國立政治大學國際經營與貿易研究所碩士論文

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論反仿冒貿易協定談判與智慧財產權保護多邊貿易架構之分合

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摘要

自 19 世紀以降，各國體認以國內法律為基礎的保護方式具有侷限性，因此開始嘗試以國際條約的方式對智慧財產權進行規範，產生了巴黎公約、伯恩公約、羅馬公約等國際協定，可定位為智慧財產權保護多邊貿易架構形成的第一階段，也是第一次各國國內立法朝國際保護靠攏的現象。1967 年 WIPO 成立使多邊貿易架構顯得較為完備，然而在 WIPO 之運作架構下又因為不同國家的立場分歧未能進一步修正智慧財產權公約，多邊架構發展出現瓶頸，已開發國家未因此退出多邊貿易架構，反而選擇持續完善此多邊架構。TRIPS 於 1995 年烏拉圭回合後生效，規定了嚴格且具體的執行規範，但是多邊架構未能於 TRIPS 後再取得重大成果，已開發國家和開發中國家在智慧財產權利益之立場分歧使得多邊架構之發展陷入僵局。已開發國家於 TRIPS 後時期選擇了另一種途徑，本文舉美國 FTAs 貿易政策為例，發現此時出現了暫時偏離多邊架構，改以雙邊架構為政策重心的分離，惟雙邊貿易政策經本文分析並無法產生美國的預期效果。

ACTA 的發展可以定位出美國目前的政策走向，改採協商複邊貿易協定的方式，希望可以循 FTAs 政策的途徑，企圖讓 ACTA 此複邊架構的成果可以擴張到多邊架構中。本文認為 2010 年 12 月公布最終版本的 ACTA 能否順利生效仍屬未知數，即便順利生效，依其談判成果可以推定，已無法達到所有參與談判國的預期。不論已開發國家之後的政策走向為何，我們可以發現擁有智慧財產權利益國家的最終目標仍是提升國際間智慧財產權保護水準，過程中則變動地、持續地在多邊、複邊貿易架構中，選擇性執行能達成最終目標的政策，國際智慧財產權保護貿易架構中存在著各國政策反覆於多邊、複邊架構間來回擺盪的分合現象。

關鍵字：TRIPS、反仿冒貿易協定、智慧財產權保護、TRIPS-Plus

The Relationship between the Negotiation of Anti-Counterfeiting Trade Agreement and the Intellectual Property Protection under the Multilateral Trade Framework

Abstract

Countries found out that the protection of intellectual property based only on national law was insufficient. They chosen to base on international agreement from 19 century and concluded important treaties such as Paris Convention, Berne Convention and Rome Convention. This is the first phase in the process of which the intellectual property protection under the multilateral trade framework forming. WIPO was established at 1967 and completed the multilateral trade framework a little further. But countries had different positions thus could not obtain mutual recognition on specific issues. The developed countries did not walk away from the framework; nevertheless, they worked even harder to try to get some result. TRIPS came into force at 1995 after the Uruguay Round which is the most important multilateral agreement at the present day. The multilateral trade framework was stuck after TRIPS resulting from the gap between the developed and developing countries. The former began to work in other direction. We took the U.S. bilateral trade policy of FTAs as an example and found out there is a temporary departure from the multilateral trade framework at this phase. The U.S. policy of FTAs however didn't achieve the goal expected.

We could point out the next step of U.S. by observing the negotiation of Anti-Counterfeiting Trade Agreement (ACTA). U.S. took a different approach by negotiating the ACTA and hoped there will be a spillover effect from the plurilateral

agreement to the multilateral framework. Negotiating parties announced the final draft of ACTA on December 3rd, 2010. After analyzing the final draft, we could make a conclusion that the result from the negotiation is not outstanding; moreover, it is not clear whether the agreement will come into force in time. No matter what kind of action will the developed countries take in the next, their final and utmost goal is always trying to protect the intellectual property and their related interest. Changing policy becomes the normal condition. This leads to the phenomenon that the intellectual property protection is continuously swaying from the multilateral side to the bilateral or plurilateral trade framework, and vice versa.

Key Words: TRIPS, Anti-Counterfeiting Trade Agreement, Intellectual Property Protection, TRIPS-Plus

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第壹章 緒論

第一節　研究背景與動機

國際貿易自二次世界大戰後蓬勃發展，發展至今，國際貿易範圍已經不限於有形之實體貨品，也開始包括無實體之服務、型態多樣的智慧財產權。加上近年來知識經濟成為世界主要國家經濟發展之重點，因此，智慧財產權之保護成為許多國家的首要目標。國際貿易與智慧財產權的關係越來越緊密，相關議題也開始受到國際社會的重視。

自 19 世紀的「工業財產權保護公約」（The International Convention for the Protection of Industrial Property，簡稱巴黎公約，Paris Convention）開始，國際間嘗試以國際條約的方式對智慧財產權進行規範。世界智慧財產權組織（World Intellectual Property Organization，簡稱 WIPO）於 1967 年 7 月 14 日成立，WIPO 透過國際合作以促進全世界智慧財產權的保護，且透過多邊協定來處理各國與智慧財產權相關的法令與行政工作。烏拉圭回合談判後成立了世界貿易組織（World Trade Organization，簡稱 WTO），WTO 中與貿易有關之智慧財產權協定（Trade-Related Aspects of Intellectual Property Rights，簡稱 TRIPS）可說是 20 世紀在智慧財產權領域最重要的發展，因為首次在國際條約中對於智慧財產權的執行作出詳盡且具強制力的規定。雖然智慧財產權保護之多邊貿易架構逐漸建立，但盜版、仿冒等侵害智慧財產權之行為仍然非常猖獗。某些已開發國家，特別是美國，由於在智慧財產權領域享有相當大的經濟利益，因此嘗試以其他方式提升國際間智慧財產權的保護水準。美國藉由與他國簽署複邊或雙邊貿易協定的過程，納入智慧財產權保護的相關規定，此一貿易政策已實施了一段時期。

自 2007 年起，美國倡議訂定「反仿冒貿易協定」（Anti-Counterfeiting Trade Agreement，簡稱 ACTA），許多在智慧財產權保護具有利益的已開發國家加入談判，但僅有少數開發中國家獲准加入，是一個協商過程不對外公開而且限制了參

與國家數目之複邊貿易協定，推動 ACTA 成為一個締約國家數目多、具有代表性多邊貿易協定似乎並非美國目前的首要目標。根據參與談判國之宣示，此複邊貿易協定之主要目的為以 TRIPS 為基準，進一步在政策目標相同的國家間，加強智慧財產權的執行與保護。有趣的是，檢視當前國際間智慧財產權保護的架構，多邊架構有對於智慧財產權的執行作出詳盡且具強制力的規定的 TRIPS，複邊或雙邊的架構則另有美國與為數眾多且涵蓋不同地理區域國家所簽訂之自由貿易協定，兩者的發展也都是美國幾年來強力主導的結果。那麼，為什麼美國仍號召其他國家一起訂定 ACTA 此貿易協定呢？再者，如果真的如談判國所宣稱的，規範內容絕大部分將與 TRIPS 的規定重疊，美國以及其他參與國家的政策目的為何？關於 ACTA 的這些問題都令人好奇。

在前述背景之下，本文之研究目的將以 ACTA 的談判為切入點，審視國際間智慧財產權保護多邊貿易架構之分合關係。首先，了解當前國際間智慧財產權保護之多邊體系的演變與現況，並討論此體系是否存在著智慧財產權保護的不足之處。若真的存在缺失，再進一步探討美國為了因應此種缺失，在多邊體系外之雙邊貿易政策，是否真的可以填補此多邊體系不足之處。最後提及本文的重心─反仿冒貿易協定─討論美國政策目標為何，是為了進一步延續美國認為已發揮預期效果的 FTAs 之貿易政策，或者相反地，因為雙邊貿易政策無效，只好再次嘗試主導發展一個新的國際間智慧財產權保護架構？

貿易是我國的經濟命脈，以知識經濟為重心之產業轉型亦是我國當前政策目標，而知識經濟之利益維護，又勢必以對智慧財產權的保護作為手段，因此，了解智慧財產權保護國際架構之變化趨勢，對我國有相當重要的意義。由 ACTA 為一個觀察基準，我們嘗試討論是否國際智慧財產權保護貿易架構中存在一個各國政策反覆於多邊、複邊架構間來回擺盪的分合現象。

第二節　研究方法與限制

全文的研究方法包括文獻探討、美國貿易協定條文分析，並加以歸納整理。

文獻探討的部分，蒐集國內外相關書籍、期刊、新聞報導與國際組織官方網站之資料與研究，內容涵蓋與智慧財產權相關之國際條約約文內容與締約過程、智慧財產權執行層面的成效評估、各國政府機關的新聞稿。美國貿易協定條文的部分，主要針對美國與其他國家間之自由貿易協定，討論協定中與智慧財產權權利保護及執行相關的規範，藉此分析美國貿易政策提升智慧財產權國際保護基準之策略，再進一步討論智慧財產權保護之複邊體系建構行動與可能成效。

在此須先說明，參與協商國家雖然陸續公布了相關新聞與各階段的協商成果，且已於 2010 年 12 月對外公布最終版本的草案內容，但是仍須經各國國內程序批准，最終版本可能在這個階段會再有變動，本文僅能就目前可得之資料與草案內容進行整理與探討，因此在研究上受到一定程度之限制。

第三節　研究架構

全文共分為五章，以下就全文架構作概略說明。

第一章包括研究背景與動機、研究方法與限制及研究架構。

第二章介紹當前國際間智慧財產權保護的多邊體系，主要針對數個較重要的國際條約與國際組織加以說明。後續研究以此為基礎，延伸討論為何在此多邊體系之外，尚有國家尋求在雙邊甚至是複邊的貿易框架中，架構起一個智慧財產權的權利保護與執行體系。

第三章以美國貿易政策為中心，先概述其國際貿易政策在多邊主義與複邊主義兩者間重心的調整，再說明何謂 TRIPS Plus，並且具體審視美國與其他國家間之自由貿易協定內容，探討美國智慧財產權保護之具體貿易政策與成效。

第四章則針對反仿冒貿易協定，簡介締約背景與各參與談判國之參與動機，並討論談判過程中引發之外界批評，接著概述草案內容概要以及其實體規範未來適用之可能問題，最後對反仿冒貿易協定之可能成效提出初步意見。

第五章則綜合歸納以上內容提出結論。

第貳章　智慧財產權保護多邊體系之現況

智慧財產權係指受法律保障之人類智慧產物，而權利人所享有的權利係由一國所賦予，使權利人得在一定期間內專屬的利用該智慧產物，並禁止他人剝奪或侵害自己所享有的商業上或財產上之利益。對智慧財產權給予法律上的保護，原則上目前已成為許多國家公認之合理規範，但是得以法律保護智慧財產權之概念在形成普遍的原則以前其實也有許多爭論。

自 19 世紀以降，各國逐漸體認到以各國國內法律為基礎的保護方式，能達成的保護效果與範圍具有其侷限性，因此，開始朝建構國際保護的方式調整。由巴黎公約開始，國際間嘗試以國際條約的方式對智慧財產權進行規範，後來也陸續針對不同類型的智慧財產權訂定了不同的國際條約，可說是智慧財產權保護多邊貿易架構形成的第一階段。此階段的國際條約為國際間智慧財產權的保護奠定了基礎，但此種保護框架在規範本質上具有某些缺失，因此實際的執行成效有限。

智慧財產權保護多邊貿易架構進一步發展，各國的參與程度以及國際間保護程度又再一次提高，此階段成果展現在烏拉圭回合後成立的 WTO 規範中。各個智慧財產權相關之國際公約對於權利所涵蓋之範圍有差異，但就烏拉圭回合後 WTO 架構下之智慧財產權規範而言，最少應就著作權、商標權、地理標示、工業設計、專利、積體電路佈局、未公開資料等七項給予保護。WTO 管轄下的 TRIPS，也嘗試修正並補強前一個智慧財產權保護多邊貿易架構形成階段，各個國際公約所具有的執行缺陷。

第一節　烏拉圭回合以前之國際法律架構

烏拉圭回合之前，智慧財產權保護之法律架構主要為貿易協定以外之條約與協定，亦即以不同類型的智慧財產權利為條約之規範主體。自 19 世紀以來，許多國家開始推動智慧財產權之國際保護，主因為西歐國家關切其國內創作在其他

國家之保護，因此開始制定保護智慧財產權之國際協定。

締約時間較早且參與國家較具代表性者為1883年由11個國家在法國巴黎簽署之巴黎公約，目的在於對工業財產權（Industrial Property）提供保護；後於1886年，各國簽訂了「保護文學及藝術著作之伯恩公約」（The Berne Convention for the Protection of Literary and Artistic Works，簡稱為伯恩公約，Berne Convention）；經過約半個世紀後，由於錄製技術與廣播技術之發展，1961年又簽訂了「保護表演人、錄音物製作人及廣播機構之國際公約」（The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations，簡稱為羅馬公約，Rome Convention），是國際間關於保護鄰接權（Neighboring Rights）之主要公約。

WIPO於1967年成立，1974年成為聯合國之特別機構，成立之目的為透過國際合作以促進全世界智慧財產權的保護，以及處理各國與智慧財產權相關的法令與行政工作。前述之巴黎公約、伯恩公約及羅馬公約均納入WIPO之管轄。

以下針對前述提及之國際條約分別進行介紹，首先概述締約背景，接著簡單審視各個公約之實體規定，並且藉此分析一個問題：既然在多邊架構下已有數個國際條約規範了不同智慧財產權權利之保護，亦有WIPO此國際組織統合處理各國與智慧財產權相關的法令與行政工作，為何幾個主要的已開發國家仍希望將智慧財產權納入WTO此多邊貿易協定的架構之下？

第一項　巴黎公約

工業財產權所保護之權利為人類智慧思考之結晶，且與產業行為相關者，具有促進產業利益、保障產業功能之目的。依工業財產權權利標的之差異，可以分為：以創新發明為目的而取得合法獨占權益者，如專利、新型、新式樣；另一類為表彰商品來源、增加消費者之信任，用以謀求產業利益者，如商標、服務標章、產地標示[1]。對工業財產權國際利法保護始於19世紀末，歐洲國家自中世紀

[1] 經濟部智慧財產局資料服務組，巴黎公約解讀，頁16，經濟部智慧局，2000年。

開始即對外拓展貿易，到 18、19 世紀時，國際貿易與產業發展狀況已相當興盛，產品與商標等商業信譽擴及世界各地，造成其他各國爭相模仿其產品或冒用其商標，因此，如何保護自己國家的商業產品與商譽，使其免於遭受國際侵害，成為歐洲各國關注焦點[2]。

西元 1873 年萬國博覽會於維也納舉行時，由於外國發明人的發明得不到奧地利帝國法律保護，致使許多外國發明人不願參展，奧地利因此以法律提供外國人發明特殊臨時保護，以吸引外國發明人參展，參展各國亦就地召開有關工業財產權第一次國際會議，就工業財產權的國際保障作第一次意見交換[3]。在經歷數年意見交換後，各國終於達成共識，1883 年 3 月 20 日，法國等 11 個國家[4]正式簽訂巴黎公約，公約於 1884 年 7 月 7 日生效，藉由將締約國組成同盟的方式來保護工業財產權[5]。巴黎公約至 2010 年止共計有 173 個會員國[6]。

巴黎公約的規範內容可以分為四大部分：規範各同盟國的權利暨義務，確立巴黎同盟的組織及行政規範；對工業財產權的相關規範，要求或允許各同盟國於該領域予以立法；規範工業財產權領域中有關私人間權利義務，但是僅規定各同盟國需以其本國法規範之；有關個人間權利義務關係的實體規範，不僅及於國內法的適用，且直接就相關議題加以規範[7]。

巴黎公約對國際智慧財產權保護的貢獻，在於其確立了智慧財產權保護基本原則，簡單介紹如下：

一、國民待遇原則[8]

國民待遇原則（The Principle of National Treatment）指外國人與本國人於工

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[2] WIPO, WIPO INTERNATIONAL PROPERTY HANDBOOK: POLICY, LAW AND USE 241 (2d ed. 2004).
[3] *Id*.
[4] 十一個國家分別為：比利時、巴西、薩爾瓦多、法國、瓜地馬拉、義大利、荷蘭、葡萄牙、塞爾維亞、西班牙及瑞士。
[5] WIPO, *supra* note 2.
[6] WIPO website, *Treaties Statistics*, *at* http://www.wipo.int (Apr. 13, 2010).
[7] 經濟部智慧財產局資料服務組，前揭註 1，頁 6-10。
[8] 巴黎公約第二條第(1)款規定：「就工業財產之保護而言，任一同盟國國民，於其他同盟國家內，應享有各該國法律賦予(或將來可能賦予)其本國國民之權益，而所有此等權益，概不妨礙公約所特別規定之權利。因此，其如遵守加諸該本國國民之條件及程序，而權利受侵害時，應享有與該本國國民同樣的保護與法律救濟。」

