are listed in a single Statement of Intent, each individual work must be clearly and separately identified in items 1 through 6 of the Statement. For series and episodes, these titles must be clearly identified by a title or number.

Explanation of item #1: Only motion pictures and their contents (as defined in 17 U.S.C. 104A and 101) are eligible for copyright restoration. Potential copyright owners can submit the titles of any number of works for which they are seeking restoration on a single Statement of Intent. Assuming that the exploitation of the contents in a motion picture was legally authorized at the time the motion picture was made, submission of the title of the motion picture will suffice for the restoration of copyright protection for the works included in it.

Optional information for item #1 includes alternative titles (for example, the American release title of a motion picture if

different from the foreign title); the original producer and/or director of the motion picture; and the format or physical description of the work as first published (for example, running time, number of reels, and whether the work is on film, videotape, videodisc, or another medium). This descriptive material will help identify similarly titled films or rereleases.

(2) Nation of First Fixation (Required Information)

Explanation of item #2: To be eligible for copyright restoration a work must have been first fixed in Mexico or Canada, or, if first fixed in any other nation, it must have been first published in Mexico or Canada. For example, a work may be eligible for restoration if it was first fixed before 1978 in the United States but later published in Mexico or Canada between January 1, 1978, and March 1, 1989.

Optional information for item #2 would include the year date of first fixation.

(3) Nation of First Publication (Required Information)

Explanation of item #3: To be eligible for copyright restoration the work must have been first published in Mexico or Canada if it was first fixed in a nation other than Mexico or Canada. If a work remains unpublished in 1994, the NAFTA copyright restoration provisions are not applicable because the work is already protected under the copyright law of the United States regardless of the nationality or domicile of its author. The duration of unpublished works is governed by 17 U.S.C. 302 and 303.

(4) Date of First Publication (Required Information)

Explanation of item #4: To be eligible for copyright restoration a work must have been first published on or after January 1, 1978, and before March 1, 1989, and must have entered the public domain in the United States for failure to comply with the copyright notice requirements of the U.S. Copyright Code. For example, the date of first publication would be the date of a film's release, or the date of its first offering for rental or sale.

(5) Name and Address (Required Information)

The name and mailing address of the potential copyright owner of work, and a telephone and telefax number, if available.

Explanation of item #5: The name and mailing address (the telephone and telefax numbers, if available) of the potential copyright owner will be used to create a readily available public record at the Library of Congress. This information will serve to identify the copyright owner of works for which copyright has been restored, to provide notice to the public that these works will have copyright protection for the remainder of their term,

and to facilitate licensing and other uses of these works by the general public.

Optional information for item #5 would include the name of the original copyright owner of the work, if it is different from the potential copyright owner; and for works contained in motion pictures, the potential owner or owners of those works, if different from the potential copyright owner submitting a Statement of Intent. Separate Statements of Intent may be submitted by the potential copyright owner(s) of the underlying works, if different from the owner of the motion picture.

(6) Certification Statement and Signature (Required Information)

The following dated certification statement must be included in its entirety along with the signature of the potential copyright owner or authorized agent:

I hereby certify that each of the above titled works was first fixed or first published in Mexico or Canada and entered the public domain in the United States of America because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by the copyright law of the United States of America then in effect. I certify that the information given herein is true and correct to the best of my knowledge, and understand that any knowing or willful falsification of material facts may result in criminal liability under 18 U.S.C. 1001.

Explanation of item #6: The entire certification statement must be reproduced on each Statement of Intent to attest that the person signing the statement understands the copyright restoration provisions and the consequences of false statements of material facts. A complete Statement of Intent must be signed and dated by the potential copyright owner or an authorized agent.

III. Sample Statement of Intent

As an Appendix, the Copyright Office provides a sample Statement of Intent which may be used by potential copyright owners or their authorized agents. This Appendix will not appear in the Code of Federal Regulations. The sample Statement includes both the required information that must be provided for the Statement of Intent to be effective and the additional optional information which is not required. If provided, the optional

information, clearly identified in this sample, will greatly enhance the Copyright Office records. The Office encourages potential copyright owners to use this suggested format for their submissions to ensure that all necessary information is provided and to avoid correspondence.

IV. Copyright Office Procedures for Handling Statements of Intent

A timely Statement of Intent will be reviewed by the Copyright Office for the required information listed in items 1 through 6. If the Statement does not give the required information, the Copyright Office will ask the potential copyright owner or authorized agent to submit the missing information. Complete and timely Statements of Intent will be entered into the Copyright Office's records and will be readily accessible to the public. The Copyright Office will publish a list of all the titles of eligible works for which effective Statements of Intent have been made in the *Federal Register* as soon as possible after January 1, 1995, and will make it available to the public after that date. Statements of Intent submitted after December 31, 1994, will not be accepted for inclusion in the Copyright Office's database or for the *Federal Register* notice in 1995. Copyright restoration is automatic and requires no further action by the Copyright Office.

Appendix

Statement of Intent To Restore Copyright Protection in the United States in Accordance With the North American Free Trade Agreement (NAFTA)

1. Title of work(s): _____

(For multiple works complete items 1 through 6 for each separate work.)

1a. Include series and episode title(s)/number(s), if any _____

1b. If this Statement does not cover the entire motion picture, specify the underlying work covered, *e.g.*, screenplay, music, etc. _____

1c. (Optional) Alternative titles (for example, U.S. release title, if different from foreign title) _____

1d. (Optional) Original producer and/or director _____

1e. (Optional) Format or physical description of work as first published (running time, reels, etc.) _____

Film _____ Videotape _____ Videodisc _____ Other (describe) _____

2. Nation of first fixation—Mexico () Canada () Other nation (specify): _____

2a. (Optional) Year of first fixation: _____

3. Nation of first publication—Mexico () Canada () Other nation (specify): _____

4. Date of first publication: _____
(month/day/year)

5. Name and mailing address of potential copyright owner of work:

Name: _____

Address: _____

(Street or Post Office Box, City/State, Country)

Telephone: _____ Telefax: _____

6. Certification and Signature: I hereby certify that each of the above titled works was first fixed or first published in Mexico or Canada and entered the public domain in the United States of America because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by the copyright law of the United States of America then in effect. I certify that the information given herein is true and correct to the best of my knowledge, and understand that any knowing or willful falsification of material facts may result in criminal liability under 18 U.S.C. 1001.

Signature: _____ Date: _____

(Potential copyright owner or authorized agent)

List of Subjects in 37 CFR Part 201

Copyright, Restoration of copyright for certain works in accordance with the North American Free Trade Agreement.

Interim Regulations

For the reasons set out in the Preamble, section 37 CFR chapter II is amended in the manner set forth below.

PART 201—[AMENDED]

1. The authority citation for part 201 is revised to read as follows:

Authority: Sec. 702, 90 Stat. 2541; 17 U.S.C. 702; § 201.31 is also issued under Public Law 103-182, 107 Stat. 2115.

2. A new § 201.31 is added to read as follows:

§ 201.31 Procedures for copyright restoration in the United States for certain motion pictures and their contents in accordance with the North American Free Trade Agreement.

(a) *General.* This section prescribes the procedures for submission of Statements of Intent pertaining to the restoration of copyright protection in the United States for certain motion pictures and works embodied therein as required in 17 U.S.C. 104A(a). On or after January 3, 1995, the Copyright Office will publish in the **Federal Register** a list of works for which potential copyright owners have filed a complete and timely Statement of Intent with the Copyright Office.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Effective filing.* To be effective a Statement of Intent must be complete and timely.

(2) *Eligible work* means any motion picture that was first fixed or published in Mexico or Canada, and any work included in such motion picture that was first fixed or published with this motion picture, if the work entered the public domain in the United States because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by 17 U.S.C. 401, 402, or 403, the absence of which has not been excused by the operation of 17 U.S.C. 405, as such sections were in effect during that period.

(3) *Fixed* means a work "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being

transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.
17 U.S.C. 101

(4) *Potential copyright owner* means the person who would have owned any of the exclusive rights comprised in a copyright in the United States in a work eligible for copyright restoration under NAFTA, if the work had not fallen into the public domain for failure to comply with the statutory notice requirements in effect at the time of first publication, or any successor in interest to such a person.

(5) *Published* means distribution of copies of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

(c) *Forms.* The Copyright Office does not provide Statement of Intent forms for the use of potential copyright owners who want to restore copyright protection in eligible works.