業財產權享有相同程度保護與救濟，不可有歧視待遇，包括各國法律對其本國國民現在以及將來在工業財產保護所給予之利益、保護以及法律救濟途徑[9]。

二、優先權原則[10]

當創作人欲申請工業財產權時，基本上不太可能同時在許多國家申請，巴黎公約乃依各工業財產權不同性質，規定不同期限的優先權（The Right of Priority），當創作人於某國申請權利時，得在優先權期限內至其他同盟國內申請該權利[11]。

三、專利獨立原則[12]

各同盟國國民就同一發明在數個同盟國或非同盟國家所取得之專利權均互相獨立（Independence of Patent）。因此，權利所有人欲在任何同盟國內受到保護，應依各國國內法向各該國主管機關申請註冊始受到各國保護；而在他國已申請而取得的權利，除非在國內另行申請註冊，並不當然受到保護[13]。此原則係為了尊重各國立法自主權而有之規定。

巴黎公約作為國際間最早且最重要的工業財產權公約，條文架構完善且周延，亦奠定了國際間工業財產權保護的許多重要原則，然而，再完善的條文若無法與時俱進、亦無法有利的執行各項規定，則此國際條約所能發揮的效果自然有限。

首先，巴黎公約對於權利保護執行較少有具體規範。針對專利權的部分，於第五條之四規定：「倘產品所輸入之同盟國家已有保護該項產品之製法專利，專利權人就該進口物品得主張之權利，相同於輸入國法令所賦予其對該國境內製造之物品所得主張之一切權利。」換言之，不僅是製法專利的使用，即使是販賣或使用其物品亦構成侵害；商標權的部分，於第九條規定可扣押進口商品[14]，亦即，

[9] 經濟部智慧財產局資料服務組，前揭註 1，頁 22-23。

[10] 巴黎公約第四條第 A 項第(1)款規定：「任何人於任一同盟國家，已依法申請專利、或申請新型或新式樣、或商標註冊者，其本人或其權益繼受人，於法定期間內向另一同盟國家申請時，得享有優先權。」

[11] 經濟部智慧財產局資料服務組，前揭註 1，頁 29。

[12] 巴黎公約第四條之二規定：「同盟國國民就同一發明於各同盟國家內申請之專利案，與於其他國家取得之專利權，應各自獨立，不論後者是否同盟國家。」

[13] 經濟部智慧財產局資料服務組，前揭註 1，頁 48。

[14] 巴黎公約第九條規定：「(1)各同盟國家對於進口之商品非法附有其境內所保護之商標或商號者，應予扣押。(2)非法附有商標或商號於商品之發生地所屬國以及輸入之國家，均應實施扣押。(3)

當進口的商品對商標或商號之權利造成侵害，應扣押附有該商標或商號之商品，禁止其進口，或在國內扣押之，若同盟國未定有前揭措施者，國民待遇原則亦適用於商標或商號受侵害的情形。

最後，巴黎公約最受批評的缺點，在於缺少一個可以促使會員國有效履行之執行程序，以及解決會員國間發生爭議時可以援引的爭端解決機制。巴黎公約第二十八條[15]有關管轄權的規定，係於西元 1967 年斯德哥爾摩會議中所訂定，規定會員國之間所產生爭端可以訴諸國際法庭（International Court of Justice，簡稱 ICJ）來解決，或者同盟國間同意以其他方式和解，如國際仲裁，但各國得聲明不予採納第二十八條。

第二項　伯恩公約

伯恩公約是國際間最早且最重要的著作權公約。在伯恩公約簽訂以前，國際間對於文學及藝術作品的保護，僅止於某些歐洲國家間雙邊協定，這些協定包含各種不同保護條件及限制，作者及出版者們若欲使其著作獲得國際性的保護，必須各自符合這些多樣的保護要件，相當複雜且無法確保獲得全面性的保護，因此，一個簡單、統一性的著作權保護機制係當時環境所需[16]。經過一連串的協商討論，於 1886 年 9 月 9 日在瑞士伯恩有十個國家[17]簽署了伯恩公約，並且於 1887 年 11 月 5 日正式生效。伯恩公約前言揭示了公約之目的為：「期以盡可能有效且一致

扣押之執行，得由檢察官、其他主管機關，或利害關係人(不論其為自然人或法人)依各國法令申請之。(4)各同盟國家對於過境商品不予扣押。(5)倘同盟國家法律不准於商品進口時予以扣押，則應改為禁止進口或於其輸入國內後予以扣押。(6)倘同盟國家法律既不准於商品進口時予以扣押，亦不准其禁止進口及於其輸入國內後予以扣押，則於其法律配合修正前，該國應准予其國民依現行法令採行訴訟及尋求救濟。」

[15] 巴黎公約第二十八條規定：「(1)兩個或兩個以上同盟國家間有關本公約解釋或適用所發生之爭議無法以談判解決者，倘相關國家未同意以其他方法解決，則得由其中任一國家，依照國際法院規約，提請國際法院處理。將該爭議提請國際法院處理之國家應通知國際局。國際局應將此事通知各同盟國家。(2)各國得於其簽署本法或存放其批准書或加入書時，聲明其不受前款之拘束。則其與其他同盟國家間之爭議將不適用前款規定。(3)依前款作聲明之國家，得隨時通知局長撤回其聲明。」

[16] 胡心蘭，論科技發展對合理使用與著作財產權限制之影響，中原大學財經法律學系碩士論文，九十年，頁 42。

[17] 十個國家分別為：比利時、法國、德國、英國、海地、義大利、賴比瑞亞、西班牙、瑞士及突尼西亞。

之方式，保障著作人於其文學與藝術著作之權利」。伯恩公約至 2009 年 10 月 15 日止共計有 164 個會員國[18]。

伯恩公約自 1886 年簽署以來歷經七次修正[19]，最近一次的修正是 1971 年於巴黎所修正的版本。歷次修正案均是為了因應科技的發展而持續提升著作權保護標準。除此之外，1967 年斯德哥爾摩修正案之提出亦是為了因應眾多新獨立開發中國家的需求，惟該次修正案實質條款尚未生效，就被 1971 年巴黎修正案所替代[20]。

伯恩公約共 38 條及 1 個附件，第一條至第二十一條為該公約之實體規定，第二十二條以下規範該公約的機構與公約修正等非實體問題，附件則規定對開發中國家的特別待遇。

伯恩公約最初制定目的有二，第一，建立國際性對作者權的最低保護標準（minimum standard of protection）；第二，因為伯恩公約的會員國包含有各種發展程度的國家，對於著作之保護有各種不同利益，為了確保各國對作者權保護趨於一致，即建立國民待遇原則[21]。基於這兩個目的，伯恩公約發展了幾項重要的基本原則，架構出了公約的規範基礎：

一、國民待遇原則[22]

採用國民待遇原則，低保護程度國家的國民，在高保護程度國家所獲得的保護高於本國，將對本國產生向高保護程度國家看齊的壓力，會有助於國內保護制度進一步提升[23]；

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[18] WIPO website, *supra* note 6.

[19] 事實上係五次修正(柏林 1908；羅馬 1928；布魯塞爾 1948；斯德哥爾摩 1967；巴黎 1971)，兩次增訂(巴黎 1896；伯恩 1914)，每一次的「修正」均係就公約內容作全面的重新編訂，而「增訂」則係就原有內容補充新的協定或做部分的修改。包括：1896 年巴黎修正案、1908 年柏林修正案、1914 年伯恩增訂議定書、1928 年羅馬修正案、1948 年布魯塞爾修正案、1967 年斯德哥爾摩修正案、1971 年巴黎修正案。

[20] WIPO, *supra* note 2, at 265.

[21] 前揭註 16。

[22] 伯恩公約第五條第一項規定：「著作人就其受本公約保護之著作，於源流國以外本聯盟各會員國境內，應享有本公約特別授予之權利，以及各該國家法律現在或將來對其國民授予之權利。」

[23] 前揭註 16，頁 43。

二、自動保護原則[24]

著作權之享有與行使不需履行任何形式要件，只要著作完成即自動保護（Automatic Protection），不需註冊或是登記[25]；

三、獨立保護原則[26]

指某著作在各該會員國中所受保護，係依該國之著作權法規定，而非以該著作源流國對該著作的保護程度為準，稱為獨立保護原則（Independence of Protection）[27]；

四、最低保護原則[28]

伯恩公約規範為著作權保護的最低基準（The Principle of Minimum Standard of Protection），若各國法律對著作提供較高程度保護，公約不應阻止權利人依該規定要求較高保護[29]。各國對於外國人著作保護均以其國內法為準據法，而各國著作權法對著作保護要件不同，且各國保護期間亦有差異，為使各國保護趨於一致，國際公約規定了最低保護標準。

伯恩公約作為國際間最早且最重要的著作權公約，條文架構完善且周延，亦奠定了國際間著作權保護的許多重要原則，然而，再完善的條文若無法與時俱進、亦無法有利的執行各項規定，則此國際條約所能發揮的效果自然有限。

首先，自 1971 年巴黎會議以後，伯恩公約即未再修訂過。在科技不斷創新發展之下，面對各種新興型態之著作以及對著作之利用方式，產生伯恩公約的最低保護標準是否仍足以因應的疑慮[30]。

伯恩公約對於權利保護之執行亦較少有具體規範，僅於第十六條規定可以扣

[24] 伯恩公約第五條第二項規定：「上開權利之享有及行使，不得要求須履行一定形式要件，且應不問著作源流國是否給予保護。」
[25] WIPO, *supra* note 2, at 262.
[26] 伯恩公約第五條第二項後段規定：「是故，除本公約另有規定者外，保護之範圍，以及著作人為保護其權利所享有之救濟方式，專受主張保護之當地國法律之拘束。」
[27] WIPO, *supra* note 2, at 262.
[28] 伯恩公約第十九條規定：「本聯盟任一會員國法律授予較大保護者，就該較大保護之利益得為之主張，不受本公約規定影響。」
[29] WIPO, *supra* note 2, at 263.
[30] 前揭註 16，頁 60。

押著作侵害物。該條第一項規定，各國均得對著作侵害物加以扣押；第二項規定縱使該項對著作權構成侵害之重製物係來自未保護或停止保護該著作之國家者，亦同；第三項則述明扣押應依各國法律為之。

最後，伯恩公約最遭致批評的缺點，在於缺少一個可以促使會員國有效履行的執行程序，以及解決會員國間發生爭議時可以援引的爭端解決機制。雖然伯恩公約第三十三條規定會員國之間所產生爭端可以訴諸國際法庭（International Court of Justice，簡稱 ICJ）來解決[31]，但 ICJ 沒有接受過任何關於會員國間因為適用伯恩公約而產生爭議的案例[32]。

第三項　羅馬公約

鄰接權係指鄰接於著作權之一種權利，範圍包括對表演者、廣播機構以及錄音物製作人保護其著作免於遭受侵害之權利[33]。欲向公眾傳達著作物之內容，擔任傳達媒介者，例如出版者、電影製作人、表演人、錄音物製作人、廣播機構、演員等存在為不可或缺，其存在對文化發展亦頗具貢獻。由於科技進步，複製技術進步快速普及，逐漸侵蝕前述表演人等經濟利益。這些表演人、錄音物製作人及廣播機構所做成著作，雖所具備的創作性程度不若小說、雕刻等著作，仍有保護的必要，應賦予其某種程度的法益[34]。然而表演人等是利用既有之著作物，本身並非創作著作物人不宜視為著作人，沒有給予著作權保護之理由，因此有必要於著作權架構下，另設一新權利賦予類似著作權人權利，以保護表演人等利益為目的，於是產生了所謂「著作鄰接權」或「鄰接權」概念[35]。

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[31] 伯恩公約第三十三條規定：「(1)本聯盟有二以上會員國對本公約之解釋或適用產生爭議，經協商無法解決者，除各當事國對其他特定解決方式達合意者外，任一當事國得依國際法院規約提出聲請，將爭議交付國際法院審理。將爭議交付國際法院審理之國家，應告知國際局；國際局應使其他會員國注意該事件。(2)各國得於簽署本修正案或交存批准書或加入書時，聲明其不受第(1)項規定之拘束。為此聲明之國家，如與其他會員國發生爭議者，不適用第(1)項規定。(3)為第(2)項聲明之國家，得隨時以書面通知理事長，撤回其聲明。」

[32] 前揭註 16，頁 61。

[33] WIPO, *supra* note 2, at 314.

[34] 李湘雲，著作鄰接權制度之研究─以日本著作鄰接權制度為研究經緯，中原大學財經法律學系碩士論文，九十三年，頁 31。

[35] 同上註。

國際勞工組織（International Labor Organization，簡稱 ILO）自 1926 年起就開始關注對於表演人等之保護。1948 年 6 月於比利時布魯塞爾召開伯恩公約修正會議時，正式提出鄰接權的概念，希望導入關於錄音物製作人、廣播機構及表演藝術家保護，然而會員國意見不一致。1960 年 5 月，聯合國教科文組織（United Nations Educational Scientific and Cultural Organization，簡稱 UNESCO）、伯恩同盟和 ILO 三個機構聯合促成在荷蘭海牙召開的專家委員會議，完成「海牙草案」（「有關表演人、錄音物製作人及廣播機構保護的國際條約草案」：Draft International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization）。1961 年 10 月於羅馬召開會議，以海牙草案為基礎進行審議，在 1961 年 10 月 26 日成立羅馬公約[36]。羅馬公約前言直接揭示了公約目的為：「締約國希望保護表演家、錄音物製作人及傳播機構之權利。」

由於表演、錄音物及廣播機構通常都是利用他人著作，為避免僅保護鄰接權而未保護著作權之情形發生，羅馬公約第二十三條及二十四條乃規定只有伯恩公約與世界著作權公約（Universal Copyright Convention）之會員國始可加入羅馬公約。羅馬公約至 2010 年 3 月 28 日止共計有 88 個會員國[37]。

羅馬公約共 34 條。以下僅就重要原則進行說明：

一、國民待遇保護原則[38]

因為鄰接權具有跨國性及無體性等特點，要確定來源國實屬不易，因而羅馬公約不像伯恩公約是以來源國為國民待遇原則確定標準，而分別以表演人、錄音物製作人與廣播機構來具體規範國民待遇適用原則[39]。分別於第四條、第五條及第六條針對表演人、錄音物製作人及廣播機構，賦予國民待遇保護。

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[36] WIPO, *supra* note 2, at 315.
[37] WIPO website, *supra* note 6.
[38] 羅馬公約第二條規定：「本公約適用上之內國國民的待遇，依以下規定之被要求保護之締約國的國內法令定之：
(1)對於表演家為其國民，而於其本國領域內為表演、廣播或最初固定者。
(2)對於發音片製作人為其國民、而於其本國領域內最初固定或最初發行者。
(3)對於在其本國有主事務所之傳播機關，而其為傳播之傳播設備設於其本國者。」
[39] 前揭註 34，頁 36。

二、最低保護原則[40]

參與公約的締約國，於其本國法律規定賦予外國著作鄰接權人保護不能低於公約規定的標準，由於各國對鄰接權的保護程度標準不一，若僅適用國民待遇原則而未設一最低標準，則可能產生嚴重失衡現象，因此國際公約遂規範一最低保護原則，調和不同保護程度國家間利益。

羅馬公約作為世界第一個保護表演人、錄音物製作人及廣播機構的國際性公約，後續有關於鄰接權公約[41]，原則上承續了羅馬公約的原則及架構。然而，羅馬公約的缺點和巴黎公約、伯恩公約相同：對於權利保護之執行較少有具體規範、缺少一個可以促使會員國有效履行執行程序，以及解決會員國間發生爭議時可以援引的爭端解決機制。

第四項　世界智慧財產權組織

WIPO 於 1967 年 7 月 14 日依據「設立世界智慧財產權組織公約」（Convention Establishing the World Intellectual Property Organization）成立，其總部設立於瑞士日內瓦，自 1974 年起成為屬於聯合國專門機構[42]。WIPO 成立目的為促進國際智慧財產權法律和水準之提升、促進世界對智慧財產權的有效保護、執行與智慧財產權有關專門公約、促進研究以及處理各國與智慧財產權相關的法令與行政工作[43]。WIPO 目前已成為現今推動國際智慧財產權保護工作的主要組織。包括設立世界智慧財產權組織公約在內，WIPO 共管理 24 個與智慧財產權有關的國際公約。

依據其公約第五條規定，其會員國資格取得途徑有三種：該國為巴黎公約等 WIPO 所管理公約的會員國；其次，聯合國會員國或聯合國旗下特設機構之會員，

[40] 羅馬公約第二條第二項規定：「內國國民之待遇，本公約應作明確保障及明確限制之規定。」
[41] 例如：世界智慧財產權組織表演及錄音物條約（WIPO Performances and Phonograms Treaty, WPPT）、日內瓦錄音物公約（Phonograms Convention）、布魯塞爾衛星公約（Brussels Convention）等。
[42] WIPO website, *What Is WIPO?*, *at* http://www.wipo.int/about-wipo/en/what_is_wipo.html (Apr. 13, 2010).
[43] *Id.*

或是國際原子能機構會員國或國際法院規約當事國；最後，由 WIPO 邀請成為 WIPO 會員國的任何國家。WIPO 至 2010 年 3 月 28 日止共計有 184 個會員國[44]。

WTO 與 WIPO 間關係非常密切，不僅法律規範本身具有引用的關係，在組織業務方面亦有密切的合作。首先，下一節欲討論 TRIPS 在有關著作、專利、商標等智慧財產權保護方面，引用了 WIPO 所管轄的巴黎公約、伯恩公約與羅馬公約。其次 WIPO 與 WTO 於 1995 年時，訂定了「WIPO 與 WTO 合作協定」（Cooperative Agreement Between WIPO and the WTO），規定雙方在會員國法律通知與翻譯及其他技術協助方面須相互合作。不過在智慧財產權保護國際層面之發展及其法律基礎探討等方面，仍是以 WIPO 為專門討論平台[45]。

不過 WIPO 所管轄的國際條約，包括巴黎公約、伯恩公約及羅馬公約，正如前面相關篇幅在討論時皆有提及，都有兩個基礎性的缺陷：針對各國國內司法與行政機關的權利執行缺少具體且詳細的規定；缺乏一個有效且具有拘束力的爭端解決機制。加上隨著科技的進步，特別是資訊數位科技，使得現存的國際智慧財產權規範需要與時俱進的修訂[46]。

自 1970 年代開始，已開發國家提議將相關智慧財產權條約進行修正，認為智慧財產權國際條約應予以加強，以對智慧財產權提供有效保障，因為缺乏對智慧財產權有效保障將鼓勵仿冒與盜版之行為；亦主張智慧財產權國際公約應該具備正式的爭端解決機制，才能確保締約國遵守相關規定[47]。1980 年巴黎公約締約國提議修改巴黎公約，但是不同國家的著墨重點不同，已開發國家希望透過修改巴黎公約強化智慧財產權保障；開發中國家則希望公約可以處理技術移轉給開發中國家的問題[48]。由於雙方無法達成一致之意見，最後巴黎公約仍維持 1967 年所為之修正版本。巴黎公約的修正提議失敗，伯恩公約和羅馬公約也持續因為缺

[44] WIPO website, *Member States*, *at* http://www.wipo.int/members/en/ (Apr. 13, 2010).
[45] 許忠信，WTO 與貿易有關智慧財產權協定之研究，頁 177-178，2005 年 5 月。
[46] DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 10 (2d ed. 2003).
[47] 羅昌發，國際貿易法，頁 640，1999 年 7 月。
[48] 同上註。

乏強制力而受到批評[49]。

第五項　小結

現存的國際智慧財產權公約具有基礎性的缺失，然而在 WIPO 運作架構下又因為不同國家的立場分歧，未能進一步修正智慧財產權公約。開發中國家無法制訂相關規定，利用智慧財產權刺激其經濟發展以及科技的進步；已開發國家認為國內的智慧財產權權利未受到保障，無法在 WIPO 處理日漸嚴重的盜版與仿冒問題。已開發國家尋求在 WIPO 以外的架構及場域處理智慧財產權問題，於此種時空背景下似乎是必然的選擇。

第二節　世界貿易組織下之 TRIPS 協定

在 WTO 成立之前，保護智慧財產權的國際法律已略具規模，比較重要的基本原則雖然已經奠定，惟在保護架構上仍有相當缺陷，如本章第一節所述。烏拉圭回合談判制定之 TRIPS 協定於 1995 年與 WTO 成立一同生效後，為目前國際間提供智慧財產權保護態樣最為廣泛的多邊協定，亦首次在國際條約中對於智慧財產權執行作出詳盡且具強制力的規定。

第一項　TRIPS 之形成過程

一、關稅暨貿易總協定時代

在 TRIPS 生效以前，關稅暨貿易總協定（General Agreement on Tariffs and Trade，簡稱 GATT）與智慧財產權有關的條文者最重要的為 GATT 第 20 條第(d)款[50]，該款規定係指，若一國國內法律係關於專利、商標或著作權保護，而該法律規章與 GATT 不相違背，則該國為確保此等法律規章之執行所採取之措施得為

[49] 同上註。

[50] GATT 1947 Art. XX (d):"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

GATT 之例外。因此，至少在 1973-79 年的東京回合（Tokyo Round）舉行之前，智慧財產權在 GATT 之架構中基本上被視為是一種可接受的貿易障礙[51]。但是，隨著仿冒與盜版商品逐漸變成嚴重的貿易議題，必須在國際貿易架構對智慧財產權保護問題提出解決方式。在 1979 年東京回合結束之際，歐體與美國達成協議，訂定「阻止仿冒品進口措施之協定」（Agreement on Measure to Discourage the Importation of Counterfeit Goods）草案，草案目的係提供締約國相當機制以阻斷仿冒品跨國界流通，此草案在 1979 到 1982 年間被各國討論；但相對於已開發國家的立場，許多開發中國家極力反對將智慧財產權議題納入 GATT，認為 GATT 的管轄範圍僅及於有形商品貿易，且已有 WIPO 存在，GATT 並無智慧財產權之職權[52]。此一爭議直到烏拉圭回合談判時才得到結論[53]。

二、烏拉圭回合談判

1986 年的部長宣言，正式開始了 GATT 烏拉圭回合談判，其中包括了與貿易有關之智慧財產權。部長會議設定 TRIPS 的談判目標包括了：減少國際貿易的扭曲與障礙；以更積極的做法來促進有效且適當的智慧財產權保護；避免執行智慧財產權之措施與程序本身不會成為公平貿易的障礙等[54]。

烏拉圭回合宣言最初之強調重點系為了處理仿冒與盜版問題，但其後各國之提議均超過此一原訂目標。1987 年烏拉圭回合第一階段的談判開展時，除了美國外，尚有歐體、日本及瑞士針對 TRIPS 提出各自版本的提案。歐體所提議案基本上與美國類似；而瑞士則對如何改善智慧財產權保護，提出進一步的建議[55]；歐體由於其區域內多數紅酒生產者的緣故，強調地理標示（geographic indication and appellations of origin）必須納入 TRIPS 中；許多開發中國家也聯合提出草案[56]。

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[51] DANIEL GERVAIS, *supra* note 46, at 6.
[52] *Id*. at 8.
[53] 前揭註 47，頁 643。
[54] Multilateral Trade Negotiations, *Ministerial Declaration on the Uruguay Round*, WTO Doc. MIN.DEC (Sept. 20, 1986).
[55] *Id*. at 16.
[56] *Id*. at 22.

烏拉圭回合談判的前三年，TRIPS 談判持續陷在已開發國家與開發中國家彼此對於應納入 GATT 之智慧財產權範圍的分歧立場而無實質進展。TRIPS 談判陷入僵持的主要原因在於以印度及巴西為首的開發中國家的反對。這些開發中國家持續質疑 GATT 與智慧財產權議題的關聯性，並強調 WIPO 才是解決智財權議題適切的論壇。開發中國家亦對過度保護智財權所造成科技移轉障礙，以及對藥品與農化產品施予專利保護所衍生的問題表達嚴重關切[57]。

最後，經過多方協商與安排，開發中國家及低度開發國家鑒於：多邊經貿諮商優於雙邊經貿諮商，TRIPS 提供了有效的多邊爭端解決、WTO 其他協定可為其增加利益，補充 TRIPS 方面的損失、TRIPS 增訂為公益或醫療衛生等之例外規定，並對其訂有過渡期間優惠、已開發國家威脅退出烏拉圭回合談判、智慧財產權保護為全球必然趨勢無從迴避等因素，開發中國家最後終於同意進行 TRIPS 討論[58]。因此，烏拉圭回合談判終將智慧財產權保護之全面性規範納入 TRIPS 中。

1993 年 12 月 15 日完成烏拉圭回合（Uruguay Round）談判，並於 1994 年 4 月 12 日到 15 日在摩洛哥（Morocco）簽署烏拉圭回合最終協議（Final Act），協議成立一永久性世界貿易組織 WTO。WTO 於 1996 年正式取代 GATT。WTO 將與保護智慧財產權的事項納入協定的附錄 C，稱為「與貿易有關之智慧財產權協定」。WTO 成為目前國際上最重要的多邊貿易組織，TRIPS 亦為目前國際間提供智慧財產權保護態樣最為廣泛的單一多邊協定。

第二項　TRIPS 概述

TRIPS 所保護之智慧財產權包括：著作權及其鄰接權、商標、專利、地理標示、工業設計、積體電路電路佈局、未公開資訊之保護等，規範目的在於除訂定相關權利最低保護原則外，尚包括各項實質權利內容及執行智慧財產權保護程

[57] DANIEL GERVAIS, *supra* note 46, at 14.
[58] 廖心予，WTO 架構下國際智財權規範的發展與變遷，第四屆全國公共事務論文發表會，東海大學行政管理暨政策學系，2007。

序與相關行政程序。TRIPS 規範共分七個部分，主要內容包括：一般規定的基本原則；智慧財產權之範圍、使用等相關規範標準；智慧財產權的執行；智慧財產權的取得與維護以及相關程序；有關爭端的防止與解決；過渡條款；組織條款暨最終規範。以下僅針對 TRIPS 之義務範圍、一般原則及與其他智慧財產權公約之關係進行概述。

一、義務範圍

TRIPS 第 1 條第 1 項[59]揭示 TRIPS 僅為締約方就智慧財產權之保護所應遵守最低標準，故會員若自願實施較 TRIPS 所要求者為高之標準，並非 TRIPS 所禁止。惟會員在 TRIPS 下亦無義務實施較嚴格之保護標準，但並非謂會員在其他協定之下亦不得被要求實施較嚴格之保護標準。再者，由於 TRIPS 所要求者為保護之結果，至於保護方法，由於各國國內法律體制並不相同，各締約方有權決定所採取的方法[60]。

二、與其他智慧財產權公約之關係

TRIPS 許多實體規範，係直接將若干既存國際協定或公約的規定納入作為內容加以規定。其所引用之國際協定及公約包括：巴黎公約、伯恩公約、羅馬公約以及「關於積體電路之智慧財產權條約」（The Treaty on Intellectual Property in Respect of Integrated Circuits，簡稱為 IPIC 公約）等。

由於 TRIPS 協定引用其他公約或條約規定，可以避免兩者在制訂過程中所無意產生之差異，且其他公約與條約在 TRIPS 生效後仍有存在餘地。由此角度而言，TRIPS 不但係一種獨立的智慧財產權保護體系，亦可視為補充 WIPO 等智慧財產權體系不足之設計[61]。

三、重要原則

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[59] TRIPS, Art. 1:" 1.Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their 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."

[60] 前揭註 47，頁 645-646。

[61] 同上註，頁 648。

(一)、 國民待遇原則

TRIPS 於第 1 條第 3 項規定，會員應將本協定規定之待遇給予其他會員國民[62]；第 3 條第 1 項前段規定[63]，原則上每一會員應賦予其他會員國民的待遇不得低於其賦予本身國民之待遇，亦即就智慧財產權保護而言，其他會員國民至少應與該會員國民受到同等保護，但亦承認相關公約所規定之既有例外。

(二)、 最惠國待遇原則

過去的智慧財產權領域的國際公約中，幾乎沒有一個公約有制訂最惠國待遇（The Principle of Most-Favored-Nation Treatment）條款。TRIPS 在其所引用的四個重要國際智慧財產權公約中，在既有的國民待遇基礎上，納入最惠國待遇原則，規定在 TRIPS 第 4 條，對於非歧視性貿易提供了重要的法律基礎。

第三項 與執行相關之規範

以往在 WIPO 的架構下並無一有效且具拘束力的執行規範，很難要求各國遵守相關的國際智慧財產權公約，故在烏拉圭回合談判時，已開發國家認為應在 TRIPS 協定中另設較為有效之執行規範。至於開發中國家則有不同立場，認為只要在 TRIPS 協定中就執行規範設定原則性規定即可，並認為有必要在協定中承認開發中國家就智慧財產權之執行，在行政與財政之基礎設施及資源上普遍不足

[62] TRIPS, Art. 1.3:"3.Members shall accord the treatment provided for in this Agreement to the nationals of other Members. 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 WTO members of those conventions. Any Member availing itself of 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 (the "Council for TRIPS")."

[63] TRIPS, Art. 3.1:"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 protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or 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 (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS."

[64]。最後通過之 TRIPS，不同於既存國際公約，對於智慧財產權之執行設有相當詳細且具體的規範。

一、一般性義務

TRIPS 明訂了執行面一般義務（General Obligation），會員必須設有一定執行程序，以有效處理智慧財產權侵權行為；所要求之有效處理措施，包括迅速救濟措施以阻止侵害行為，以及對將來可能發生之進一步侵害行為可以形成嚇阻作用之救濟措施。但是這種救濟程序的適用，應避免造成對合法貿易之障礙，且應提供防護方法以避免造成濫用[65]。

會員所設置之執行程序並須符合公平且合理（fair and equitable）之件，且此等程序不得過於複雜或是使當事人負擔過重成本，亦不得設定不合理期限或造成不當遲延[66]。就案件之實體問題所作成決定以書面並附具理由為佳；此等決定最少必須提供當事人，且不得有不當之遲延，對實體問題所做成決定，必須完全依據證據，且當事人對相關之證據，必須有機會提出言詞辯論[67]。會員對相關程序之當事人就該程序最終決定，應賦予向司法機關要求進行司法審查之權[68]。不過，TRIPS 協定關於執行程序之規定，並不要求會員在其司法體制下，將執行智慧財產權之體制，與其執行其他法律之體制相區別；會員在 TRIPS 協定之下，並無義務在其國內資源分配上，對智慧財產權之執行給予較多於其他一般性之法律執

[64] 前揭註 47，頁 747。

[65] TRIPS, Art. 41.1:"1.Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse."

[66] TRIPS, Art. 41.2:"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."

[67] TRIPS, Art. 41.3:"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."

[68] TRIPS, Art. 41.4:"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 a Member's law 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."

行之資源分配[69]。最後一項規定係回應開發中國家在談判中的要求。

二、民事與行政程序及救濟

會員就民事程序（Civil Procedures and Remedies）所應遵守之原則係規定於TRIPS 協定第 42 至第 48 條。第 49 條則規定若行政程序對案件實體爭點，最終可以導致提供民事救濟，則該行政程序應遵守此處所設原則[70]。

(一)、 公平且合理之程序

智慧財產權執行程序並非一味對權利人提供毫無限制之保障，而係同時要求對權利人與被告有相同保護。因此，除了前述第 41 條第 2 項規定「公平且合理」程序之外，並於第 42 條規定：「會員應賦予權利人行使本協定所涵蓋之智慧財產權之民事訴訟程序之權利。被告有被及時以書面詳細告知其被告之理由及其他相關細節之權利。雙方當事人均得委任獨立之律師代理訴訟，且訴訟程序於當事人必須親自到庭之相關規定上，不得使當事人增加無謂之負擔。訴訟當事人均應有權提出證據及陳述理由；訴訟程序於不違反憲法規定之原則下，應提供認定與保護秘密資訊之措施。」[71]原則上，一般國家法律原則均可以符合此規定的基本要求。

(二)、 證據規範

第 43 條就民事程序證據（Evidence）之提出義務，強制要求被告必須在某

[69] TRIPS, Art. 41.5:"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 law in general, nor does it affect the capacity of Members to enforce their law 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 law in general."

[70] TRIPS, Art. 49:"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."

[71] TRIPS, Art. 42:" Members shall make available to right holders 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."

些情況下提出其相關文件，以作為該民事案件證據[72]。第 43 條第 1 項規定：「當一造已提出合理可以獲得之充分證據支持其主張，且指明相關重要證據為對造所持有時，司法機關有權命對造提出該證據。但必須受有確保秘密資訊保護之限制。」同條第 2 項規定：「當事人一造在合理時間內自願且無正當理由而拒絕提供或未提供必要資訊，或明顯的阻礙執行程序，會員得授權司法機關依據已被提出之資訊，包括因他方拒絕提供資訊而受不利影響之當事人所提出之指控及主張為肯定或否定之初步或最終判決。但應給予當事人就主張或証據辯論之機會。」

(三)、 禁制令

禁制令（Injunctions）係英美法概念，大陸法系僅有類似之「假處分」[73]。TRIPS 第 44 條要求會員對司法機關賦予簽發禁制令權限[74]，並非要求大陸法系國家改變其制度而採取禁制令之規定，實際上是要求各會員均設有類似禁制令之規範，故會員亦得以「假處分」之規定履行第 44 條之規定。

(四)、 損害賠償

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[72] TRIPS, Art. 43:"
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 to providing the parties an opportunity to be heard on the allegations or evidence."