(d) *Requirements for effective Statements of Intent.*

(1) The document should be clearly designated as a "Statement of Intent to restore copyright protection in the United States in accordance with the North American Free Trade Agreement".

(2) Statements of Intent must include: (i) The title(s) of the work(s) for which copyright restoration is sought; (ii) nation of first fixation; (iii) nation of first publication; (iv) date of first publication; (v) name and mailing address (and telephone and telefax, if available) of the potential copyright owner of the work; (vi) the following certification (in its entirety); signed and dated by the potential copyright owner or authorized agent:

I hereby certify that each of the above titled works was first fixed or first published in Mexico or Canada and entered the public domain in the United States of America because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by the copyright law of the United States of America then in effect. I certify that the information given herein is true and correct to the best of my knowledge,

and understand that any knowing or willful falsification of material facts may result in criminal liability under 18 U.S.C. 1001.

(3) Statements of Intent must be received in the Copyright Office on or before December 31, 1994.

(4) Statements of Intent must be in English and either typed or legibly printed by hand, on 8 1/2 inch by 11 inch white paper.

(e) *Fee.* The Copyright Office is not requiring a fee for the processing of Statements of Intent.

(f) *Effective date of restoration of copyright protection.*

(1) Potential copyright owners of eligible works who file a complete and timely Statement of Intent with the Copyright Office will have copyright protection restored in these works effective January 1, 1995.

(2) The new section 17 U.S.C. 104A (c) created by the NAFTA Implementation Act gives a one year exemption to U.S. nationals or domiciliaries who made or acquired copies of a motion picture or its contents before December 8, 1993, the date of enactment of the implementing act. These individuals or entities may continue to sell, distribute, or perform publicly such works without liability for a period of one year following the Copyright Office's publication in the Federal Register of the list of the works determined to be properly qualified for protection and for which complete and timely Statements of Intent have been filed.

(g) *Registration of works whose copyright has been restored.* After January 1, 1995, the Copyright Office encourages potential copyright owners to make voluntary copyright registration in accordance with 17 U.S.C. 408 for works that have had copyright restored in accordance with NAFTA.

Dated: March 8, 1994.

Barbara Ringer,
Acting Register of Copyrights.

James H. Billington,
The Librarian of Congress.

[FR Doc. 94-6122 Filed 3-15-94; 8:45 am]

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IX.

The House Report on the North American Free Trade Agreement Implementation Act

103D CONGRESS
1st Session

HOUSE OF
REPRESENTATIVES

REPORT
No. 103-361(I)

NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT

House Report (Ways and Means Committee)

No. 103-361(I), Nov. 15, 1993

[To accompany H.R. 3450]

House Report (Banking, Finance, and Urban Affairs
Committee)

No. 103-361(II), Nov. 15, 1993

[To accompany H.R. 3450]

House Report (Energy and Commerce Committee)

No. 103-361(III), Nov. 15, 1993

[To accompany H.R. 3450]

Senate Report (Finance, Agriculture, Nutrition, and Forestry,
Commerce, Science, and Transportation, Governmental Affairs,
Judiciary, and Foreign Relations Committees)

No. 103-189, Nov. 18, 1993

[To accompany S. 1627]

HOUSE REPORT NO. 103-361(I)

The Committee on Ways and Means, to whom was referred the bill (H.R. 3450) to implement the North American Free Trade Agreement, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

* * *

SUMMARY

H.R. 3450, the "North American Free Trade Agreement Implementation Act," approves the North American Free Trade Agreement (NAFTA) transmitted by the President to the Congress on November 4, 1993. The draft bill contains in six titles the provisions which are necessary or appropriate to implement the Agreement in U.S. domestic law.

Sections 1 and 2 set forth the short title, a table of contents, and definitions of terms used in the Act.

**TITLE I.—APPROVAL OF AND GENERAL PROVISIONS
RELATING TO, THE NORTH AMERICAN FREE TRADE
AGREEMENT**

Title I contains general provisions concerning approval and entry into force of the NAFTA and the relationship of the Agreement to U.S. laws. Congress approves the NAFTA and the Statement of Administrative Action transmitted by the President on November 4, 1993; conditions are set forth for entry into force of the Agreement on or after January 1, 1994.

Title I establishes a Federal-State consultation process concerning NAFTA obligations affecting State laws. U.S. laws prevail over the Agreement if there is a conflict; the Agreement prevails over inconsistent State or local law. No person other than the United States has a cause of action or defense under the Agreement.

Changes in U.S. law necessary or appropriate to implement modifications to the Agreement will be subject to standard legislative procedures, except for provisions of the Act authorizing implementation of certain actions by Presidential proclamation are subject to prior consultation and 60 calendar day Congressional layover requirements.

Institutional provisions include authorization of a U.S. Section of the NAFTA Secretariat, requirements relating to selection of

dispute settlement panelists, and a preliminary process for considering possible future country accession to the NAFTA, subject to Congressional approval.

TITLE II—CUSTOMS PROVISIONS

Title II implements in U.S. domestic law the customs provisions of the NAFTA. The President is authorized to proclaim the modifications in U.S. duties to implement the scheduled phaseout and elimination of all tariffs required under various provisions of the NAFTA, and to maintain the general level of concessions. The rules of origin in the NAFTA to ensure application of preferential tariff treatment only to goods originating in Mexico or Canada are enacted in the statute.

Title II implements U.S. obligations under the NAFTA to eliminate customs merchandise processing fees, restrict duty drawback, and revise country of origin marking requirements; amends penalties and recordkeeping requirements to enforce NAFTA rules of origin and other customs requirements; and requires monitoring of television and picture tube imports.

TITLE III—APPLICATION OF AGREEMENT TO SECTORS AND SERVICES

Title III implements in U.S. domestic law various provisions of the NAFTA relating to particular economic sectors. Title III includes procedures and criteria for applying bilateral and global import relief measures on Canadian or Mexican articles; implements NAFTA obligations that apply to certain agricultural commodities, intellectual property right protection, temporary entry of business persons, standards and sanitary and phytosanitary measures, and corporate average fuel economy; and authorizes the waiver of discriminatory government purchasing restrictions on NAFTA-covered procurement.

TITLE IV—DISPUTE SETTLEMENT IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

Title IV implements in U.S. domestic law the institutional provisions of the NAFTA establishing binational panel and extraordinary challenge committee review of final antidumping and countervailing duty determinations, in lieu of domestic judicial review, including procedures and criteria for the selection of panelists appointed by the United States, and special procedures for the selection of Federal judges for panels and

committees. Objectives for future negotiations with NAFTA countries on subsidies and special procedures for industries facing subsidized competition pending development of subsidy rules are also included.

TITLE V—NAFTA TRANSITIONAL ADJUSTMENT ASSISTANCE AND OTHER PROVISIONS

Title V establishes a NAFTA transitional adjustment assistance program of comprehensive benefits, including training and income support, for workers who may be laid off due to increased U.S. imports from Mexico or Canada or shift of productions to Mexico or Canada, and authorizes State self-employment assistance programs.

Other provisions of Title V relate to performance under the NAFTA, including a comprehensive report by the President on the operation and economic impact of the Agreement after three years; response to actions affecting U.S. cultural industries; a report on the impact of the NAFTA on motor vehicle exports to Mexico; response to discriminatory tax measures; and authorization of a Center for the Study of Western Hemisphere Trade.

Changes in customs user fee levels and amendments to the Internal Revenue Code offset the budgetary costs of the NAFTA.

With respect to supplemental agreements to the NAFTA, Title V authorizes U.S. participation in, and appropriations for, the Commissions on Labor Cooperation, Environmental Cooperation, and Border Environment Cooperation. It also includes provisions relating to U.S. membership in the North American Development Bank.

TITLE VI—CUSTOMS MODERNIZATION

Title VI includes numerous provisions to streamline and automate the commercial operations of the U.S. Customs Service, including authority to establish the National Customs Automation Program. Title VI also improves compliance with customs laws, and provides safeguards, uniformity, and due process rights for importers.

BACKGROUND AND PURPOSE

The North American Free Trade Agreement submitted to the Congress by the President for approval on November 4, 1993, is the culmination of an initiative launched over three years ago.

In a Joint Statement issued in Washington on June 11, 1990, President Salinas and President Bush endorsed the objective of a free trade agreement as the best means for attaining the agreed objectives of a vigorous economic relationship, maintaining sustained growth, and expanding trade and investment between the two countries. The Presidents directed their respective trade ministers to undertake consultations and to do the preparatory work needed to initiate negotiations on such an agreement, and to report back to them as soon as practicable.