[73] 前揭註 47，頁 750。

[74] TRIPS, Art. 44:"
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 subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available."

損害賠償（Damages）為智慧財產權法律救濟最基本方式，不過 TRIPS 第 45 條第 1 項規定要求須賠償者，限於明知而侵害智慧財產權之情形，以及雖非明知，但有合理之理由應該得知造成侵權之情事[75]。其他情形所造成之侵害行為，TRIPS 並不要求會員必須命侵權行為人賠償。

同條第 2 項一方面規定權利人包含律師費等相關支出亦為侵權人應賠償之範圍[76]，另一方面賦予會員相當之自由決定權，決定是否對權利人擴大保護之程度。換言之，會員可自行決定是否要求非明知或無可得知之侵權人對權利人賠償損害，會員亦可自由決定是否將損害賠償範圍擴大到利益之損失，甚至可以自行決定是否在其國內法中預先設定固定賠償額度，以便適用於具體案件中；不過，會員並無義務必須對非明知或無可得知之侵權人要求賠償，亦無義務將損害賠償範圍擴大到利益之損失或在其法律中預先設定固定賠償額度[77]。

(五)、 其他救濟

TRIPS 所要求會員對權利人提供救濟方式，除前述禁制令以及損害賠償外，尚有「將侵害產品排除於商業管道之外」之救濟方式（Other Remedies）。第 46 條規定：「為有效遏阻侵害情事，司法機關對於經其認定為侵害智慧財產權之物品，應有權在無任何形式之補償下，以避免對權利人造成任何損害之方式，命於商業管道外處分之，或在不違反其現行憲法之規定下，予以銷毀，司法機關對於主要用於製造侵害物品之原料與器具，亦應有權在無任何形式之補償下，以將再為侵害之危險減至最低之方式，命於商業管道外處分之。在斟酌前述請求時，侵害行為之嚴重性，所命之救濟方式及第三人利益間之比例原則應納入考量，關於商標仿冒品，除有特殊情形外，單純除去物品上之違法商標並不足以允許該物品

[75] TRIPS, Art. 45.1:" 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 that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity."

[76] TRIPS, Art. 45.2:" 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 knowingly, or with reasonable grounds to know, engage in infringing activity."

[77] 前揭註 47，頁 752。

進入於商業管道。」[78]本條所規定救濟方式並不以貨品所有人被認定違反刑事責任為條件，亦不以貨品所有人被認定必須賠償權利人之損失為前提，而係一種獨立民事救濟方式[79]。

(六)、 對被告之賠償

對智慧財產權保障若超過合理程度，有可能對貿易造成影響或限制他人合法行為。故 TRIPS 第 48 條要求締約方必須賦予其司法機關對要求採取措施卻濫用執行程序之當事人，對於被錯誤禁止或限制之當事人，由於此項濫用執行程序所造成損害提供適當補償（Indemnification of the Defendant）；司法機關亦應有權命該申請執行程序當事人，對執行程序被告支付其所發生之費用[80]。

三、暫時性措施

由於智慧財產權司法救濟程序中時間常為重要考慮因素之一，故 TRIPS 要求締約方必須在其法律制度內，設有暫時性措施（Provisional Measures）。第 50 條第 1 項規定：「司法機關應有權採取迅速有效之暫時性措施以：(a)防止侵害智慧財產權之情事發生，特別是防止侵害物進入管轄區域內之商業管道包括業經海關通關放行之進口物品在內。(b)保全經主張為與侵害行為相關之證據。」[81]

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[78] TRIPS, Art. 46:" 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."

[79] 前揭註 47，頁 753。

[80] TRIPS, Art. 48.1:" 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."

[81] TRIPS, Art. 50.1:" 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;

四、邊境措施之特別規定

智慧財產權保護重要課題之一為避免侵權貨品進行跨國界流通。TRIPS 應美國及其他已開發國家要求，亦納入邊境措施規範（Special Requirements Related to Border Measures）。邊境措施規定主要內容為，要求會員賦予其主管機關較大之權限以控制仿冒品之進出國界[82]。

第 51 條規定，締約方必須針對商標與著作權侵權物品制定進口邊境保護特別措施，至於其他智慧財產權之特別邊境保護措施，以及關於所有智慧財產權之出口特別邊境保護措施，則可由締約方自由決定是否在其法律中加以規定[83]。在本條規定下，締約方可以決定究竟由司法機關或由行政機關作為主管實施邊境措施機關，一旦主管機關決定應暫停將相關貨物放行，海關即有義務實施該主管機關決定。第 52 條規定，權利人要求實施本條所定之程序，僅須提出其懷疑侵害其權利正當理由即可；但權利人仍必須提出相當證據以證明有可資推定侵害之事實存在[84]。第 53 條第 1 項規定，主管機關亦得要求權利人在申請實施此項程序時提出一定之擔保，以保護被告及主管機關，並防止權利人濫用此一程序[85]。第 59 條規定，主管機關並應有權對侵權貨品，依照第 46 條其他救濟所訂原則，命

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

[82] 前揭註 47，頁 754。

[83] TRIPS, Art. 51:" Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods 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."

[84] TRIPS, Art. 52:" Any right holder initiating the procedures under Article 51 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 the right holder's 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."

[85] TRIPS, Art. 53.1:" 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 to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures."

加以破壞或處置，但被告應有權對此尋求司法審查[86]。

五、刑事程序

刑事程序（Criminal Procedures）原則上係嚇阻侵害智慧財產權之最有效方法。但由於若干侵害行為並未構成刑事上可罰程度，故 TRIPS 並不要求締約方必須對所有侵害智慧財產權行為課以刑事處罰。第 61 條規定：「會員至少應對具有商業規模而故意仿冒商標或侵害著作權之案件，訂定刑事程序及罰則。救濟措施應包括足可產生嚇阻作用之徒刑及（或）罰金，並應和同等程度之其他刑事案件之量刑一致。必要時，救濟措施亦應包括對侵權物品以及主要用於侵害行為之材料及器具予以扣押、沒收或銷毀。會員亦得對其他侵害智慧財產權之案件，特別是故意違法並具商業規模者，訂定刑事程序及罰則。」

六、爭端解決

加強智慧財產權的執行和建立有效且具強制力的爭端解決機制（Dispute Settlement）是已開發國家在 TRIPS 談判過程中追求的目標，TRIPS 第 64 條第 1 項規定：「爭端解決瞭解書所解釋及適用之 GATT 1994 第 22 條及第 23 條，應適用於本協定之爭端諮商與解決。但本協定另有規定者，不在此限。」[87]原則上，因 TRIPS 所生爭端皆可以適用整個爭端解決程序。

第四項　小結

由前述 TRIPS 執行與爭端解決相關規範可看出，與既存智慧財產權國際公約不同的是，TRIPS 不僅規定了應保護的智慧財產權類型，同時要求締約方採取各種具有實際效益措施來落實協定規範內容，以阻止智慧財產權侵權行為之發生。TRIPS 規定了嚴格且具體的執行規範，要求締約方必須實施民事、行政、刑事法

[86] TRIPS, Art. 59:" 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. 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."

[87] TRIPS, Art. 64.1:" 1.The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein."

律程序以及臨時措施和邊境措施處理智慧財產權侵權行為，希望可以改善國際間智慧財產權保護水準[88]，促進全球在打擊侵權和盜版商品方面的國際合作，並且減少國際貿易可能因此產生之扭曲和不公平競爭。

然而，TRIPS 的規範架構仍存在著相當的爭議性與不足處。首先，TRIPS 協商時，網際網路和資訊科技發展尚未普遍，今日網際網路不但已經普及也快速的商業化，科技的演進對於智慧財產權保護帶來重大挑戰。這種規範未及之處使得國際間後來積極在 TRIPS 現有的規範基礎上透過 WIPO 對網際網路與智慧財產權的保護問題加以因應[89]。

再者，盜版及仿冒品之情形仍然猖獗，原因是侵權行為之態樣多變，加上 TRIPS 的執行規範在某些國家國內實踐時流於空白和模糊，皆使得智慧財產權之保護不夠有效率[90]。WTO 的締約方對此種現象有不同反應。有些已開發國家，例如美國，嘗試進一步提升 TRIPS 規範基準打擊侵權行為，這些遠高於 TRIPS 所設立最低保護基準的規定被稱為「TRIPS-Plus」，美國同時在多邊貿易體系以及雙邊貿易體系推動這些 TRIPS-Plus 規定；有些開發中或低度開發國家則因為無法有效執行 TRIPS，使得智慧財產權保護遠落後 TRIPS 之最低保護基準[91]。智慧財產權國際保護基準產生分裂現象，使得採行 TRIPS-Plus 國家與 TRIPS 執行落後國家間產生了摩擦，多邊貿易體系中智慧財產權國際保護之進展與談判，也因為這種摩擦以及長久以來已開發國家和開發中國家在智慧財產權利益之立場分歧而陷入了僵局。

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[88] Timothy P. Trainer, *Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. Marshall Rev. Intell. Prop. L. 47(2008).

[89] 如 WIPO 於 1996 年所通過的「WIPO 著作權條約」（WIPO Copyright Treaty，簡稱 WCT）與「WIPO 表演及錄音著作物條約」（WIPO Performances and Phonograms Treaty，簡稱 WPPT）。

[90] Timothy P. Trainer, *supra* note 88.

[91] *Id.*

第參章　美國智慧財產權保護之貿易政策

已開發國家成功的在烏拉圭回合談判中將智慧財產權保護納入WTO管轄範圍，TRIPS成為目前國際間提供智慧財產權保護態樣最為廣泛之單一多邊協定，同時規定了嚴格且具體的執行規範，也提供了具拘束力的爭端解決機制，解決了許多之前既存國際公約在智慧財產權保護之缺陷。已開發國家對於強而有力的智慧財產權保護之訴求似乎已經達成。但是，TRIPS只是這些已開發國家朝向此目標的過程而已，美國以及其他已開發國家在TRIPS制訂之後，仍繼續新的貿易政策，希望可以持續地推動並提升國際間智慧財產權保護水準。

多邊貿易架構的進展在TRIPS後出現了一些阻礙，例如，開發中國家和已開發國家兩個陣營立場分明的抗衡造成已開發國家的所有訴求無法在烏拉圭回合談判中完全被接受、TRIPS制定完成後各會員中的實際執行水準出現落差[92]等，使得已開發國家無法在現階段的多邊貿易架構中取得更進一步成果，迫使已開發國家選擇將努力的重點由多邊貿易體系移轉到雙邊和複邊的貿易體系。因此，當許多開發中與低度開發國家仍為如何達成TRIPS之義務而努力時，以美國為首的已開發國家已經開始嘗試藉由自由貿易協定（Free Trade Agreement，簡稱FTA）提高所欲追求國際智慧財產權保護水準。智慧財產權保護多邊貿易架構的體系出現割裂與摩擦，原本以多邊體系為發展重心的的智慧財產權保護，似乎開始又朝各國漸漸分離的方向發展。

惟已開發國家的政策重心雖有所移轉，並非意謂其完全放棄了歷經相當時間、花費許多執行成本才建立起的多邊貿易架構。對於智慧財產權保護的執行實則採取了雙軌並行方式，在複邊與多邊貿易架構中同時推動。只是相較於TRIPS後短時間內似乎無法再取得相當程度成果的多邊貿易架構，已開發國家開始往複邊貿易架構中注入更多的資源以執行智慧財產權保護之相關政策。考量到多邊貿易架構參與者眾多造成各方利益分歧、談判協商不易進行的本質，已開發國家持續

[92] *Id.*

推動並提升國際間智慧財產權保護水準目標的過程中，複邊貿易架構會從此變成已開發國家的政策重心，造成智慧財產權保護永遠自多邊貿易架構偏離不再有聚合的國際情勢發生嗎？本章將以美國貿易政策為主軸對此點進行討論。

第一節　美國貿易政策之演變

國際貿易體系存在著數種不同的貿易政策架構。單邊主義（Unilateralism），指試圖將一國對特定產品貿易或全球貿易政策觀點強加在他國身上，並使他國接受。此種單邊主義通常僅在享有壓倒性經濟支配力之優勢下才有作用，但並不見得一定會成功，且通常會造成長期的對立氣氛。雙邊主義（Bilateralism）主要藉由雙方直接談判而形成國際貿易政策。雙邊主義認為若僅涉及雙方當事人，談判目的較容易達成，但是雙邊方式是否有效，須視一個國家有多少能影響其他國家行為之談判籌碼而定。此種談判方式對於強國較為有利，而對小國或中等國家利益較為不利。複邊主義（Plurilateralism）的範圍較雙邊主義大，但又較有多數參與者的多邊主義為小，是一種在較小的集團內之行為。各國貿易政策並非單軌且固定不變，往往會因應當時國際情勢及考量國內貿易政策目標後，採取對自己較有利的貿易政策手段。

第一項　不同時期之貿易政策

早期的智慧財產權保護同其他貿易利益，各國為了發展國內產業以及促進出口成長，都是以國內保護為原則並對他國採取歧視性之待遇。後來了解到這種方式對於智慧財產權保護非常沒有效率，於是發展出了最惠國待遇原則與國民待遇原則，納入在早期規範範圍涵蓋智慧財產權的雙邊友好通商航運條約（Friendship, Commerce and Navigation agreement，簡稱 FCN）中[93]。但是到了 1800 年代中期，雙邊貿易協定數目大量增加，形成了所謂的「義大利麵碗效應」[94]（Spaghetti Bowl

[93] BRYAN MERCURIO, TRIPS-PLUS PROVISIONS IN FTAS: RECENT TRENDS, IN REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 216-217(Lorand BArtlels & Federico Ortino eds., 2006).

[94] 義大利麵碗效果(spaghetti bowl effect)，用法始於 Bhagwati 及 Panagaryia 於 1996 年出版之《優惠貿易協定經濟學》（The Economics of Preferential Trade Agreements）書中，主要在說明區域的或雙邊的優惠貿易協定並非推動貿易自由化的最佳方式，因為它對非會員國是一種歧視。

Effect)，最惠國待遇和國民待遇適用漸趨複雜，很難加以管理或適用，各國政府因此認知到必須用一個正式的國際架構規範保護智慧財產權。以早期雙邊貿易協定所發展出的規則作為基礎，在這段時期完成了巴黎公約、伯恩公約之簽署，後續並成立了 WIPO 管理這些與國際智慧財產權保護相關之國際公約[95]。

經過一段時間之後，因為 GATT 1947 未能成功地將所有 FCNs 中傳統所涵蓋之智慧財產權議題納入管轄範圍，各國於是開始協商雙邊投資條約（Bilateral Investment Treaty，簡稱 BIT)，用以保護包含智慧財產權在內之各種私權[96]。在 1970 年代與 1980 年代早期所協商之 BITs，代表了各國將智慧財產權之保護重心由多邊又移轉到雙邊體系，並且也隨之發展出了更詳盡的規範內容與保護方式。然而多邊貿易體系在同一時期並非全然沒有進展，以 WIPO 作為重心仍有相當程度之發展，惟 WIPO 被視為由開發中國家所主導之國際組織，已開發國家認為 WIPO 無法對智慧財產權提供有效之國際保護，因而此時期已開發國家之重心仍以 BITs 協商為主[97]。

但是以雙邊條約為主的智慧財產權保護架構並未能有效地達成原本預期目的。盜版活動猖獗，仿冒品貿易金額龐大，估計當時每年造成美國約 430 到 610 億美元之損失[98]。由於美國產業特性，加上美國自 1970 年代開始，國內製造業大規模外移、萎縮，貿易赤字驚人，美國經濟必須仰賴服務業的輸出以及研發的回收來平衡，智慧財產權逐漸成為美國的國家商業利益，因此智慧財產權保護變成美國貿易政策的重要目標之一，國際貿易和智慧財產權開始產生密切牽連[99]。美國採取了許多政策工具希望可以增強其在智慧財產權領域之優勢與利益，同時以單邊、複邊及多邊之貿易手段執行其政策目標。

最著名之單邊貿易政策即為美國 301 制度[100]，是 1974 年貿易法(US Trade Act

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[95] Bryan Mercurio, *supra* note 93.
[96] *Id*., at 217.
[97] *Id*.
[98] *Id*.
[99] 前揭註 47，頁 641。
[100] 有關 301 條款更進一步之說明，見羅昌發，美國貿易法中三零一報復條款之研究，美國貿易救濟制度：國際經貿法研究一，頁 7 以下，月旦出版社，1994 年。

0f 1974）第 301 條款所創設之制度；1988 年綜合貿易與競爭力法案（Omnibus Trade and Competitive Act of 1988）又大幅擴展了 301 條款之範疇，創造出所謂的「特別 301 條款」及「超級 301 條款」，並且正式賦予貿易代表署（United State Trade Representative，簡稱 USTR）301 條款的調查權限[101]。特別 301 條款要求 USTR 每年提列出未提供適當地保護智慧財產權，或未公平合理的開放市場以使智慧財產權商品自由進入的國家，將其分列入：優先指定國家（Priority Foreign Country）、優先觀察名單（Priority Watch List）與一般觀察名單（Watch List）。美國會在公告後 6 個月內對優先指定國家展開調查並進行諮商，若不能達成協議再決定貿易報復措施，針對該國任何輸入美國的重要產品課徵高關稅；「優先觀察名單」與「一般觀察名單」國家則不會面臨立即報復措施或要求諮商，除非美國察覺有更嚴重的違反智慧財產保護行為[102]。美國此時重要複邊貿易政策為北美自由貿易協定（North American Free Trade Agreement，簡稱 NAFTA）之協商。NAFTA 是當時協商內容最為廣泛自由貿易協定。美國在 NAFTA 協商過程加入智慧財產權規範，同時將智慧財產權與其普遍化優惠關稅制度（Generalized System of Preferences，簡稱 GSP）作連結[103]。多邊貿易政策方面，則由於東京回合談判未能處理仿冒品議題，加上開發中國家強烈抗拒將智慧財產權列為烏拉圭回合談判項目之一而未有顯著成果。因此，1980 年代中期，美國智慧財產權保護之貿易政策主要將具攻擊性單邊貿易政策以及 BITs 列為主軸[104]。

美國嘗試將智慧財產權納入 WTO 管轄範圍之努力，由於眾多已開發國家對此議題立場一致，終於成功將智慧財產權列為烏拉圭回合談判項目，烏拉圭回合後 TRIPS 生效[105]。TRIPS 在智慧財產權保護之特點第貳章已有概述。但是 TRIPS 正式生效後，基於並非所有訴求在烏拉圭回合談判中皆被接受、TRIPS 制定完成

[101] 林彩瑜，WTO 爭端機制與美國貿易法 301 條款之研究，1999 全國智慧財產權研討會論文，國立交通大學，1999 年。
[102] *Id*.
[103] Bryan Mercurio, *supra* note 93, at 218.
[104] *Id*.
[105] *Id*.

後實際執行情況在各國有落差等現實因素，美國以及其他已開發國家仍希望可以繼續推動並提升國際間智慧財產權保護之水準。1990 年代，已開發國家延續先前主張，在 WTO 下繼續尋求更高水準智慧財產權保護。開發中國家則認為其在烏拉圭回合讓步過多，且已開發國家為了換取 TRIPS 生效對開發中國家所作出之種種承諾並未完全實現，因此強力抗拒在 TRIPS 以後繼續讓智慧財產權議題有更進一步發展[106]。

隨著西雅圖部長會議（Seattle Ministerial）失敗、杜哈會議「TRIPS 協定與公共健康宣言[107]」（The Doha Declaration on TRIPS and Public Health）之通過，以及現階段陷入延宕的杜哈回合談判（Doha Round）等眾多因素[108]，都使得美國再次將貿易政策的重心移轉到雙邊和複邊貿易架構，亦即開始利用 FTAs 談判將智慧財產權保護納為 FTAs 實體規範一部分，並且要求對手國需提高智慧財產權保護水準。

第二項　美國 TRIPS-Plus 貿易政策之產生

美國選擇將貿易政策的重心移轉到雙邊和複邊貿易架構有幾個重要因素：第一，多邊貿易體系下為了使眾多參與者皆能達成共識，許多不同意見或利益必須妥協，因此所能獲得的談判成果往往有限；若為雙邊談判，由於美國為世界最主要的市場之一，FTA 的對手國為了可以獲得 FTA 可能帶來的經濟利益會作出幅度較大之讓步[109]。第二，多邊條約中通常會訂定有不參與條款（opt-out clause）或者特殊待遇，這些條款會使得締約目標未能完全實踐，也會使得雙邊或複邊協定可進一步針對這些漏洞加以規範[110]。

美國目前總共與 20 個國家簽署 FTAs，其中有三個已簽署但尚未生效。美國目前已簽署且經國會同意生效之 FTAs 國家與簽署時間分別為：以色列（1985）、

106 *Id*.
107 WTO Ministerial Conference Fourth Session, *Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (Nov. 14, 2001) [hereinafter *The Doha Declaration on TRIPS and Public Health*].
108 Bryan Mercurio, *supra* note 93, at 219.
109 *Id*., at 220.
110 *Id*.

加拿大、墨西哥（NAFTA ，1992）、約旦（2000）、新加坡（2003）、智利（2002）、摩洛哥（2004）、巴林（2004）、澳洲（2004）、多明尼加、哥斯大黎加、薩爾瓦多、瓜地馬拉、宏都拉斯及尼加拉瓜中美洲六國（Dominican Republic- Central America Free Trade Agreement，簡稱 CAFTA-DR，2004）、阿曼（2006）、秘魯（2006）；目前已簽署但仍待國會批准之 FTAs 國家與簽署時間分別為：哥倫比亞（2006）、南韓（2007）、巴拿馬（2007）；談判仍在進行中或處於中止狀態的 FTAs 包括：馬來西亞、泰國、阿拉伯聯合大公國、南非洲關稅同盟[111]、美洲自由貿易區[112]（Free Trade Area of the Americas，簡稱 FTAA）[113]。值得一提的是，雖然此處列舉的 FTAs 數目看似眾多，但是相較於所耗費的成本與時間，加上在美國國內、對手國國內等針對 FTAs 的反對聲浪，其實美國所獲得的成果相當有限。本文後續也將針對此美國 FTAs 的政策成效進行分析。

美國 FTAs 貿易談判與提升國際間智慧財產權保護二者存在有直接關連，但是以上這些與美國已經簽署 FTAs 之國家，皆非一般認知中盜版及仿冒活動猖獗國家，例如中國、印度或俄羅斯，這些嚴重侵害了美國智慧財產權利益之國家，一直以來都被列在美國 301 制度中的優先觀察名單，為何不是美國雙邊貿易談判的選擇[114]？甚至，這些 FTAs 國家也未包含美國傳統上重要的經濟貿易夥伴，例如歐盟或日本，考慮到彼此間龐大的貿易交易量和經濟利益，美國為何不在多邊貿易體系之外，另外尋求與這些國家協調彼此國內智慧財產權規範之可能性[115]？美國投入了大量的時間、人力與經費在 FTAs 的協商，藉由 FTAs 中的 TRIPS-Plus 規範架構出了一個複雜的法律框架，美國到目前為止 FTAs 對手國的選擇，是否

[111] 南非洲關稅同盟（Southern African Customs Union，簡稱 SACU）於 1969 年 12 月 11 日成立，成員包括南非、波札那、賴索托、史瓦濟蘭和納米比亞。

[112] 美洲自由貿易區，最早於 1994 年美國邁阿密西半球元首會議上提出，目標是在 2005 年建立一個全世界最大的自由貿易區，但是目前談判陷入停擺的狀態。可參考 FTAA 官方網站：http://www.ftaa-alca.org/alca_e.asp。

[113] USTR, *Free Trade Agreement*, *at* http://www.ustr.gov/trade-agreements/free-trade-agreements (May 19, 2010).

[114] Jean-Federic Morin, *Multilateral TRIPS-Plus Agreements: Is the US Strategy a Failure?*, 12 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 175, 176 (2009).

[115] *Id*.

實質上反應出其智慧財產權保護貿易政策的真正意涵？

第二節　何謂 TRIPS-Plus

美國是目前 TRIPS-Plus 此種雙邊貿易政策之主要施行國家，因此，本節將檢視納入在許多 FTAs 中智慧財產權保護規範，並藉此了解美國如何以這種貿易政策達到提高國際間智慧財產權保護水準目的。

第一項　TRIPS-Plus 之定義

美國貿易談判授權法（Trade Promotion Authority Act 2002，簡稱 TPA）第 2102 條中明訂了貿易談判目標之一就是將智慧財產權保護水準提升到與美國國內立法一致[116]。這些被納為 FTAs 實體規範一部分並且要求對手國需提高智慧財產權保護水準規定，被稱為 TRIPS-Plus。

TRIPS-Plus 泛指規定內容保護程度高於已經被涵蓋在 TRIPS 中者。美國利用 FTAs 談判提高智慧財產權保護水準之方式大略有以下幾種：在 FTAs 中規定新興類型之智慧財產權、以高於 TRIPS 規定之標準執行智慧財產權保護、消除或限縮 TRIPS 中所提供之執行彈性或選擇[117]。這些都是 TRIPS-Plus 表現形式。

第二項　TRIPS-Plus 之規範類型

美國近期所簽署 FTAs 包含了各種可以執行及保護智慧財產權之機制和規定，本文礙於篇幅不會全部整理與比較各個 FTA 中的每條 TRIPS-Plus 規範，而是僅區分為幾個主要的類型進行概述。雖然美國與各國所簽署 FTAs 並非完全相同，締約時會因對手國不同在細部規定有差異，但是仍可整理出一些共同的要素。

一、專利權與醫藥試驗資料保護

(一)、　專利權保護期間

TRIPS 第 33 條規定專利權保護期間自申請日起至少 20 年[118]。FTAs 基本上

[116] 原文：The principal negotiating objectives of the USA regarding trade-related property are…to further promote adequate and effective protection of intellectual property right, including through…

[117] Bryan Mercurio, *supra* note 93, at 219.

[118] TRIPS, Art. 33:" The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date."

提供相同保護期間，但是若由於法定主管機關審查程序的「不合理」（unreasonable）延遲，專利權之保護期間可以再延長等同該不合理延遲所造成的期間[119]。在多數的已開發國家類似措施為常態，但是，開發中國家往往因為行政資源短缺與行政人員經驗不足造成審查程序期間延長，若何謂「不合理」未能明確作出定義，此看似合理的條款其實對於開發中國家的利益會有負面影響[120]。

(二)、 可專利性

TRIPS 第 27 條第 3 項(b)款規定會員得不對微生物以外植物與動物予以專利保護[121]（patentability），但是所有的 FTAs 中皆規定應對其提供專利保護。其中，規範效力最強的是與摩洛哥之 FTA，當中表明了對生命形態提供專利保護詳細規定[122]。

(三)、 藥品上市許可審核

FTAs 中的相關規定了限制一國政府對學名藥（generic drug）廠商提供競爭機會可能性[123]。原則上學名藥廠商必須獲得藥品管制機關允許才得進入市場，FTA 在此程序設立了一些障礙，例如，若尚在藥品專利權存續期間，需獲得專利權人同意才可獲得藥品管制機關上市許可（market approval）。TRIPS 對此並未有任何規定。

(四)、 資料專屬權

申請藥品上市許可之前，藥品製造商必須向藥品管制機關聲請許可，經此程序才能確保上市藥品是安全且有效的，藥品管制機關審核之依據為申請人提交的臨床試驗資料和數據；若另有申請人亦針對同一種藥品申請許可，後者只要證明

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119 *See* CAFTA-DR Art. 15(9)(6), US-Chile FTA Art. 17(9), US-Singapore Art. 16(7)(7), US-Morocco Art. 15(9)(7), and US-Australia Art. 17(9)(8).

120 Bryan Mercurio, *supra* note 93, at 229.

121 TRIPS, Art. 27.3 (b):" Members may also exclude from patentability: (b) plants and animals other than micro-organisms, 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 subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

122 US-Morocco Art. 15(9).

123 *See* CAFTA-DR Art. 19(5)(3), US-Chile FTA Art. 17(9)(4), US-Singapore Art. 16(7)(5), US-Morocco Art. 16(7)(5), and US-Bahrain Art. 14(8)(5).

與已獲上市許可藥品具有相同品質與治療等效性（therapeutic equivalence），就可以不必再提出臨床試驗資料和數據，如此一來學名藥廠商可以更快且節省更多成本的讓學名藥上市[124]。TRIPS 並未規定對於前述情形中的原始申請人資料需提供資料專屬權（data exclusivity）保護，TRIPS 第 39 條第 3 項只規定對於未經公開資料應防止該項資料被不公平（unfair）的使用於商業用途；除基於保護公眾必要，或已採取措施確實防止該項資料被不公平商業使用外，會員應保護該項資料並防止洩露[125]。由 TRIPS 文字無法看出是否包含資料專屬權，同時，何謂「不公平」商業使用也留待各國自行定義[126]。FTAs 中對於資料專屬權所為規定皆同美國國內法之實踐，包含：需提供資料專屬權保護期間，一般為五年，亦即在保護期間之內，學名藥廠商不得依據原始申請人之臨床試驗資料與數據申請自己藥品的上市許可[127]；進一步延伸前述規定，外國的資料專屬權對於本國也發生效力，即便本國廠商要申請本國的藥品上市許可，亦不得依賴競爭者向外國藥品管制機關提交的已受到資料專屬權保護之臨床試驗資料與數據，甚至該外國藥品管制機關並非 FTA 之締約國亦同[128]。

(五)、　對強制授權之限制

TRIPS 第 31 條對強制授權（compulsory license）予以規範[129]，雖未明文限定強制授權事由，但在第 31 條文中提到的事由包括：國家危難或緊急狀況、公共非商業使用、反競爭行為和互相依賴之專利。TRIPS 並未對強制授權的事由（ground）予以限制，會員可自由決定該授權的基礎為何，只是各會員在強制授

[124] Bryan Mercurio, *supra* note 93, at 226.
[125] TRIPS, Art. 39.3:" 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."
[126] Bryan Mercurio, *supra* note 93, at 227.
[127] *See* US-Chile Art. 17(10)(1), US-Morocco Art. 15(10)(1), US-Bahrain Art. 14(9)(1)(a),US-Singapore Art. 16(8)(1),and US-Australia Art. 17(10)(1).
[128] *See* US-Singapore Art. 16(8)(2), US-Morocco Art. 15(10)(2), US-Bahrain Art. 14(9)(1)(b), and US-Australia Art. 17(10)(1)(b).
[129] TRIPS, Art. 31:" Where the law of a Member allows for other use 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…"

權的專利實施時必須遵守該條列舉的各項條件及義務[130]。

(六)、 藥品的平行輸入（parallel importation）

權利耗盡理論是指當智慧財產權產品經由智慧財產權人或其所同意(通常為被授權人)之人，提供予市場進行交易，則智慧財產權人不得就該產品在市場的流通進行控制，因為其受法律保護的流通交易權能已獲得滿足，不得再據此對任何第三人主張權利。目前權利耗盡理論各國規範不一致，TRIPS 第 6 條更特別規定 TRIPS 不得被用以處理智慧財產權權利耗盡之問題[131]。但是 FTAs 中允許專利權人禁止外國市場之合法藥品平行輸入本國市場[132]。

二、著作權

(一)、 著作權保護期間

TRIPS 第 12 條規定著作保護期間為 50 年[133]，多數 FTAs 中則將保護期間額外再延長了 20 年[134]。

(二)、 科技保護措施

多數FTAs中都有反規避條款，亦即禁止規避（circumventing）著作權利人為了保護其權利所採取的科技保護措施（technological protection measures）。數位科技的發展，使得傳統著作權法對著作權人保護已不足以因應數位科技帶來的衝擊，著作權人乃試圖以科技保護措施來控制其著作可否被接觸、重製或傳輸。惟此議題並未涵蓋在TRIPS規範範圍。美國於1998 年通過數位千禧著作權法（Digital Millennium Copyright Act，簡稱DMCA），禁止規避著作權人於著作物

[130] 倪貴榮，WTO 會員設定強制授權事由的權限：以維也納條約法公約之解釋原則分析飛利浦 CD-R 專利特許事由與 TRIPS 的相容性，第九屆國際經貿法學發展學術研討會，國立政治大學國際經濟組織暨法律研究中心，2009。

[131] TRIPS, Art. 6:" For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."

[132] *See* US-Singapore Art. 16(7)(2), US-Morocco Art. 15(9)(4), and US-Australia Art. 17(9)(4).

[133] TRIPS, Art. 12:" 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 50 years from the end of the calendar year of authorized publication, 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."

[134] *See* US-Singapore Art. 16(4)(4), US-Chile Art. 17(5)(4),US-Morocco Art. 15(5)(5), US-Australia Art. 17(4)(4), and US-Bahrain Art. 14(4)(4).