On August 8, 1990, the U.S. Trade Representative, Carla A. Hills, and the Mexican Secretary for Commerce and Industrial Development, Jaime Serra Puche, jointly recommended to the Presidents the initiation of formal negotiations, in accordance with each country's domestic laws, on a comprehensive free trade agreement, following preliminary consultations with private sector representatives and Members of Congress.

In a letter dated August 21, 1990, President Salinas of Mexico formally proposed to President Bush the initiation of formal negotiations as soon as possible for a free trade agreement between the United States and Mexico.

On September 25, 1990, President Bush notified the Chairman of the Committee on Ways and Means, pursuant to section 1102(c) of the Omnibus Trade and Competitiveness Act of 1988, of trade negotiations with Mexico. The letter also informed the Committee of the expressed desire by the Government of Canada to participate in the negotiations with a view to negotiating an agreement or agreements among all three countries, and of the interest of the three governments to consult on this possibility.

On February 5, 1991, President Bush notified the Chairman of the Committee on Ways and Means that he, President Salinas, and Prime Minister Mulroney had agreed, on the basis of the trilateral consultations and consultations with the private sector and Members of Congress, to seek a three-way free trade area. Although recognized as not necessarily technically required by section 1102 of the 1988 Act, the President formally notified the Committee of trade negotiations with Canada.

On March 1, 1991, President Bush requested the Congress to extend the fast track procedures for implementation of multilateral or bilateral trade agreements for two years ending June 1,

1993, to enable completion of the GATT Uruguay Round of multilateral trade negotiations and the proposed North American Free Trade Agreement. A number of Congressional concerns about free trade with Mexico were conveyed in letters during March to the President jointly from the Chairman of the House Committee on Ways and Means and the Senate Committee on Finance and from the Majority Leader of the House.

On May 1, 1991, the President responded with a set of detailed action plans for addressing these issues, including labor and environmental concerns, as well as views on the economic impact of the proposed free trade agreement (WMCP: 102-10). The fast track procedures were automatically extended for the additional two-year period for trade agreements entered into before June 1, 1993, when neither House of Congress passed by May 31, 1991, a resolution disapproving extension.

On March 8, 1993, the Speaker of the House reconstituted a Trade Agreement Coordinating Group, originally established in the 102nd Congress, chaired by the Chairman of the Committee on Ways and Means and consisting of the chairmen and ranking minority members of committees of jurisdiction over matters involved in trade negotiations or likely to be affected by trade agreement implementing legislation, the Majority and Minority Leaders, and co-chairs of the Democratic Trade Task Force. The corresponding coordinating group at the staff level, chaired by the Chief Counsel and Staff Director of the Committee on Ways and Means, was also continued. This group was the primary coordinating mechanism in the House for monitoring the progress of the NAFTA negotiations and later the informal consultation process with the Administration on developing the draft implementing legislation.

Under the auspices of the Coordinating Group, frequent briefing sessions were held at the Member and staff level with Administration negotiators on all subjects under discussion, beginning in June 1991 and continuing until the NAFTA and supplemental agreement negotiations were concluded. Given the broad interest of Members generally in a free trade area with Mexico, the briefings were open to Members and staff at large, in addition to those on committees of jurisdiction.

In addition, the Committee on Ways and Means and other committees of jurisdiction, as well as various Member caucuses

groups, held Member and staff-level meetings with Administration officials, particularly the USTR, throughout the negotiations on issues of their particular interest.

On August 12, 1992, President Bush announced the completion of negotiations for a comprehensive North American Free Trade Agreement between Mexico, Canada and the United States. At that time, the Administration issued various documents, including a negotiated summary of the Agreement.

On September 8, 1992, President Bush officially notified the Speaker of the House and the President of the Senate, in accordance with the 90-day notice requirement under section 1103(a)(1) of the 1988 Act, of his intent to enter into a NAFTA with the Governments of Mexico and Canada. The notice was accompanied by the reports of 38 private sector advisory committees on the draft Agreement as required by section 135 of the Trade Act of 1974. The President committed to work closely with the Congress to develop appropriate implementing legislation. The Administration also issued a report at that time on the benefits of the NAFTA and actions taken to fulfill the commitments made by the President on May 1, 1991 on worker adjustment, labor rights, and environmental protection.

On October 7, 1992, President Bush, President Salinas, and Prime Minister Mulroney met in San Antonio, Texas to discuss plans for implementing the NAFTA and affirmed their shared commitment to adopt the agreement in 1993, to take effect on January 1, 1994. The three trade ministers who negotiated the agreement—U.S. Trade Representative Carla Hills, Secretary Jaime Serra, and Minister Michael Wilson—initialed the NAFTA draft legal text.

On December 17, 1992, the expiration date of the 90-day minimum notice period, President Bush, President Salinas, and Prime Minister Mulroney signed the NAFTA in their respective capitals. On that day, President-elect Clinton reaffirmed his support for the NAFTA, but reiterated his campaign pledge that three supplemental agreements would be required before proceeding with the implementing legislation. These three supplemental agreements would cover the environment, workers, and special safeguards for unexpected surges in imports.

On August 13, 1993, U.S. Trade Representative Michael Kantor announced agreement by the three governments on

supplemental agreements to the NAFTA on labor cooperation, on environmental cooperation, and on import surges. He also announced a basic agreement on a new institutional structure for funding environmental infrastructure projects in the U.S.-Mexican border region. The NAFTA side agreements were signed in a White House ceremony on September 14, 1993.

Informal staff-level consultations began in February 1993, between the USTR and committees of jurisdiction, and with House and Senate legislative counsel on those changes in U.S. statutes or additional authorities necessary to implement NAFTA obligations. Beginning in June, the Coordinating Group at the staff level held periodic meetings to coordinate the development of agreed draft texts between committees of joint jurisdiction as well as provisions in the jurisdiction of other committees for inclusion in a consolidated draft bill. House and Senate legislative counsel drafted the text of the proposed implementing bill, initially from drafts supplied by the Administration.

In a letter to the Speaker of the House dated September 28, 1993, the President emphasized the importance of Congress voting on a NAFTA implementing bill before adjournment in 1993, to enable the Agreement to take effect on January 1, 1994, as scheduled. To meet that timetable, the President proposed the completion of informal consultations between the Administration and all Congressional committees of jurisdiction on the joint drafting of an implementing bill by November 1 to permit introduction at that time.

On November 2, 1993, the Speaker of the House and the Majority leader of the Senate transmitted to the U.S. Trade Representative proposed implementing legislation for the NAFTA, and proposals for inclusion in the Statement of Administrative Action as developed through informal consultations between House and Senate committees of jurisdiction and the Administration. The legislation noted the few items on which informal consensus could not be reached between the House and Senate and for which the Administration would have to make the final judgment with respect to inclusion in the bill.

On November 4, 1993, President Clinton sent two letters of transmittal to the Congress covering: (1) transmittal of the text of the NAFTA, together with the draft implementing bill, Statement of Administrative Action; and supporting documents as

required under section 1103(a) of the 1988 Act for Congressional approval (House Document 103-159, vol. 1 and 2); and (2) transmittal of supplemental agreements to the NAFTA on labor, the environment, and import surges, and additional agreements and documents (House Document 103-160). The supplemental agreements and the other agreements are Executive agreements that do not require Congressional approval but are part of the entire NAFTA package to be considered by Congress in deciding whether to approve the implementing bill.

As provided under section 151 of the Trade Act of 1974, the implementing legislation was introduced as H.R. 3450 in the House on November 4, by Mr. Rostenkowski (as designee of the Majority Leader) for himself and Mr. Archer (as designee of the Minority Leader), by request, and jointly referred to eight committees of jurisdiction: Ways and Means; Agriculture; Banking, Finance, and Urban Affairs; Energy and Commerce; Foreign Affairs; Government Operations; and Public Works and Transportation. The bill was introduced in the Senate on November 4 as S. 1627 and referred to the Committee on Finance.

BENEFITS OF THE AGREEMENT

The North American Free Trade Agreement is the most comprehensive trade agreement ever negotiated and creates the world's largest integrated market for goods and services. At the same time, the Agreement does not create any new trade barriers with third countries and provides a solid framework for the liberalization of trade barriers throughout the Western Hemisphere. Moreover, it should also provide the catalyst for negotiations to liberalize trade barriers on a multilateral basis.