中所設置的科技保護措施，與DMCA相似甚至一樣之規定都出現在與美簽署的FTAs中[135]。

(三)、 網路服務業者責任

網路服務業者（Internet Service Provide，簡稱ISP業者）為提供網路服務的業者，當其用戶利用其網路服務從事侵權行為時ISP業者是否應負責任，同樣的並未涵蓋在TRIPS之規範範圍。與美簽署之FTAs中直接採用了與DMCA相似甚至一樣規定[136]。

(四)、 舉證責任

多數FTAs皆要求被告需負擔舉證責任，證明著作物已屬於公共領域（public domain），這種舉證責任分配的方式明顯有利於著作權人。TRIPS並未對於舉證責任分配加以著墨。

三、智慧財產權權利之執行

TRIPS 考慮到開發中國家會員情況，在第 41 條第 5 項給予會員在智慧財產權執行存在有選擇彈性[137]。但是在 FTAs 中不是未清楚規定有類似 TRIPS 之執行彈性存在，或者更進一步直接明訂不得以國內資源有限做為不遵守 FTA 智慧財產權執行相關規範理由[138]。

FTAs 中的某些特定執行規定，要求各國國內主管機關需遵守額外的組織義務，例如，TRIPS 第 51 條邊境措施的規定適用範圍只針對進口品[139]，但是在 FTAs

[135] *See* US-Singapore Art. 16(4)(7), US-Chile Art. 17(7)(5),US-Morocco Art. 15(5)(8), US-Australia Art. 17(4)(7), and US-Bahrain Art. 14(4)(7).
[136] *See* US-Singapore Art. 16(9)(22), US-Chile Art. 17(11)(23),US-Morocco Art. 15(11)(28), US-Australia Art. 17(11)(29), and US-Bahrain Art. 14(7)(29).
[137] TRIPS, *supra* note 74.
[138] *See* US-Singapore Art. 16(9)(4), US-Chile Art. 17(11)(2),US-Morocco Art. 15(11)(3), and CAFTA-DR Art. 15(11)(2).
[139] TRIPS, Art. 51:" Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods 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."

中將邊境措施適用範圍擴張到包含出口品甚至是轉運商品（transiting goods），亦即各國邊境措施主管機關檢查範圍被擴大。

FTAs 中要求對侵權行為需有法律上更具遏制作用之規範，例如，民事程序部分，TRIPS 第 45 條第 1 項規定侵權行為人應對權利人因其侵權行為所受損害給付相當賠償，但是所有 FTAs 中規定在盜版或商標仿冒情況，不論權利人是否受到損害皆需繳納罰鍰；刑事程序部分，TRIPS 第 61 條規定至少應對具有商業規模而故意仿冒商標或侵害著作權案件，訂定刑事程序及罰則，許多 FTAs 則擴張了刑事程序適用範圍，使得許多不具商業規模之終端使用者盜版（end-user piracy）也須負刑事責任。

第三項　引發之爭議—以藥品取得問題為例

在 TRIPS 制定之前，開發中國家倚賴較為廉價的學名藥作為藥品的來源，然而，隨著 TRIPS 生效，因專利藥受到智慧財產權保護，藥品市場上替代品減少，對於開發中與低度開發國家而言成為非常嚴重的公共健康及衛生問題。部分開發中國家試圖藉由平行輸入及強制授權機制尋求對藥品取得問題之解決，但是已開發國家及跨國製藥公司確認為這些措施已經違反 TRIPS 協定之相關規定，揚言將採取貿易制裁。這個議題在 WTO 下成為不同陣營會員關注及爭執的焦點。

開發中國家與低度開發國家主張，TRIPS 不應阻止會員為了公共健康需求而採行取得藥品必要措施。為了回應這些主張，WTO 於 2001 年 11 月在杜哈召開部長會議，通過了「TRIPS 協定與公共健康宣言」，肯認 TRIPS 不應阻止會員採取保護公共健康措施，且於解釋及實行 TRIPS 時，必須確保國際貿易體系與公共健康利益相容。後來又於 2003 年 8 月作出「TRIPS 協定與公共健康宣言第六段之履行」[140]決議，使不具充分製藥能力之會員得以採取措施進口所需藥品。

TRIPS 雖然未符合開發中國家期待，但是 TRIPS 仍設有可供利用之彈性制

[140] WTO General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WTO Doc. WT/L/540 and Corr. 1 (Sep. 1, 2003).

度，例如強制授權和平行輸入；TRIPS 協定與公共健康宣言也肯認了會員維護本國公共健康利益的權利。但是，這些 TRIPS 下所容許存在之彈性，都會因為美國 TRIPS-Plus 規範而受到相當程度的限縮。例如，前述學名藥廠商申請上市許可的障礙，可能事實上導致強制授權不能順利進行，因為難以想像若不允許在專利權存續期間同意學名藥上市許可，學名藥如何能合法生產[141]；另外，FTAs 中對強制授權的限制可以再分為兩個層面，第一為直接限制，就是 FTAs 規範中直接對強制授權的事由予以限制；第二為間接限制，肇因於前述資料專屬權之適用使得學名藥無法或必須延遲上市；再者，例如美國對藥品平行輸入禁止，美國 FTAs 的對手國中的某些開發中國家，例如智利和約旦，原並未明確表態禁止平行輸入，因此實際上本應享有 TRIPS 所賦予的執行彈性，卻因為和美國簽署 FTAs 而被剝奪[142]。

第三節　美國智慧財產權保護之貿易政策評估

美國自烏拉圭回合 TRIPS 成功納入 WTO 體系之後，希望再次推動重大進展的目標未能完全實現，雖然沒有完全自多邊貿易架構中退場，政策重心仍暫時偏離耗費許多時間成本建立起的多邊貿易架構，改而往複邊貿易架構中注入更多的資源以執行智慧財產權保護之相關政策。美國現階段貿易政策主軸為雙邊貿易政策，最終目的是提升國際間智慧財產權保護水準，此政策引起了許多本文前述論及的爭議。考量時間、政策資源、批評等成本，美國的貿易政策選擇是否正確？本節將檢視此貿易政策實施以來截至目前為止的成效，評估是否真的可以達成美國的政策目標，並且嘗試找出美國的下一個選擇會是什麼，再次回到多邊貿易架構場域或者持續執行雙邊貿易政策？

第一項　美國智慧財產權保護之貿易政策目標

美國貿易政策的直接目標是提升國際間智慧財產權保護，欲達成此直接目標，

[141] Bryan Mercurio, *supra* note 93, at 224.
[142] *Id*., at 233.

其貿易政策可以分為幾個階段性目標，這些階段性目標皆達成後，這些效果總合就可以成功提升國際間智慧財產之保護。以下將參考學者 Jean-Frederic Morin 的論述架構，分別概述這些階段性目標為何。

一、骨牌效應

利用雙邊貿易協定產生骨牌效應（The Domino Effect），希望 FTAs 締約國會與第三國簽訂具有類似規範的協定，進而將美國國內的智慧財產權保護法規傳達到 FTAs 締約國以外國家[143]。例如美國與墨西哥簽訂 NAFTA，要求墨西哥需使植物新品種保護國際公約（International Union for the Protection of New Varieties of Plant Convention，簡稱 UPOV 公約）在國內生效，墨西哥後來也對非 UPOV 會員之玻利維亞作出類似要求。

但是美國期望產生的骨牌效應並不明顯，主要原因在於與其締結 FTA 的對手國並無強烈動機將美國國內規範傳達到 FTA 締約國以外國家。因為 TRIPS 中的最惠國待遇原則要求一會員給予任一其他國家國民任何利益、優惠、特權或豁免權，應立即且無條件給予所有其他會員國民，與其在未獲得對手國任何減讓之承諾就直接提供比 TRIPS 更高的保護，一國會比較傾向與他國訂立互惠條款，如此一來才可以確保自己在貿易談判時有更多籌碼[144]。因此，曾與美國簽訂 FTAs 之澳洲、新加坡等國，與第三國 FTAs 中只重申雙方會遵守 TRIPS 義務，無意複製美國的國內法規[145]。

二、俱樂部效應

雙邊貿易協定會產生俱樂部效應（The Club Effect），使得未參與國家有參加壓力，促使第三國加入既存條約，以獲取與美國貿易的利益；此外，若已有先例存在，則其他第三國會認為加入一個類似的貿易協定是合理的，且不會對本國之經濟利益產生損害。例如，墨西哥在加入 NAFTA 之前，對於藥品專利提供的保護程度非常低，但加入之後反而在 TRIPS 之談判過程中，向其他開發中國家傳

143 Jean-Federic Morin, *supra* note 114, at 178.
144 *Id*., at 180.
145 *Id*.

遞訊息，鼓勵第三國同意接受美國的規範[146]。

此外，若同一區域存在數個雙邊貿易協定，如果未來可以因為其他國家的積極加入而擴張成區域貿易協定，那麼此一區域貿易協定框架甚至是實體規範，相當程度會以既存的雙邊貿易協定為範本，美國也就可以把 FTAs 中所訂出之規則套用到區域貿易協定。例如，美國與摩洛哥、巴林和阿曼締結 FTAs 就是希望可以在未來發展出一個大型的中東地區自由貿易協定；和新加坡、南韓之 FTAs 也是期望未來在亞太地區整合出區域層級自由貿易協定[147]。

但是美國預期情況在現實並未發生。沒有第三國積極表示想加入一個既存雙邊自由貿易協定，雙邊自由貿易協定成為區域自由貿易協定整合基礎的可能性也不高。俱樂部效應截至目前最好的情況，只有當一國和美國簽署 FTA 後，該國之鄰近國家也會開始積極表態希望和美國簽署FTAs，或者加入仍在進行中談判，後者的例子為多明尼加參與美國與幾個中南美洲國家間進行的 CAFTA 之談判[148]。因此，雙邊自由貿易協定只可能維持在現狀，而非朝複邊之層級擴張。

三、結盟效應

持有類似態度和價值觀國家可以藉著雙邊自由貿易協定之締結，在多邊體系中組成策略性的結盟，形成結盟效應（The Coalition Effect）。當越來越多的國家與美國簽署 FTAs，並且在 FTAs 中接受美國較高之智慧財產權保護水準後，就會在多邊體系中，例如 WIPO 和 WTO，累積成具決定性之多數，使得美國國內標準成為新的國際性的標準[149]。例如，在杜哈回合的談判過程中，USTR 認為美國最好的盟友皆為目前或先前 FTAs 締約國[150]。

但是美國利用 FTAs 找尋結盟國之努力並未如預期。FTAs 締約國在多邊體系談判中常常不願意表態支持美國立場，或者無法與美國達成相同共識，甚或直

146 Rein J., *International Governance through Trade Agreement: Patent Protection for Essential Medicines*, 21 JOURNAL OF INTERNATIONAL LAW AND BUSINESS 379, 382 (2001).
147 Jean-Federic Morin, *supra* note 114, at 181.
148 *Id*.
149 *Id*., at 182.
150 *Id*.

接持與美國完全相反之意見。例如，秘魯、哥倫比亞和多明尼加三個皆為美國 FTAs 締約國國家，曾經聯合提議修改 TRIPS，要求專利申請人必須揭露與申請案相關之傳統知識或基因來源，此修正提議完全和美國一向的立場相反[151]。

四、模效效應

美國希望展現 FTAs 締約國，藉由與美國之 FTA 加強了智慧財產權保護後，進而吸引許多外國投資，並且利用這些成功的典範，鼓勵第三國自願地且單邊地在其國內適用相同保護基準以吸引類似的外國投資並且促進科技發展，或者至少達到使第三國減少對美國提議之抗拒，形成模校效應（The Emulation Effect）[152]。例如，美國藥品研究與製造商協會（the Pharmaceutical Research and Manufacturers of America，簡稱 PhRMA）在 CAFTA 協商過程中，以約旦為例，表示約旦與美簽署 FTA 後，由於智慧財產權保護之增強，約旦國內新藥品上市速度加倍[153]，促使參與談判的中南美洲國家接受類似智慧財產權保護規定。美國也一直以約旦為成功例子，對開發中國家強調加強智慧財產權保護之利益[154]。

但是現實情況中並未出現美國預期的樂觀結果。美國與泰國、南非洲關稅同盟分別進行的 FTAs 談判目前皆陷入談判中止的狀態，雖然導致談判中止的原因眾多，但是雙方對於智慧財產權議題未能達到共識亦為原因之一[155]。甚至，許多學者和國際非營利組織對於與美國簽署 FTA 對一國影響，皆認為成本和風險遠高於美國所宣稱的利益和機會，例如有學者指出，美國高估了 FTA 對約旦國內藥品所可能帶來利益，並且嚴重低估了可能的負面成本[156]。

五、詮釋性效應

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[151] WTO General Council Trade Negotiations Committee, *Doha Work Programme-the Outstanding Implementation Issue on the Relationship between the TRIPS Agreement and the Convention on Biological Diversity*, WTO Doc. IP/C/W/474 (July 5, 2006).

[152] SCOTT J., FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 359-381 (Institute for International Economics ed., 2004).

[153] Jean-Federic Morin, *supra* note 114, at 185.

[154] *Id*.

[155] *Id*.

[156] El-Said H. and El-Said M., *TRIPS, Bilateralism, Multilateralism and Implications for Developing Countries: Jordan's Drug Sector*, 2(1) Manchester Journal of International Economic Law 59-73 (2005).

雖然適用上有爭議，但是雙邊協定可以做為解釋既存多邊協定之工具[157]。有主張認為 WTO 未來與 TRIPS 規範有關之爭端，美國可用 FTAs 為證據支持對其有利之解釋方式[158]。

自 WTO 爭端解決體系運作以來，其所建立的案例法（case law），已清楚指明維也納條約法公約（Vienna Convention of the Law of Treaties 1969，簡稱 VCLT）第 31 條、第 32 條的條約解釋規則在 WTO 爭訟中的地位已臻鞏固。第 31 條規定條約解釋的一般規則（general rule of interpretation）[159]，指出解釋條約時上下文除指連同序言及附件在內之本文外，並應包括：全體當事國間因締結條約所訂與條約有關之任何協定、嗣後在條約適用方面確定各締約國對條約解釋之協定之任何實踐（subsequent practice）。

有兩個 WTO 爭端解決案件可以判斷 WTO 是否支持詮釋性效應（The Interpretative Effect）的存在。第一個案件是「加拿大—專利期限案[160]」，TRIPS 第 33 條規定專利保護期間為自申請之日起算 20 年，加拿大對專利權保護期間為自授予專利權之日起算 17 年。美國主張根據 TRIPS 第 70 條第 2 款[161]，凡在 TRIPS

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157 Jean-Federic Morin, *supra* note 114, at 186.

158 Okediji R., *TRIPS Dispute Settlement and the Sources of International Copyright Law*, 49 Journal of the Copyright Society of the U.S.A. 585, 602 (2001).

159 VCLT Art.31:" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

160 小組裁決於 2000 年 5 月 5 日公布，上訴裁決於 2000 年 9 月 18 日公布。Appellate Body Report, *Canada – Term of Patent Protection*, WTO Doc. WT/DS170/AB/R (Sept. 18, 2000).

161 TRIPS, Art. 70.2:" 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, 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

生效日仍有效之專利權，保護期間計算應一律調整為依 TRIPS 第 33 條為準；加拿大則主張依 TRIPS 第 70 條第 1 款[162]，加拿大在 TRIPS 生效前行為不應被溯及，並舉證 NAFTA 中對於專利保護期間計算為自專利授與之日起 17 年、申請之日起 20 年[163]。小組認為 NAFTA 及其他在 GATT 生效前就已經簽署的雙邊、複邊貿易協定，不應該被視為 GATT 生效後之實踐，因此 NAFTA 之規定不得作為解釋工具以判斷加拿大是否有遵守 TRIPS[164]。

第二個案件是「加拿大一醫藥品專利保護案[165]」，加拿大專利法允許學名藥廠得於新藥專利期尚未到期前，即可以進行與取得學名藥上市許可審核相關資料所需的試驗，不會因此侵犯專利權。加拿大亦允許學名藥廠得以在專利藥專利期限尚未到期前最後六個月，即開始製造、並且儲存學名藥，學名藥廠可於專利藥專利期限一屆滿便立即上市銷售學名藥。歐盟主張加拿大專利法違反 TRIPS 第 28 條第 1 項[166]，加拿大則抗辯其相關規定符合 TRIPS 第 30 條[167]，並且主張有其他國家在 TRIPS 生效後亦有類似的規範存在[168]。小組認為即便維也納條約法公約第 31 條第 2 項 b 款規定嗣後在條約適用方面確定各當事國對條約解釋之協定之任何慣例需與上下文一併考慮，但是其他國家的國內法律實踐不應作為解釋要素[169]；小組也認為嗣後在條約適用方面確定各當事國對條約解釋之協定之任何慣

Agreement."

[162] TRIPS, Art. 70.1:" 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."

[163] Panel Report, *Canada – Term of Patent Protection*, WTO Doc. WT/DS/170/R, ¶ 6.90.

[164] *Id.*, footnote 49.

[165] 小組裁決於 2000 年 3 月 17 日公布，Panel Report, *Canada – Patent Protection of Pharmaceutical Product*, WTO Doc. WT/DS114/R (Mar. 17, 2000).

[166] TRIPS, Art. 28.1:" 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 the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's 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."

[167] TRIPS, Art. 30:" 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."

[168] *Canada – Term of Patent Protection*, *supra* note 165, ¶ 7.42.

[169] *Id.*, ¶ 7.47.

例若要成立，則所有締約方間必須成立有拘束力協定[170]。即使締約方間針對多邊條約有疑義要件之解釋，在爭端解決過程達成共識，該共識可以適用範圍亦十分有限，僅能在該爭端解決案件及爭端案件當事國間成立[171]。

由前述兩個爭端案件，可以看出美國的 FTAs 規範要能成為解釋工具的可能性目前不大。那麼是否會因為未來的 FTAs 締約國數目大幅增加，而使得這些規範變成所謂的國際習慣法（customary law）[172]？有學者指出，依國際公法學說，要能成為國際習慣法必須滿足兩個要件：普遍之實踐（general practice）與法之信念（opinio juris sive neccessitatis）[173]。目前國際上各國對於 TRIPS-Plus 之意見不一致，甚至也產生許多批評聲浪，由當前狀況很難得出此兩個要件已被滿足的結論。

六、加入效應

美國所簽署之部分 FTAs 中，要求締約國必須加入某些非 TRIPS 直接引用多邊國際條約，藉由加入效應（The Adherence effect），美國可以使得多邊體系中的智慧財產權保護更趨於一致，有助於提升智慧財產權保護水準。

有四個被美國認為在智慧財產權保護方面重要的相關國際條約，分別為：國際承認用於專利程序的微生物保存布達佩斯條約[174]（Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure，簡稱布達佩斯條約）、專利合作條約[175]（Patent Cooperation Treaty，簡稱 PCT）、專利法條約[176]（Patent Law Treaty，簡稱 PLT）、UPOV 公約[177]。美國在 FTAs 中會直接要求對手國必須加入（accede to）並且批准（ratify）上述這

[170] *Id*., ¶ 4.31.
[171] Jean-Federic Morin, *supra* note 114, at 188.
[172] *Id*.
[173] *Id*.
[174] *See* US-Morocco Art. 15(1)(2), US-Australia Art. 17(1)(2),US-Bahrain Art. 14(1)(2), CAFTA-DR Art. 15(1)(3), and US-Oman Art. 15(1)(2).
[175] *See* US-Australia Art. 17(1)(2),US-Singapore Art. 16(1)(2), CAFTA-DR Art. 15(1)(3), US-Morocco Art. 15(1)(2), US-Bahrain Art. 14(1)(2), and US-Chile Art. 17(1)(2).
[176] *See* CAFTA-DR Art. 15(1)(6), and US-Chile Art. 17(1)(4).
[177] *See* US-Jordan Art. 4(1), US-Singapore Art. 16(1)(2), CAFTA-DR Art. 15(1)(5), and US-Chile Art. 17(1)(2).

些國際公約，或者未要求成為會員但是必須遵守這些國際公約的相關規定。

第二項　美國智慧財產權保護之貿易政策成效

美國用雙邊貿易政策試圖提升國際間智慧財產權保護水準，前一部分將此貿易政策分為六個階段性目標，檢視實施之成效如何。由前述分析可以看出，六個階段性目標中，只有鼓勵國家加入既存國際智慧財產權相關公約的「加入效應」產生較具體的成效，其餘的階段性目標皆無法達成美國原先之預期。

國際間因美國 TRIPS-Plus 所產生的爭議如本章第二節所述，除此之外，美國國內對此也開始產生質疑。美國國會認為 FTAs 中的智慧財產權相關規範，違背了 TPA 第 2101 條中支持杜哈 TRIPS 協定與公共健康宣言規定[178]，因此，2007 年的兩黨貿易政策協定（Bipartisan Agreement on Trade Policy）中規定，美國未來所有的雙邊和區域自由貿易協定中的智慧財產權保護規範，必須在保障製藥大廠的專利權和維護開發中國家對藥品的需求二者間取得平衡，例如放寬對於藥品資料專屬權規定、表示會遵循杜哈 TRIPS 協定與公共健康宣言與各國保障國內公共健康權利等[179]。美國後續和哥倫比亞、秘魯及巴拿馬所分別簽署之 FTAs 中，專利權相關規範就採取了比較寬鬆的規定方式[180]。國會與美國民眾也質疑，在 FTAs 談判上耗費的時間和金錢，是否有更好的利用方式？將這些資源分配到多邊貿易體系，例如和歐盟各國建立友好的多邊關係，或者直接協助主要盜版及仿冒活動國家的智慧財產權執行等，應該都可以達到更好的成效[181]。美國國內存在的質疑和批評，都會使得 USTR 未來進行貿易談判時，談判地位和執行權力的削弱，對美國貿易政策更加不利。

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[178] Congress of the United States, *Letter from 12 Members of Congress to President Bush on Intellectual Property Provisions in CAFTA*, *at* http://www.cptech.org/ip/health/trade/cafta/congress09302004.html (Sep. 30, 2004).

[179] USTR, *Bipartisan Agreement on Trade Policy*, *at* http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf (May, 2007).

[180] Jean-Federic Morin, *supra* note 114, at 191.

[181] *Id*.

第三項　小結

總體而言，美國以 FTAs 為主軸的貿易政策，雖然可以達成提升締約國國內智慧財產權保護水準的目的，但截至目前為止的締約國皆非主要貿易對手國，亦非主要盜版及仿冒活動國家。TRIPS-Plus 規範所引發的爭議也使美國在國際間擁有「反成長」（anti-development）的負面形象，雙邊貿易政策無法成為美國實行多邊貿易政策的助力，反而在多邊貿易體系造成不安定，並且切割出了不同立場的國家陣營。

美國貿易政策在各個時期有不同主軸，多邊貿易體系的 WTO 杜哈回合談判陷入延宕後，美國最有力的貿易政策工具似乎就是雙邊貿易協定。美國也將 FTAs 簽署列為政策重點，但是經過本章前述之分析後，可以看出美國智慧財產權保護之貿易政策實施以來並無法產生預期效果。

未來美國該以哪一種貿易政策推動國際間智慧財產權之保護？繼續回到多邊貿易體系，在 WTO 之下積極推動杜哈回合談判之完成；或者維持目前 FTAs 貿易政策的進行，等待實施了更長的一段時期後，也許能達到政策之目的？不論美國下一步貿易政策的選擇為何，可以觀察到的是，以美國為例，國際間智慧財產權保護水準的提升，仍然是那些擁有智慧財產權利益國家的最終目標，惟過程中則變動地、持續地在多邊貿易架構、複邊貿易架構中，以能達成最終目標的政策去執行，因此出現了智慧財產權保護體系的分合情形。

第肆章　智慧財產權保護複邊體系之建構─反仿冒貿易協定

本文主張國際間智慧財產權保護存在著反覆擺盪於多邊、複邊或雙邊貿易架構的現象。前文已經依序介紹了幾個重要的發展里程，WIPO 管轄的數個智慧財產權相關國際公約，20 世紀 WTO 架構中 TRIPS 生效，美國因為在多邊貿易架構無法得到更大進展因此改以推行 TRIPS-Plus 為主之雙邊貿易政策，這些發展階段可以觀察出已開發國家在不同時間點分別以多邊、雙邊的貿易政策為重心之現象。但是美國近期以 TRIPS-Plus 為重心之雙邊貿易政策，經過本文第三章的分析，可以發現截至目前為止並未達成顯著成果，此雙邊貿易政策陷入泥淖，則美國勢必又選擇將智慧財產權保護政策的重心移往其他的國際保護體系，於是，智慧財產權保護多邊貿易架構之分合現象再次出現，尚未生效的「反仿冒貿易協定」是美國當前的政策努力重點。

本章先嘗試描繪出 TRIPS 生效後至今當前國際智慧財產權保護與遭受的挑戰與挫敗，找出在這種時空背景中各國是否存在著推行 ACTA 談判的強烈動機。找出動機後，再依時間發展整理 ACTA 的談判歷程以及成果，同時點出 ACTA 在談判過程所遭致的批評和爭議。接著概述 ACTA 條文架構，並且分析 ACTA 具體條文內容與未來適用可能產生之問題。最後一部分則綜合各點對 ACTA 的成效提出評估，了解美國 ACTA 此智慧財產權保護政策是否有效，而成效之評估也可以讓我們思考，智慧財產權保護多邊貿易架構分合現象是否會再次發生。

第一節　締約背景與過程

本節先概述當前全球盜版及仿冒活動，介紹已開發國家國內相關產業一直深受盜版及仿冒所苦之情形，探討美國積極推動 ACTA 談判的動機，接著依時間順序分述截至目前為止 ACTA 的談判過程。

第一項　國際盜版活動猖獗

國際刑警組織（International Crime Police Organization，簡稱 INTERPOL）為全球目前規模最大的國際警察組織，智慧財產權犯罪被列為國際刑警組織六個優先處理的犯罪領域之一[182]，並成立了智慧財產權犯罪行動小組（INTERPOL IP Crime Action Group）專責處理此問題[183]。在國際刑警組織執行行動的過程中，發現商業盜版、仿冒活動與恐怖組織的犯罪緊密相關。例如，以印度、巴基斯坦為根據地的跨國性犯罪組織對於資訊產品的盜版具有主要控制能力；以中國為根據地的跨國性犯罪組織則對於 CD/DVD 之製造、運動用品和奢華品牌的產品具有主要控制能力[184]。阿根廷、巴西和巴拉圭三個南美洲國家的邊境交界處更被國際刑警組織列為執行重點地區，該地區的盜版活動目前已成為中東境外伊斯蘭教恐怖活動的主要資金來源，例如真主黨每年可由此區域獲得約 2000 萬美元的資金，其中有 350 萬美元來自盜版 DVD 之銷售[185]。

盜版商品除了與組織性犯罪、恐怖主義產生連結外，另外一種類別的盜版及仿冒，偽藥，也對開發中國家產生負面影響。國際刑警組織在資料中指出，偽藥對世界各國的公共健康都造成嚴重威脅且偽藥銷售也成為越來越普遍的情況，特別是非洲地區深受偽藥之影響[186]。世界衛生組織（World Health Organization，簡稱 WHO）在 2008 年也提出類似的報告，指出非洲的許多國家以及亞洲、拉丁美洲部分地區，市面上販售之藥品有超過 30%是偽藥，至於經由網路非法網站銷售且隱藏實體製造地址的藥品有超過 50%是偽藥[187]。WHO 認為偽藥製造商每年

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[182] *See* INTERPOL website: www.interpol.int/default.asp (last visited May 30, 2010).
[183] INTERPOL, *Intellectual Property Crimes: Trademark Counterfeiting & Copyright Piracy*, *at* www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publication/IIPCAGBrouchure.pdf (2007).
[184] INTERPOL, *Operation Jupiter 2004-2009*, *at* www.interpol.int/public/FinancialCrime/IntellectualProperty/OperationJupiter/Default.asp (last visited May 30, 2010).
[185] Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of A Treaty*, 46 Hous. L. Rev. 1235, 1242 (2009).
[186] INTERPOL, *Operation Mamba:Targeting Counterfeiting Medicines in Tanzania and Uganda*, *at* www.interpol.int/public/News/2008/mamba20081029.asp (last visited May 30, 2010).
[187] WHO, *Counterfeiting Drugs Kill!*, *at* www.who.int/impact/FinalBrochureWHA2008a.pdf (2008).

獲利至少達 320 億美元，並預估在 2010 年獲利會增加到 750 億美元，因此偽藥實際上造成的傷害比毒品更嚴重[188]。

根據以上的敘述，不難理解為何已開發國家產業會深受盜版及仿冒活動所苦。由於盜版及仿冒活動影響的不僅有商業利益此種私益，也包括一國整體社會的公共利益，因此，開發中國家也具有參與國際間打擊盜版及仿冒活動的動機。

第二項　加強國際執行之必要

本文前幾章曾討論過在多邊貿易架構與某些國家的複邊貿易政策中，為了處理國際間盜版及仿冒行為有過許多努力，但是成效有限。因此，智慧財產權權利人及利益團體持續針對國際執行的加強提出解決方案，在數個相關的國際組織，諸如 WIPO、國際關務組織（World Custom Organization，簡稱 WCO）、WTO 等，都提出與盜版及仿冒行為有關的倡議。國際組織之間亦開始針對此問題進行合作，例如於 2004 年第一屆全球反仿冒及盜版會議（Global Congress on Combating Counterfeiting）就有過正式的討論，此項會議係由 WIPO、國際刑警組織及 WCO，配合國際間非政府組織之協調連繫而產生，會議之宗旨在結合各國官方機構、非政府組織以及民間企業力量，共同建構一個討論層次較高之論壇平台，針對全球日益嚴重之仿冒與盜版行為進行戰略性與策略性集思廣議，以研究遏阻與打擊之道[189]。全球反仿冒及盜版會議至目前為止共舉行了五屆，第五屆會議於 2009 年 12 月 1 日到 3 日在墨西哥的坎昆舉行，共有來自 80 個國家的 800 多位代表參與會議[190]。雖然全球反仿冒及盜版會議提供了一個討論的平台，而意見與政策的交流確實也有助於打擊跨國性質的盜版與仿冒活動，惟缺乏一個具有拘束力的法律架構，實際成效仍屬有限。

2005 年的八大工業國高峰會（The Group of Eight Summit，簡稱 G8 高峰會）

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188 Charles R. McManis, *supra* note 185, at 1243.

189 全球反仿冒及盜版會議，可參考其官方網站：http://www.ccapcongress.net/。

190 Global Congress Combating Counterfeiting &Piracy, *Fifth Global Congress-Cancun, at* http://www.ccapcongress.net/Cancun.htm (last visited June 26, 2010).

中，也針對是否以簽署一個新的國際條約方式處理智慧財產權的侵權問題進行討論[191]。延續此項討論，2006 年開始，美國及日本開始倡議各國應協商一個複邊條約，以建立更強而有力的智慧財產權執行規範，俾有效解決商業性仿冒及盜版的問題[192]。基於上述倡議，美國於 2007 年正式宣佈將與重要夥伴展開合作，以協商一個新的貿易協定處理盜版與仿冒問題，此即為 ACTA 最初的雛形[193]。

ACTA 各參與談判國家的動機，是在承諾對智慧財產權提供有力保護國家間，建立智慧財產權執行共同標準以打擊全球的智慧財產權侵權，藉由加強國際性合作、強化智慧財產權的執行層面，更有效率地解決與日俱增的侵權挑戰[194]。所針對的是影響商業利益甚鉅的國際間商業性仿冒及盜版，而非一般公民的行為。ACTA 的架構包含了下列項目：邊境措施（border measure）、刑事執行（criminal enforcement）、民事執行（civil enforcement）、盜版光碟（optical disc piracy）以及和網路相關的智慧財產權執行[195]。

第三項　談判過程

ACTA 總共舉行過 11 次正式會談，舉行時間及地點分別為：2008 年 6 月在瑞士日內瓦、2008 年 7 月在美國華盛頓、2008 年 10 月在日本東京、2008 年 12 月在法國巴黎、2009 年 7 月在摩洛哥拉巴特、2009 年 11 月在南韓首爾、2010 年 1 月在墨西哥瓜達拉哈拉、2010 年 4 月在紐西蘭威靈頓、2010 年 6 月底至 7 月初在瑞士盧森、2010 年 8 月在美國華盛頓、2010 年 9 月底至 10 月初在日本東京。參與談判的國家包括澳洲、加拿大、歐盟、日本、南韓、墨西哥、摩洛哥、

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191 Department of Foreign Affairs and Trade, *ACTA: Discussion Paper, at* http://www.dfat.gov.au/trade/acta/discussion-paper.html (Nov. 13, 2007).

192 USTR, *The Anti-Counterfeiting Trade Agreement – Summary of Key Elements under Discussion, at* http://www.ustr.gov/about-us/press-office/fact-sheets/2009/april/acta-summary-key-elements-under-discussion (Apr. 6, 2009) [hereinafter *Summary of Key Elements under Discussion*].

193 USTR, *Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes, at* http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes (Oct. 23, 2007).

194 *Summary of Key Elements under Discussion*, *supra* note 192.

195 USTR, *Anti-Counterfeiting Trade Agreement Trade Facts, at* http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file760_15084.pdf (Aug. 4, 2008).