Canada and Mexico are the United States' first and third largest trading partners, and NAFTA will lead to a continued expansion of that trade. In 1992, bilateral trade between the United States and Canada amounted to almost \$200 billion while bilateral trade between the United States and Mexico reached nearly \$76 billion. With NAFTA, the United States, Canada, and Mexico will create the biggest integrated market in the world—a combined economy of \$6.5 trillion and 370 million people. NAFTA is the U.S. opportunity to respond to, and compete with, burgeoning trade alliances in Europe and Asia. By creating export opportunities, NAFTA will enable the United States to take advantage

of U.S. economic strengths and remain the world's biggest and best exporter.

The cornerstone of the Agreement will be the phased-out elimination of all tariffs on trade between the three countries. With respect to Canada, all tariffs in our bilateral trade will be eliminated by 1999, as was agreed in the earlier United States-Canada Free Trade Agreement. As for Mexico, most tariffs in our bilateral trade will be eliminated by 2004, although a few U.S. tariffs on potentially import-sensitive items will not be completely eliminated until 2009. Mexican tariffs on U.S. dutiable exports presently average 10 percent, compared to an average U.S. tariff of 4 percent on dutiable imports from Mexico.

The NAFTA also reduces a number of nontariff barriers to trade, liberalizes restrictions on investment and services, sets forth strong and comprehensive rules on intellectual property, and extends to the three countries the international system established under the U.S.-Canada Free Trade Agreement for review of national determinations on unfair dumping and subsidy practices. Moreover, NAFTA and its supplemental agreements will help ensure that economic development takes place in a way that protects and improves the environment and promotes improved labor conditions. As described in the statement accompanying the President's submission of the draft implementing bill, the expanded market access under the agreement should result in substantial benefits for the U.S. economy.

A free trade area is an arrangement between two or more countries in which each removes tariff and other restrictions on trade with the other parties to the arrangement. Article XXIV of the General Agreement on Tariffs and Trade (GATT) permits free trade areas or customs unions as a deviation from the nondiscrimination, most-favored-nation (MFN) principle of Article I if the agreement meets certain criteria. GATT-approved free trade areas: (1) must eliminate duties and other restrictive measures on "substantially all" trade between the parties; and (2) duties and other regulations of commerce maintained by the parties may not be higher or more restrictive to the trade of third countries than the parties had in place prior to the agreement.

The NAFTA is the latest in a series of free trade agreements entered into by the United States beginning with the U.S.-Israel Free Trade Agreement in 1984 and followed by the U.S.-Canada

Free Trade Agreement in 1988. The Caribbean Basin Initiative authorized by the Caribbean Basin Economic Recovery Act (Public Law 98-67) generally provides one-way duty-free entry into the United States but does not meet the criteria of a reciprocal free trade area.

LEGISLATIVE AUTHORITY

The North American Free Trade Agreement was negotiated and entered into under the trade agreement authorities of section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418). Section 1102 authorizes the President to enter into multilateral or bilateral trade agreements, before June 1, 1993 (extended until April 15, 1994, only for the GATT Uruguay Round of Multilateral Trade Negotiations), to reduce or eliminate tariff or nontariff barriers and other trade-distorting measures. The authorities provide the means to achieve U.S. negotiating objectives set forth under section 1101 of the 1988 Act.

The President is authorized under section 1102(a) to implement trade agreement modifications on U.S. tariffs by proclamation within specified limits. Agreements regarding nontariff barriers entered into under section 1102(b) or bilateral agreements entered into under section 1102(c) to eliminate or reduce U.S. duties and nontariff barriers are subject to consultation requirements with Congressional committees of jurisdiction under sections 1102 and 1103 of the 1988 Act and Congressional approval of implementing legislation under special "fast track" procedural rules of the House and Senate under section 151 of the Trade Act of 1974.

The negotiation of bilateral trade agreements under "fast track" authority is also conditioned upon additional procedural requirements being met:

- (1) The foreign country requests the negotiation of a bilateral agreement;
- (2) The President provides at least 60 legislative days advance notice of negotiations to the House Committee on Ways and Means and the Senate Committee on Finance and consults with these Committees regarding negotiation of such an agreement; and

- (3) Neither of the two Committees disapproves of the negotiation of such an agreement before the end of that 60-day period.

Trade agreements negotiated under section 1102 authority cannot enter into force for the United States and become binding as a matter of domestic law unless the President meets certain requirements for consultation with the Congress and implementing legislation approving the agreement and any changes in U.S. statutes are enacted into law:

- (1) Before entering into an agreement, the President must consult with the appropriate committees of jurisdiction over subject matters affected by the agreement, especially regarding issues of implementation.
- (2) The President must give the Congress at least 90 days advance notice of his intention to enter into the agreement.
- (3) After entering into the agreement, the President must submit a copy of the agreement to the Congress, together with a draft implementing bill, a statement of any administrative actions proposed to implement the agreement, an explanation of how the bill and statement change or affect existing law, and a statement of reasons the agreement serves the interests of U.S. commerce and why the bill and proposed action are required and appropriate.
- (4) The implementing bill is introduced in both Houses of Congress on the day it is submitted by the President and referred to the committee or committees of jurisdiction. Fast track rules give the committees up to 45 legislative days in which to report a bill; a committee is discharged automatically from further consideration after that period. (The Speaker of the House limited referral of H.R. 3450, introduced on November 4, to November 15, 1993.)
- (5) Each House votes on the bill within 15 legislative days after committee consideration. A motion in the House to proceed to consideration of the implementing bill is highly privileged and not debatable. Amendments or motions to recommit are not in order, and debate is limited to not more than 20 hours.

The purpose of the approval process is to preserve the constitutional role and fulfill the legislative responsibility of the Congress with respect to agreements which generally involve substantial changes in domestic laws. The consultation and notification requirements provide the opportunity for Congressional views and recommendations with respect to provisions of the proposed agreement and possible changes in U.S. law or administrative practice to be fully taken into account and any implementing problems resolved prior to entry into the agreement and introduction of the implementing bill. At the same time, the process ensures the Executive branch and foreign countries of expeditious action on the final agreement and implementing bill without amendments. This process was used successfully in approving the GATT Tokyo Round multilateral trade agreements in the Trade Agreements Act of 1979, the United States-Israel Free Trade Area Implementation Act of 1985, and the United States-Canada Free Trade Agreements Implementation Act of 1988.

COMMITTEE ACTION

The Committee on Ways and Means and Subcommittee on Trade held several series of hearings related to the NAFTA and the supplemental agreements beginning in 1990. The Subcommittee held background hearings on United States-Mexico economic relations on June 14 and 28, 1990 (Serial No. 101-108), immediately following the Joint Statement by President Bush and President Salinas endorsing the objective of a free trade agreement. On February 20, 21, and 28, 1991, the Subcommittee held hearings on the proposed negotiation of a free trade agreement with Mexico (Serial No. 102-19), in response to the notices to the Committee from President Bush of proposed negotiations with Mexico and Canada.

On completion of the NAFTA negotiations, the full Committee began a series of hearings, with Administration witnesses, on September 9 and 15, 1992, which the Subcommittee continued on September 17 and 22, with private sector witnesses (Serial No. 102-135). The subcommittee held hearings on the three proposed supplemental agreements to the NAFTA on March 11, 1993 (Serial No. 103-8). The full Committee began a series of hearings on the provisions and economic implications of the NAFTA and the three supplemental agreements and their implementation with Administration witnesses upon the signing of those agreements on September 14, 1993. These hearings were continued

by the Subcommittee with private sector witnesses on September 15, 21, and 23.

Extensive testimony was received during these hearings and in written statements submitted for the printed record from Administration officials who negotiated the NAFTA and supplemental agreements on behalf of the United States, Members of Congress, and representatives of the broad range of private sector interests affected by the Agreement, both in support and in opposition. Private sector interests included national business organizations, trade associations representing particular industry or agricultural interests, labor unions, individual companies, research institutes and academicians, environmental groups, importers and exporters, and consumer interests. Many of these concerns were addressed in the course of the negotiations on the NAFTA and side agreements or in the implementing bill or Statement of Administrative Action.

As background information for these hearings and to assist Members in evaluating the impact of a NAFTA on the U.S. economy, the Committee requested three series of investigations by the International Trade Commission under section 332(g) of the Tariff Act of 1930. The first study provided a review of trade and investment liberalization measures undertaken by Mexico and the prospects for future U.S.-Mexican relations (USITC Publication 2275, April 1990). The Committee on Ways and Means and the Senate Committee on Finance jointly requested a study by the Commission of the likely impact of a free trade agreement with Mexico on the United States (USITC Publication 2353, February 1991). The Committees jointly requested, on September 22, 1992, an updated study by the ITC of the potential impact of the NAFTA on the U.S. economy overall and specific sectors (USITC Publication 2596, January 1993) to provide a basis for Congressional assessment of the actual Agreement.

On September 30, 1993, the Subcommittee considered in an informal markup session a draft proposal in conceptual form for NAFTA implementing legislation, concerning matters within the jurisdiction of the Committee on Ways and Means. The proposal as amended in Subcommittee was transmitted informally in spreadsheet form to the full Committee on October 5, 1993, and made available to the public.

The full Committee met in [an] informal markup session on October 13, and completed consideration on October 19, 1993, of the draft implementing proposal as recommended by the Subcommittee. The Committee adopted several amendments in conceptual form to the proposal and a number of recommendations for inclusion in the Statement of Administrative Action, including an Administration proposal to establish a transitional adjustment assistance program for NAFTA-impacted workers.

The draft implementing proposal, as amended, was prepared in legislative form, together with proposals of other committees of jurisdiction, in a consolidated House proposed bill as a basis for an informal conference with Senate committees. The House Ways and Means and Senate Finance Committees issued a press release on November 9 that summarized their joint recommendations on the implementing legislation and accompanying Statement of Administrative Action with respect to provisions within their jurisdiction.

On November 9, 1993, the Committee on Ways and Means ordered reported H.R. 3450, to implement the North American Free Trade Agreement, submitted by the President to the Congress on November 4, by a rollcall vote of 25 yeas, 12 noes.

With respect to the provisions in Title VI, Customs Modernization:

On January 27, 1993, Mr. Gibbons and Mr. Crane introduced H.R. 700, the "Customs Modernization and Informed Compliance Act," which was referred to the Committee on Ways and Means. H.R. 700 as introduced was the verbatim text of Subtitle C of Title VIII of the conference report on H.R. 11, the "Revenue Act of 1992" (H. Rept. 102-1034).

On March 29, 1993, the Subcommittee on Trade approved, by voice vote, H.R. 700 with an en bloc amendment.

On October 19, 1993, the full Committee on Ways and Means approved for inclusion in the NAFTA draft implementing bill the text of H.R. 700 as introduced with an en bloc amendment. The amendments included revisions to the sections on remote location filing, drawback, unclaimed merchandise, and authority to settle claims. In addition, the amendment added new sections authorizing administrative duty exemptions, customs accounting treatment for bonded aviation fuel, cartage, and reconciliation of suspended antidumping and countervailing duty entries.

Included herein is an exchange of letters between the Chairmen of the Committee on Ways and Means and the Committee on Merchant Marine and Fisheries concerning provisions of H.R. 700, within the jurisdiction of the Committee on Merchant Marine and Fisheries:

COMMITTEE ON WAYS AND MEANS,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 10, 1993.

HON. GERRY E. STUDDS
*Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN:

Thank you for your letter of October 18, waiving sequential referral of those sections of H.R. 700, the "Customs Modernization and Informed Compliance Act," within the jurisdiction of the Committee on Merchant Marine and Fisheries.

As you may know, the text of H.R. 700, with additional amendments, was included in H.R. 3450, implementing legislation for the North American Free Trade Agreement (NAFTA), as Title VI. On November 9, the Committee on Ways and Means ordered H.R. 3450 favorably reported to the House. At your request, the Committee report will include this exchange of letters regarding your jurisdictional interest.

I want to thank you for the close cooperation of your staff in drafting the provisions relating to the vessel clearance and documentation laws of the United States.

Sincerely yours,

DAN ROSTENKOWSKI,
Chairman.

COMMITTEE ON MERCHANT MARINE AND FISHERIES,
HOUSE OF REPRESENTATIVES,

Washington, DC, October 18, 1993.

HON. DAN ROSTENKOWSKI,
Chairman, Committee on Ways and Means, Washington, DC.

DEAR MR. CHAIRMAN:

It is my understanding that the Committee on Ways and Means will today be marking up the text of H.R. 700, the "Customs Modernization and Informed Compliance Act," as part of its informal mark up of NAFTA legislation. H.R. 700 legislation includes a number of provisions amending or repealing laws that fall within the jurisdiction of the Committee on Merchant Marine and Fisheries including amendments to the Act to Prevent Pollution from Ships and the vessel clearance and documentation laws of the United States.

To assist you and the House leadership in considering this legislation as expeditiously as possible, and with all the understanding that the Committee on Ways and Means will not make any changes to the pertinent sections without the concurrence of the Committee on Merchant Marine and Fisheries, I agree not to ask for a sequential referral of these provisions. At the same time, H.R. 700 does not amend some provisions in the Customs laws which use obsolete terminology and do not reflect current agency authorities. I am hopeful that our staff can work together to develop amendments to the Customs laws to reflect changes the Committee on Merchant Marine and Fisheries has made over the last decade to modernize the U.S. maritime laws.

This agreement is made, of course, without prejudice to the jurisdictional interests of the Committee on Merchant Marine and Fisheries over the provisions specified in this letter. I would request, in addition, that our correspondence on this matter be included in your Committee report on H.R. 700 and NAFTA legislation.

With kind regards,

Sincerely,

GERRY E. STUDDS, *Chairman.*

* * *

HOUSE REPORT NO. 103-361(III)

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3450) to implement the North American Free Trade Agreement, having considered the same, report the bill without recommendation.

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PURPOSE AND SUMMARY

On December 18, 1992, former President Bush and the heads of state of Canada and Mexico signed the North American Free Trade Agreement (NAFTA), providing for the elimination or reduction in tariffs and other barriers to trade between the three NAFTA countries. If implemented by the Governments of the United States, Mexico and Canada, NAFTA would create the biggest consumer market in the world, with a combined economy of \$6.5 trillion and 370 million people.

President Clinton stated that he could not support the NAFTA negotiated by former President Bush without additional side agreements. Upon taking office, President Clinton, therefore, initiated that deal with Mexico and Canada to add provisions to NAFTA that deal with the environment, worker rights, and import surges.

Negotiations on supplemental agreements covering these three topics were concluded on August 13, 1993. The supplemental

agreements were signed at Mexico City, Washington, and Ottawa on September 8, 9, 12 and 14, 1993.

On November 4, 1993, President Clinton submitted to the Congress H.R. 3450, a bill to implement the North American Free Trade Agreement. H.R. 3450 would approve only the basic agreement and the accompanying Statement of Administrative Action. The supplemental agreements on the environment and on labor, together with side letters having to do with sugar and other agricultural products, are not approved by the legislation.

Under the provisions of the bill, the President is authorized to enter the NAFTA into force with respect to Canada and Mexico, as long as specific conditions are met, on or after January 1, 1994. The provisions of NAFTA would take effect over a 15 year period, during which tariffs and other barriers would be reduced or eliminated.

BACKGROUND AND NEED FOR THE LEGISLATION

The NAFTA as negotiated by the United States, Mexico, and Canada requires changes to the statutory laws of each of the parties. H.R. 3450 sets out the changes required in U.S. statutory laws.

The following is a discussion of provisions of H.R. 3450 that affect matters within the jurisdiction of the Committee on Energy and Commerce. This discussion also covers some of the subjects within the jurisdiction of the Committee for which no statutory provisions were required.

I. ENTRY INTO FORCE

NAFTA is a broad and comprehensive trade agreement. It provides not only for tariff reductions, but would require Mexico, and in some cases, Canada, to change its laws and regulations having to do with a broad range of matters affecting foreign commerce, such as: health and safety standards; telecommunications; financial services; competition policy; intellectual property; and investment.

In addition, there are other matters that relate to NAFTA, but are not a part of NAFTA because they were negotiated or developed separately and after NAFTA. These include the Statement of Administrative Action, two supplemental agreements to NAFTA, and various side letters reflecting arrangements on citrus

products, sugar and sweeteners, as well as an agreement on border funding.

H.R. 3450 provides for the approval by Congress of the NAFTA, which was signed on December 17, 1992, and the accompanying Statement of Administrative Action.

Title I of the bill establishes specific conditions that must be met before the President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force of the basic NAFTA with respect to that country. These conditions are:

The President determines that Mexico or Canada has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement:

The President transmits a report to the Congress certifying that Canada or Mexico has fulfilled its obligations to implement the agreement;

Mexico and/or Canada exchanges notes with the United States providing for the entry into force of the environmental and labor side agreements.

Under the bill, therefore, the President can only enter the NAFTA into force with respect to either Mexico or Canada, if those countries agree to enter the labor and environmental supplemental agreements into force. However, nothing in the bill specifies when Mexico or Canada are required to enter the supplemental agreements into force.

Furthermore, under the bill, Mexico or Canada could withdraw from the supplemental agreements, but still be entitled to the benefits of the basic NAFTA agreement. On this point, the Administration states in its Statement of Administrative Action that:

The Administration, after thorough consultation with the congress, would provide notice of withdrawal under the NAFTA, and cease to apply that Agreement, to Mexico or Canada if either country withdraws from a supplemental agreement. The preceding would not apply in any instance in which the withdrawal by another government is consensual in nature—for example, where that government and the United States withdraw from a supplemental agreement in order to

enter into a superseding agreement in the labor or environmental area.

* * *

XII.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (The Rome Convention)

Article 1

Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

Article 2

1. For the purpose of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

(a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;

(b) to producers of phonograms who are its nationals as regards phonograms first fixed or first published on its territory;

(c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

Article 3

For the purposes of this Convention:

(a) "Performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;

(b) "Phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

(c) "Producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

(d) "Publication" means the offering of copies of a phonogram to the public in reasonable quantity;

(e) "Reproduction" means the making of a copy or copies of a fixation;

(f) "Broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds;

(g) "Rebroadcasting" means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

Article 4

Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

(a) the performance takes place in another Contracting State;

(b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

(c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

Article 5

1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:

(a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);

(b) the first fixation of the sound was made in another Contracting State (criterion of fixation);

(c) the phonogram was first published in another Contracting State (criterion of publication).

2. If a phonogram was first published in a non-contracting State but if it was also published, within 30 days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

Article 6

1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:

(a) the headquarters of the broadcasting organisation is situated in another Contracting State;

(b) the broadcast was transmitted from a transmitter situated in another Contracting State.

2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

Article 7

1. The protection provided for performers by this Convention shall include the possibility of preventing:

(a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;

(b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance:

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

(iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes, and the reproduction of such fixation for broadcasting purposes.

(2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

(3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

Article 8

Any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance.

Article 9

Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.

Article 10

Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

Article 11

If, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol p, accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers.

Article 12

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

Article 13

Broadcasting organisations shall enjoy the right to authorize or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made

for purposes different from those referred to in those provisions;

(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

Article 14

The term of protection to be granted under this Convention shall last at least until the end of a period of 20 years computed from the end of the year in which:

(a) the fixation was made—for phonograms and for performances incorporated therein;

(b) the performance took place—for performances not incorporated in phonograms;

(c) the broadcast took place—for broadcasts.

Article 15

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

(a) private use;

(b) use of short excerpts in connection with the reporting of current events;

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.

Article 16

1. Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:

(a) as regards Article 12:

(i) it will not apply the provisions of that Article;

(ii) it will not apply the provisions of that Article in respect of certain uses;

(iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;

(iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

(b) as regards Article 13, it will not apply item (d) of that Article; if a Contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13, item (d), to broadcasting organizations whose headquarters are in that State.

2. If the notification referred to in paragraph 1 of this Article is made after the date of the deposit of the instrument of ratification, acceptance or accession, the declaration will become effective six months after it has been deposited.

Article 17

Any State which, on October 26, 1961, grants protection to producers of phonograms solely on the basis of the criterion of fixation may, by a notification deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession, declare that it will apply, for the purposes of

Article 5, the criterion of fixation alone and, for the purposes of paragraph 1(a)(iii) and (iv) of Article 16, the criterion of fixation instead of the criterion of nationality.

Article 18

Any State which has deposited a notification under paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 or Article 17, may, by a further notification deposited with the Secretary-General of the United Nations, reduce its scope or withdraw it.

Article 19

Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.

Article 20

1. This Convention shall not prejudice rights acquired in any Contracting State before the date of coming into force of this Convention for that State.

2. No Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State.

Article 21

The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations.

Article 22

Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.

Article 23

This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until June 30, 1962 for signature by any State invited to the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations which is a party to the

Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

Article 24

1. This Convention shall be subject to ratification or acceptance by the signatory States.

2. This Convention shall be open for accession by any State invited to the Conference referred to in Article 23, and by any State Member of the United Nations, provided that in either case such State is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General of the United Nations.

Article 25

1. This Convention shall come into force three months after the date of deposit of the sixth instrument of ratification, acceptance or accession.

2. Subsequently, this Convention shall come into force in respect of each state three months after the date of deposit of its instrument of ratification, acceptance or accession.

Article 26

1. Each Contracting State undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention.

2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.

Article 27

1. Any State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for whose international relations it is responsible, provided that the Universal Copyright Convention or the International Convention for the Protection of Literary and Artistic Works applies to the territory or territories concerned. This notification shall take effect three months after the date of its receipt.

2. The notification referred to in paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Articles 17 and 18, may be extended to cover all or any of the territories referred to in paragraph 1 of this Article.

Article 28

1. Any Contracting State may denounce this Convention, on its own behalf, or on behalf of all or any of the territories referred to in Article 27.

2. The denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations and shall take effect 12 months after the date of receipt of the notification.

3. The right of denunciation shall not be exercised by a Contracting State before the expiry of a period of five years from the date on which the Convention came into force with respect to that State.

4. A Contracting State shall cease to be a party to this Convention from that time when it is neither a party to the Universal Copyright Convention nor a member of the International Union for the Protection of Literary and Artistic Works.

5. This Convention shall cease to apply to any territory referred to in Article 27 from that time when neither the Universal Copyright Convention nor the International Convention for the Protection of Literary and Artistic Works applies to that territory.

Article 29

1. After this Convention has been in force for five years, any Contracting State may, by notification addressed to the Secretary-General of the United Nations, request that a conference be convened for the purpose of revising the Convention. The Secretary-General shall notify all Contracting States of this request. If, within a period of six months following the date of notification by the Secretary-General of the United Nations, not less than one half of the Contracting States notify him of their concurrence with the request, the Secretary-General shall inform the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, who shall convene a revision conference in cooperation with the Intergovernmental Committee provided for in Article 32.

2. The adoption of any revision of this Convention shall require an affirmative vote by two-thirds of the States attending the revision conference, provided that this majority includes two-thirds of the States which, at the time of the revision conference, are parties to the Convention.

3. In the event of adoption of a Convention revising this Convention in whole or in part, and unless the revising Convention provides otherwise:

(a) this Convention shall cease to be open to ratification, acceptance or accession as from the date of entry into force of the revising Convention;

(b) this Convention shall remain in force as regards relations between or with Contracting States which have not become parties to the revising Convention.

Article 30

Any dispute which may arise between two or more Contracting States concerning the interpretation or application of this Convention and which is not settled by negotiation shall, at the request of any one of the parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

Article 31

Without prejudice to the provisions of paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Article 17, no reservation may be made to this Convention.

Article 32

1. An Intergovernmental Committee is hereby established with the following duties:

(a) to study questions concerning the application and operation of this Convention; and

(b) to collect proposals and to prepare documentation for possible revision of this Convention.

2. The Committee shall consist of representatives of the Contracting States, chosen with due regard to equitable geographical distribution. The number of members shall be 6 if there are 12 Contracting States or less, 9 if there are 13 to 18 Contracting States and 12 if there are more than 18 Contracting States.

3. The Committee shall be constituted twelve months after the Convention comes into force by an election organized among the Contracting States, each of which shall have one vote, by the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, in accordance with rules previously approved by a majority of all Contracting States.

4. The Committee shall elect its Chairman and officers. It shall establish its own rules of procedure. These rules shall in particular provide for the future operation of the Committee and for a method of selecting its members for the future in such a way as to ensure rotation among the various Contracting States.

5. Officials of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works, designated by the Directors-General and the Director thereof, shall constitute the Secretariat of the Committee.

6. Meetings of the Committee, which shall be convened whenever a majority of its members deems it necessary, shall be held successively at the headquarters of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works.

7. Expenses of members of the Committee shall be borne by their respective Governments.

Article 33

1. The present Convention is drawn up in English, French and Spanish, the three texts being equally authentic.

2. In addition, official texts of the present Convention shall be drawn up in German, Italian, and Portuguese.

Article 34

1. The Secretary-General of the United Nations shall notify the States invited to the Conference referred to in Article 23 and every State Member of the United Nations, as well as the Director-General of the International Labour Office, the Director-

General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works:

- (a) of the deposit of each instrument of ratification, acceptance or accession;
- (b) of the date of entry into force of the Convention;
- (c) of all notifications, declarations or communications provided for in this Convention;
- (d) if any of the situations referred to in paragraphs 4 and 5 of Article 28 arise.

2. The Secretary-General of the United Nations shall also notify the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works of the requests communicated to him in accordance with Article 29, as well as of any communication received from the Contracting States concerning the revision of the Convention.

IN FAITH WHEREOF, the undersigned, being duly authorized thereto, have signed this Convention.

Done at Rome, this twenty-sixth day of October 1961, in a single copy in the English, French and Spanish languages. Certified true copies shall be delivered by the Secretary-General of the United Nations to all the States invited to the Conference referred to in Article 23 and to every State Member of the United Nations, as well as to the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works.

XIII.

Treaty on Intellectual Property in Respect of Integrated Circuits (The Washington Convention)

Article 1

Establishment of a Union

The Contracting Parties constitute themselves into a Union for the purposes of this Treaty.

Article 2

Definitions

For the purposes of this Treaty:

(i) “integrated circuit” means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function,

(ii) “layout-design (topography)” means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture,

(iii) “holder of the right” means the natural person who, or the legal entity which, according to the applicable law, is to

be regarded as the beneficiary of the protection referred to in Article 6,

(iv) "protected layout-design (topography)" means a layout-design (topography) in respect of which the conditions of protection referred to in this Treaty are fulfilled,

(v) "Contracting Party" means a State, or an Intergovernmental Organization meeting the requirements of item (x), party to this Treaty, .

(vi) "territory of a Contracting Party" means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an Intergovernmental Organization, the territory in which the constituting treaty of that Intergovernmental Organization applies,

(vii) "Union" means the Union referred to in Article 1,

(viii) "Assembly" means the Assembly referred to in Article 9,

(ix) "Director General" means the Director General of the World Intellectual Property Organization.

(x) "Intergovernmental Organization" means an organization constituted by, and composed of, States of any region of the world, which has competence in respect of matters governed by this Treaty, has its own legislation providing for intellectual property protection in respect of layout-designs (topographies) and binding on all its member States, and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to this Treaty.

Article 3

The Subject Matter of the Treaty

(1)(a) Each Contracting Party shall have the obligation to secure, throughout its territory, intellectual property protection in respect of layout-designs (topographies) in accordance with this Treaty. It shall, in particular, secure adequate measures to ensure the prevention of acts considered unlawful under Article 6 and appropriate legal remedies where such acts have been committed.

(b) The right of the holder of the right in respect of an integrated circuit applies whether or not the integrated circuit is incorporated in an article.

(c) Notwithstanding Article 2(i), any Contracting Party whose law limits the protection of layout-designs (topographies) to layout-designs (topographies) of semiconductor integrated circuits shall be free to apply that limitation as long as its law contains such limitation.

(2)(a) The obligation referred to in paragraph (1)(a) shall apply to layout-designs (topographies) that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs (topographies) and manufacturers of integrated circuits at the time of their creation.

(b) A layout-design (topography) that consists of a combination of elements and interconnections that are commonplace shall be protected only if the combination, taken as a whole, fulfills the conditions referred to in subparagraph (a).

Article 4

The Legal Form of the Protection

Each Contracting Party shall be free to implement its obligations under this Treaty through a special law on layout-designs (topographies) or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or a combination of any of those laws.

Article 5

National Treatment

(1) Subject to compliance with its obligation referred to in Article 3(1)(a), each Contracting Party shall, in respect of the intellectual property protection of layout-designs (topographies), accord, within its territory,

(i) to natural persons who are nationals of, or are domiciled in the territory of, any of the other Contracting Parties, and

(ii) to legal entities which or natural persons who, in the territory of any of the other Contracting Parties, have a real and effective establishment for the creation of layout-designs (topographies) or the production of integrated circuits,

the same treatment that it accords to its own nationals.

(2) Notwithstanding paragraph (1), any Contracting Party is free not to apply national treatment as far as any obligations to

appoint an agent or to designate an address for service are concerned or as far as the special rules applicable to foreigners in court proceedings are concerned.

(3) Where the Contracting Party is an Intergovernmental Organization, "nationals" in paragraph (1) means nationals of any of the States members of that Organization.

Article 6

The Scope of the Protection

(1)(a) Any Contracting Party shall consider unlawful the following acts if performed without the authorization of the holder of the right:

(i) the act of reproducing, whether by incorporation in an integrated circuit or otherwise, a protected layout-design (topography) in its entirety or any part thereof, except the act of reproducing any part that does not comply with the requirement of originality referred to in Article 3(2),

(ii) the act of importing, selling or otherwise distributing for commercial purposes a protected layout-design (topography) or an integrated circuit in which a protected layout-design (topography) is incorporated.

(b) Any Contracting Party shall be free to consider unlawful also acts other than those specified in subparagraph (a) if performed without the authorization of the holder of the right.

(2)(a) Notwithstanding paragraph (1), no Contracting Party shall consider unlawful the performance, without the authorization of the holder of the right, of the act of reproduction referred to in paragraph (1)(a)(i) where that act is performed by a third party for private purposes or for the sole purpose of evaluation, analysis, research or teaching.

(b) Where the third party referred to in subparagraph (a), on the basis of evaluation or analysis of the protected layout-design (topography) ("the first layout-design (topography)"), creates a layout-design (topography) complying with the requirement of originality referred to in Article 3(2) ("the second layout-design (topography)"), that third party may incorporate the second layout-design (topography) in an integrated circuit or perform any of the acts referred to in paragraph (1) in respect of the second layout-design (topography) without being

regarded as infringing the rights of the holder of the right in the first layout-design (topography).

(c) The holder of the right may not exercise his right in respect of an identical original layout-design (topography) that was independently created by a third party.

(3)(a) Notwithstanding paragraph (1), any Contracting Party may, in its legislation, provide for the possibility of its executive or judicial authority granting a non-exclusive license, in circumstances that are not ordinary, for the performance of any of the acts referred to in paragraph (1) by a third party without the authorization of the holder of the right ("non-voluntary license"), after unsuccessful efforts, made by the said third party in line with normal commercial practices, to obtain such authorization, where the granting of the non-voluntary license is found, by the granting authority, to be necessary to safeguard a national purpose deemed to be vital by that authority; the non-voluntary license shall be available for exploitation only in the territory of that country and shall be subject to the payment of an equitable remuneration by the third party to the holder of the right.

(b) The provisions of this Treaty shall not affect the freedom of any Contracting Party to apply measures, including the granting, after a formal proceeding by its executive or judicial authority, of a non-voluntary license, in application of its laws in order to secure free competition and to prevent abuses by the holder of the right.

(c) The granting of any non-voluntary license referred to in subparagraph (a) or subparagraph (b) shall be subject to judicial review. Any non-voluntary license referred to in subparagraph (a) shall be revoked when the conditions referred to in that subparagraph cease to exist.

(4) Notwithstanding paragraph (1)(a)(ii), no Contracting Party shall be obliged to consider unlawful the performance of any of the acts referred to in that paragraph in respect of an integrated circuit incorporating an unlawfully reproduced layout-design (topography) where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the said integrated circuit, that it incorporates an unlawfully reproduced layout-design (topography).

(5) Notwithstanding paragraph (1)(a)(ii), any Contracting Party may consider lawful the performance, without the authorization

of the holder of the right, of any of the acts referred to in that paragraph where the act is performed in respect of a protected layout-design (topography), or in respect of an integrated circuit in which such a layout-design (topography) is incorporated, that has been put on the market by, or with the consent of, the holder of the right.

Article 7

Exploitation; Registration, Disclosure

(1) Any Contracting Party shall be free not to protect a layout-design (topography) until it has been ordinarily commercially exploited, separately or as incorporated in an integrated circuit, somewhere in the world.

(2)(a) Any Contracting Party shall be free not to protect a layout-design (topography) until the layout-design (topography) has been the subject of an application for registration, filed in due form with the competent public authority, or of a registration with that authority; it may be required that the application be accompanied by the filing of a copy or drawing of the layout-design (topography) and, where the integrated circuit has been commercially exploited, of a sample of that integrated circuit, along with information defining the electronic function which the integrated circuit is intended to perform; however, the applicant may exclude such parts of the copy or drawing that relate to the manner of manufacture of the integrated circuit, provided that the parts submitted are sufficient to allow the identification of the layout-design (topography).

(b) Where the filing of an application for registration according to subparagraph (a) is required, the Contracting Party may require that such filing be effected within a certain period of time from the date on which the holder of the right first exploits ordinarily commercially anywhere in the world the layout-design (topography) of an integrated circuit; such period shall not be less than two years counted from the said date.

(c) Registration under subparagraph (a) may be subject to the payment of a fee.

Article 8

The Duration of the Protection

Protection shall last at least eight years.

Article 9

Assembly

(1)(a) The Union shall have an Assembly consisting of the Contracting Parties.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) Subject to subparagraph (d), the expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation.

(d) The Assembly may ask the World Intellectual Property Organization to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of the Union and the application and operation of this Treaty.

(b) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General for the preparation of such diplomatic conference.

(c) The Assembly shall perform the functions allocated to it under Article 14 and shall establish the details of the procedures provided for in that Article, including the financing of such procedures.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an Intergovernmental Organization shall exercise its right to vote, in place of its member States, with a number of votes equal to the number of its member States which are party to this Treaty and which are present at the time the vote is taken. No such Intergovernmental Organization shall exercise its right to vote if any of its member States participates in the vote.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 10

International Bureau

(1)(a) The International Bureau of the World Intellectual Property Organization shall:

(i) perform the administrative tasks concerning the Union, as well as any tasks specially assigned to it by the Assembly;

(ii) subject to the availability of funds, provide technical assistance, on request, to the Governments of Contracting Parties that are States and are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations.

(b) No Contracting Party shall have any financial obligations; in particular, no Contracting Party shall be required to pay any contributions to the International Bureau on account of its membership in the Union.

(2) The Director General shall be the chief executive of the Union and shall represent the Union.

Article 11

Amendment of Certain Provisions of the Treaty

(1) The Assembly may amend the definitions contained in Article 2(i) and (ii), as well as Articles 3(1)(c), 9(1)(c) and (d), 9(4), 10(1)(a) and 14.

(2)(a) Proposals under this Article for amendment of the provisions of this Treaty referred to in paragraph (1) may be initiated by any Contracting Party or by the Director General.

(b) Such proposals shall be communicated by the Director General to the Contracting Parties at least six months in advance of their consideration by the Assembly.

(c) No such proposal shall be made before the expiration of five years from the date of entry into force of this Treaty under Article 16(1).

(3) Adoption by the Assembly of any amendment under paragraph (1) shall require four-fifths of the votes cast.

(4)(a) Any amendment to the provisions of this Treaty referred to in paragraph (1) shall enter into force three months after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the Contracting Parties members of the Assembly at the time the Assembly adopted the amendment. Any amendment to the said provisions thus accepted shall bind all States and Intergovernmental Organizations that were Contracting Parties at the time the amendment was adopted by the Assembly or that become Contracting Parties thereafter, except Contracting Parties which have notified their denunciation of this Treaty in accordance with Article 17 before the entry into force of the amendment.

(b) In establishing the required three-fourths referred to in subparagraph (a), a notification made by an Intergovernmental Organization shall only be taken into account if no notification has been made by any of its member States.

Article 12

Safeguard of Paris and Berne Conventions

This Treaty shall not affect the obligations that any Contracting Party may have under the Paris Convention for the Protection of Industrial Property or the Berne Convention for the Protection of Literary and Artistic Works.

Article 13

Reservations

No reservations to this Treaty shall be made.

Article 14

Settlement of Disputes

(1)(a) Where any dispute arises concerning the interpretation or implementation of this Treaty, a Contracting Party may bring the matter to the attention of another Contracting Party and request the latter to enter into consultations with it.

(b) The Contracting Party so requested shall provide promptly an adequate opportunity for the requested consultations.

(c) The Contracting Parties engaged in consultations shall attempt to reach, within a reasonable period of time, a mutually satisfactory solution of the dispute.

(2) If a mutually satisfactory solution is not reached within a reasonable period of time through the consultations referred to in paragraph (1), the parties to the dispute may agree to resort to other means designed to lead to an amicable settlement of their dispute, such as good offices, conciliation, mediation and arbitration.

(3)(a) If the dispute is not satisfactorily settled through the consultations referred to in paragraph (1), or if the means referred to in paragraph (2) are not resorted to, or do not lead to an amicable settlement within a reasonable period of time, the Assembly, at the written request of either of the parties to the dispute, shall convene a panel of three members to examine the matter. The members of the panel shall not, unless the parties to the dispute agree otherwise, be from either party to the dispute. They shall be selected from a list of designated governmental experts established by the Assembly. The terms of reference for the panel shall be agreed upon by the parties to the dispute. If such agreement is not achieved within three months, the Assembly shall set the terms of reference for the panel after having consulted the parties to the dispute and the members of the panel. The panel shall give full opportunity to the parties to the dispute and any other interested Contracting Parties to present to it their views. If both parties to the dispute so request, the panel shall stop its proceedings.

(b) The Assembly shall adopt rules for the establishment of the said list of experts, and the manner of selecting the members of the panel, who shall be governmental experts of the Contracting Parties, and for the conduct of the panel proceedings, including provisions to safeguard the confidentiality of the proceedings and of any material designated as confidential by any participant in the proceedings.

(c) Unless the parties to the dispute reach an agreement between themselves prior to the panel's concluding its proceedings, the panel shall promptly prepare a written report and provide it to the parties to the dispute for their review. The parties to the dispute shall have a reasonable period of time, whose length will be fixed by the panel, to submit any comments on the report to the panel, unless they agree to a longer time in their attempts to reach a mutually satisfactory resolution to their dispute. The panel shall take into account the

comments and shall promptly transmit its report to the Assembly. The report shall contain the facts and recommendations for the resolution of the dispute, and shall be accompanied by the written comments, if any, of the parties to the dispute.

(4) The Assembly shall give the report of the panel prompt consideration. The Assembly shall, by consensus, make recommendations to the parties to the dispute, based upon its interpretation of this Treaty and the report of the panel.

Article 15

Becoming Party to the Treaty

(1)(a) Any State member of the World Intellectual Property Organization or of the United Nations may become party to this Treaty.

(b) Any Intergovernmental Organization which meets the requirements of Article 2(x) may become party to this Treaty. The Organization shall inform the Director General of its competence, and any subsequent changes in its competence, with respect to the matters governed by this Treaty. The Organization and its member States may, without, however, any derogation from the obligations under this Treaty, decide on their respective responsibilities for the performance of their obligations under this Treaty.

(2) A State or Intergovernmental Organization shall become party to this Treaty by:

(i) signature followed by the deposit of an instrument of ratification, acceptance or approval, or

(ii) the deposit of an instrument of accession.

(3) The instruments referred to in paragraph (2) shall be deposited with the Director General.

Article 16

Entry Into Force of the Treaty

(1) This Treaty shall enter into force, with respect to each of the first five States or Intergovernmental Organizations which have deposited their instruments of ratification, acceptance, approval or accession, three months after the date on which the fifth instrument of ratification, acceptance, approval or accession has been deposited.

(2) This Treaty shall enter into force with respect to any State or Intergovernmental Organization not covered by paragraph (1) three months after the date on which that State or Intergovernmental Organization has deposited its instrument of ratification, acceptance, approval or accession unless a later date has been indicated in the instrument; in the latter case, this Treaty shall enter into force with respect to the said State or Intergovernmental Organization on the date thus indicated.

(3) Any Contracting Party shall have the right not to apply this Treaty to any layout-design (topography) that exists at the time this Treaty enters into force in respect of that Contracting Party, provided that this provision does not affect any protection that such layout-design (topography) may, at that time, enjoy in the territory of that Contracting Party by virtue of international obligations other than those resulting from this Treaty or the legislation of the said Contracting Party.

Article 17

Denunciation of the Treaty

(1) Any Contracting Party may denounce this Treaty by notification addressed to the Director General.

(2) Denunciation shall take effect one year after the day on which the Director General has received the notification of denunciation.

Article 18

Texts of the Treaty

(1) This Treaty is established in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic.

(2) Official texts shall be established by the Director General, after consultation with the interested Governments, in such other languages as the Assembly may designate.

Article 19

Depositary

The Director General shall be the depositary of this Treaty.

Article 20**Signature**

This Treaty shall be open for signature between May 26, 1989, and August 25, 1989, with the Government of the United States of America, and between August 26, 1989, and May 25, 1990, at the headquarters of WIPO.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Treaty.

Done at Washington, May 26, 1989.