紐西蘭、新加坡、瑞士及美國[196]。

2008 年 6 月在瑞士日內瓦舉行的第一回合會談之重點為邊境措施，並特別針對大規模的商業侵權行為，因為此類型的侵權行為通常有組織性犯罪參與，且對公眾健康及社會安全會帶來嚴重的危害[197]。

2008 年 7 月在美國華盛頓舉行的第二回合會談之重點為與侵權行為相關的民事救濟方面之問題，包含證據的保存、損害賠償的計算等，並延續前一回合針對邊境措施的討論[198]。

2008 年 10 月在日本東京舉行的第三回合會談之重點為刑事執行，並延續前一回合針對民事執行的討論[199]。

2008 年 12 月在法國巴黎舉行的第四回合會談之重點為國際合作、執行實務以及 ACTA 未來組織安排的議題，同時也延續前一回合對刑事執行的討論[200]。

2009 年 7 月在摩洛哥拉巴特舉行的第五回合會談之重點與第四回合同，亦為國際合作、執行實務以及 ACTA 未來組織安排的議題，同時，此一回合開始將談判過程的透明化爭議納入談判之範疇，亦即討論是否應將 ACTA 相關資訊提供給與智慧財產權利益有關者與關注此議題的社會公眾[201]。

2009 年 11 月在南韓首爾舉行的第六回合會談之重點則為數位環境中的智慧財產權執行與刑事執行，同樣也延續前回合對談判過程透明化的討論[202]。

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196 *Summary of Key Elements under Discussion*, *supra* note 192.

197 USTR, *Statement from USTR Spokesman Sean Spicer on ACTA*, *at* http://www.ustr.gov/sites/default/files/uploads/pdfs/press_release/2008/asset_upload_file757_14938.pdf (June 05, 2008).

198 Foreign Affairs and International Trade Canada, *July 29-31 2008 Meeting in Washington, D.C.*, *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/washington.aspx?lang=en (Aug. 1, 2008).

199 Foreign Affairs and International Trade Canada, *October 8-9 2008 Meeting in Tokyo, Japan*, *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/washington.aspx?lang=en (Oct. 24, 2008).

200 Foreign Affairs and International Trade Canada, *December 15-17 2008 Meeting in Paris, France*, *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/paris.aspx?lang=en (Dec. 18, 2008).

201 Foreign Affairs and International Trade Canada, *ACTA 5th Round of Negotiation-Rabat*, *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/5-negotiation-5-negociation.aspx (last visited June. 26, 2010).

202 Foreign Affairs and International Trade Canada, *ACTA 6th Round of Negotiation in Seoul, Korea; November 4 to 6, 2009*, *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/6-negotiation-6-negociation.

2010 年 1 月在墨西哥瓜達拉哈拉舉行的第七回合會談之重點為民事執行、邊境措施與數位環境中的智慧財產權執行，針對透明化的爭議，參與談判國皆認為應提供機會讓社會公眾可以有意義的參與談判過程[203]。

2010 年 4 月在紐西蘭威靈頓舉行的第八回合會談，重點主要為縮小各國在前面諸回合中對上述各議題所產生的分歧；ACTA 適用的智慧財產權範圍也成為本回合協商重點[204]。至於透明化談判過程一節，本回合達成共識，各國以時機業已成熟為由，同意將反映目前談判成果的草案內容於2010年4月21日對外公布，惟並不公開各國對於草案文字之個別立場[205]。

2010 年 6 月底至 7 月初在瑞士盧森舉行的第九回合會談之重點為致力在 ACTA 各主要規範領域達成各國間之共識[206]。

2010 年 8 月在美國華盛頓舉行的第十回合會談之重點，以第九回合所達成的共識為基礎，針對各個規範領域進行更深入的討論[207]。

2010 年 9 月底至 10 月初在日本東京舉行了第十一回合會談，也是 ACTA 參與談判國間最後一次正式會談，各國在此次會談中幾乎解決了 ACTA 的所有實質議題，且同意了 ACTA 協定大部分條文的最終文字。參與談判國亦一致同意將迅速解決某些仍待討論的歧見，盡快完成 ACTA 條文的最終版本，以供各參與談判國進行國內批准程序[208]。

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aspx (last visited June. 26, 2010).

[203] Foreign Affairs and International Trade Canada, *ACTA 7th Round of Negotiation, Guadalajara, Mexico; January 26-29, 2010, at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/7-negotiation-7-negociation.aspx (last visited June. 26, 2010).

[204] *Joint Statement on the 8th Round of ACTA Negotiations, at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/8_Joint_statement-8_declaration_commune.aspx (last visited May 30, 2010).

[205] *Id*.

[206] Department of Foreign Affairs and Trade, *Agreed Press Release: Anti-Counterfeiting Trade Agreement Report on the 8th Round of Negotiations Wellington, at* www.dfat.gov.au/trade/acta/ACTAAgreedPressRelease16April2010.pdf (Apr. 16, 2010).

[207] Foreign Affairs and International Trade Canada, *ACTA 10th Round of Negotiation-Washington D.C., at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/10_joint_statement-10_declaration_commune.aspx?lang=eng (last visited Aug. 23, 2010).

[208] Foreign Affairs and International Trade Canada, *ACTA 11st Round of Negotiation-Tokyo, at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/joint_statement-finale-declaration_commune.aspx?lang=eng (last visited Oct. 02, 2010).

參與談判國於2010年12月3日正式對外公布了ACTA條文的最終版本[209]，將於2011年3月31日至2013年3月31日間開放參與談判國簽署(Signature)，若經各參與談判國全體共識同意，其他為WTO會員體、但非參與談判國之國家亦可在前述期間簽署、加入ACTA[210]。ACTA將於批准國家數目總計達6國的30日後正式生效[211]。

第二節　對談判過程之批評

智慧財產權作為一種法定財產權具有私益性質，若思考智慧財產權在社會、文化、教育、健康等等面向的重要性，其又具有相當程度的公益性。作為一個兼具不同法益性質的財產權，立法者必須思考如何在兼顧公益需求的同時又保障權利擁有者的私益，立法過程中往往會出現不同利益團體對立法機關進行遊說和角力。

ACTA由美、日倡議，協商過程共進行11次回合的正式會談，到條文最終版本對外公布，過程歷時約三年。ACTA的參與談判國多為已開發國家，這些國家基於智慧財產權擁有者的立場，原意是為了加強對智慧財產權之保護，但是ACTA的談判過程引起了許多爭議，主要是公益團體及非已開發國家為了自身權益而發聲，這些意見本文大致將其分為三類：未能顧及開發中國家權益、協商過程不對大眾公開、以及規範內容可能會侵害公民權利。以下將對這些批評意見進行概述，目的是藉此觀察在ACTA立法過程中，這些意見和團體如何影響ACTA的形成？若我們進一步對照ACTA歷次草案版本，似乎可以發現這些意見確實發揮了效用，使得ACTA相當程度偏離了已開發國家原本預期的成果。

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[209] *Anti-Counterfeiting Trade Agreement Final*, *at* http://www.ustr.gov/webfm_send/2417 (Dec. 03, 2010) [hereinafter *ACTA Final*].
[210] *ACTA Final* Art. 39.
[211] *ACTA Final* Art. 40.

第一項　開發中國家的權益被忽略

ACTA 的設計為獨立於現有國際組織以外的一個複邊貿易協定，ACTA 參與國之所以要於現有國際組織外另闢談判戰場，主要理由如下：不選擇 WIPO 是因為開發中國家和非營利組織近年來積極參與 WIPO，加上 WIPO 決議方式是採取共識決（consensus approach），如果在 WIPO 推動新的保護智財權倡議，將難以避免來自中國、巴西、印度等重要開發中國家的反對[212]；至於不選擇 WTO，則是因為部分 WTO 會員拒絕在 TRIPS 理事會（TRIPS Council）中對於智慧財產權的執行議題進行更實質的討論[213]。

儘管 ACTA 參與談判國確實包含開發中國家，例如墨西哥以及某些歐盟會員國，但這些國家僅占少數，且不可否認的，未選擇 WIPO 以及 WTO 場域已排除了多數開發中國家參與的機會，因而引發了外界對 ACTA 未考慮開發中與低度開發國家表達其智慧財產權政策立場的批評聲浪。重要的開發中國家，如中國、印度及巴西，在許多開發中與低度開發中國家（包括、南非、埃及、秘魯、古巴、委內瑞拉等國）的支持下，利用 TRIPS 理事會對 ACTA 提出批評，主張 ACTA 超越了 TRIPS 在執行面的義務並且限制了 TRIPS 規範中原本給與各會員的彈性；同時也認為開發中國家面對將來 ACTA 生效後，國際經貿環境中來自已開發國家的壓力，勢必須將智慧財產權之執行列為首要政策目標，資源排擠的結果可能會影響到國內其他更重要的公共政策[214]。

ACTA 之締約目標為以加強智慧財產權執行之方式處理國際間盜版與仿冒行為，現今猖獗的仿冒行為發生地主要在開發中國家的境內，ACTA 締約國若要採取有效的執行措施，未來必須與開發中國家進行合作，或者進一步利用政治和經貿實力迫使開發中國家配合採取某些政策。因此，就實質而論，盡管多數開發

[212] Michael Geist, *The ACTA Threat to the Future of WIPO, at* http://www.ip-watch.org/weblog/2009/04/14/the-acta-threat-to-the-future-of-wipo/ (Apr. 14, 2009).
[213] Adam Behsudi, *India, China Attack ACTA as Running Afoul of TRIPS Agreement at WTO*, INSIDE U.S. TRADE, Vol. 28, No. 23(June 11, 2010).
[214] *Id*.

中國家並非 ACTA 的直接參與國，ACTA 未來生效後的適用範圍與效力，將可能影響這些開發中國家的相關權益，但這些可能被影響的國家卻沒有參與討論的機會。基於以上推論，有學者因此主張 ACTA 採取的談判方式會嚴重侵害開發中國家的權益[215]。

第二項　要求協商過程應透明化

參與談判國在 2010 年 4 月之前並未公開 ACTA 的草案內容，再加上諮商過程及相關文件皆保密，以致外界多提出不夠透明的質疑。

美國雖是 ACTA 的主要倡議者，但其國內同樣出現許多要求透明化和公開的聲音。從 2008 年 6 月開始，「公共知識」（Public Knowledge）、「電子前鋒基金會」（Electronic Frontier Foundation, EFF）以及「知識生態國際組織」（Knowledge Ecology International, KEI）等三個消費者團體，就曾經依資訊公開法（Freedom of Information Act，簡稱 FOIA）向 USTR 要求公開 ACTA 的相關訊息，USTR 後來以國家安全為由拒絕[216]。「公共知識」以及「電子前鋒基金會」於是聯合到法院對 USTR 提出告訴，但是由於 ACTA 的關鍵文件以國家安全或外交政策為理由被列為機密，因此勝訴機率不高，兩團體被迫放棄訴訟[217]。

歐盟國內也出現類似的批評，「歐洲自由資訊基本架構推展協會」（Foundation for A Free Information Infrastructure, FFII）向歐盟理事會（EU Council）要求必須公開 ACTA 的相關諮商文件，但是被拒絕[218]。歐盟理事會主張，若公開相關諮商文件會妨礙歐盟在諮商過程中採取較適當的行為，因而減損歐盟談判過程中的

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[215] Margot Kaminski, *Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement*, 34 Yale J. Int'l L. 247, 255 (2009).

[216] Grant Gross, *U.S. Trade Office Release Information on Secret Piracy Pact*, IDG NEWS SERVICE, *at* http://www.itworld.com (Apr. 7, 2009).

[217] *NGOs Withdraw ACTA Lawsuit, Blast USTR for Lack of Transparency*, INSIDE U.S. TRADE, Vol. 27 (Jun. 19, 2009).

[218] FFII, *EU Council Refuses to Release Secret ACTA Documents*, *at* http://press.ffii.org/Press%20releases/EU%20Council%20refuses%20to%20release%20secret%20ACTA%20documents (Nov. 10, 2008).

優勢及地位，甚至影響與其他參與國的關係[219]。FFII 則認為諮商過程必須在歐盟境內公開，否則不論是歐洲議會（European Parliament）或者是歐盟成員國的國內議會，都無法在 ACTA 的諮商過程中發揮有效監督的功能，其強調貿易議題的諮商利益不會比民主的立法過程更重要，因此主張若歐盟理事會仍堅持不公開 ACTA 相關文件，未來不排除向歐洲法院（European Court of Justice）提出控訴的可能性[220]。

面對諸多要求透明化和公開 ACTA 相關文件的壓力，談判參與國不得不放棄一開始採取的保密態度。先是在國內做出部分因應，例如美國為了達成總統歐巴馬（Barack Obama）在就任時所指示的政府政策資訊透明化目標，USTR 除了公布 ACTA 的諮商議題與諮商內容外，也在其官方網站上建立 ACTA 平台，並表示未來會舉辦市民會議（Town Hall Meeting），以確保公眾取得 ACTA 諮商相關資訊與交流意見之管道[221]。

2009 年 4 月 6 日由參與國聯合公布的六頁談判重點摘要[222]，被視為各參與國態度轉變的第一步。2010 年 1 月，一份非由參與國官方公布的 ACTA 草案內容在網路上被披露（以下簡稱一月草案版本），除了條文外，也包含各國的談判立場和提案版本[223]，此舉對各國形成壓力，迫使各國不得不考慮採取進一步的行動。於是，2010 年 4 月於紐西蘭威靈頓舉行的第八回合會談中，就將應否公布諮商文件列為談判議程之一[224]，最後如前述以時機成熟為由，終於正式公布 ACTA 草案（以下簡稱四月草案版本），只是未揭露各國談判立場[225]。對於四月

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219 *Id*.
220 *Id*.
221 USTR, *Ambassador Ron Kirk Announces Plan to Move Forward with the Negotiation of the Anti-Counterfeiting Trade Agreement*, *at* http://www.ustr.gov/about-us/press-office/press-releases/2009/june/ambassador-ron-kirk-announces-plan-move-forward-negot (Jun. 22, 2009).
222 *Summary of Key Elements under Discussion*, *supra* note 192.
223 *Anti-Counterfeiting Trade Agreement Draft*, *at* http://www.laquadrature.net/files/201001_acta.pdf (Jan. 18, 2010) [hereinafter *ACTA January Draft*].
224 Foreign Affairs and International Trade Canada, *Proposed Agenda for the 8th Round of ACTA Negotiations*, *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/8-agenda-8-ordre_du_jour.aspx (last visited May 30, 2010).
225 *Anti-Counterfeiting Trade Agreement Draft*, *at* http://www.ustr.gov/webfm_send/1883 (April, 2010)

草案版本的公布，許多非營利組織採取正面的態度，不過仍認為由於未公開各國談判立場，故代表透明化程度仍需加強[226]。

雖然 ACTA 最終版本已經在 2010 年 12 月 3 日正式對外公布，但是談判過程中未能讓外界或大眾有足夠的參與機會與獲得相關資訊的管道，其實也讓人懷疑該協定條文的形成過程及最終結果，是否可以符合社會中不同利益群體的期待。

第三項　侵害公民權利

ACTA 的談判在歷經十一次正式會談後結束，在歷時三年的談判過程中，有不少非營利組織或者公民團體參考 ACTA 歷次談判回合的內容、談判範圍以及歷次的草案版本，主張 ACTA 未來適用時會對公民權利造成侵害。ACTA 的最終版本已於 2010 年 12 月 3 日正式對外公布，某些引發侵害公民權利疑慮之條文已在談判過程中修正或直接移除，但是這些談判過程中的反對意見仍值得在本文摘錄，作為 ACTA 立法過程的紀錄，可以觀察各方利益團體的角力和立場。

由於 ACTA 的適用範圍包含數位環境下的權利執行，再加上 ACTA 對於國際執法合作的加強方面要求各國主管機關交換資訊，因此公民組織認為隱私權和個人資料會因為 ACTA 的適用而受到侵害。例如歐盟「歐洲資訊保護監督機構」[227]（the European Data Protection Supervisor，簡稱 EDPS）指出 ACTA 可能侵犯人民隱私權的部分，包括：為防範網路盜版，而要求制定法律以大規模的監控網路使用者；以及儘管 ISP 業者有義務警示網路使用者停止非法下載或其它盜版行為，但在警示後甚至可進一步切斷該使用者之網路連線（即前述所稱三振條款）[228]。EDPS 認為反盜版固然重要，但不應侵害隱私權及資料保護，兩者間應尋求

[hereinafter *ACTA April Draft*].

[226] ICTSD, *Under Scrutiny, ACTA Negotiators Release Draft Text*, Vol. 14, No. 14, *at* http://ictsd.org/i/news/bridgesweekly/74387/ (Apr, 21 2010).

[227] EDPS 為歐盟之輔助機關，主要目標與工作內容為保障歐盟公民的個人隱私。可參考其網站：http://www.edps.europa.eu/EDPSWEB/edps/EDPS?lang=en。

[228] EDPS, *Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), at*

平衡點，因此 EDPS 提出數項建議：第一，三振條款並非達成保護智慧財產權目的之必要手段，可使用其他對人民權利侵犯程度較低之方式進行，例如透過對特定嫌疑網路使用者之個別監督等；第二，鑒於 ACTA 涉及締約國間之跨國資訊（個人資訊）交換，歐盟應對此架構下所交換之資訊設定防衛機制，以保護個人隱私及資訊保護等；第三，EDPS 亦建議 ACTA 應有公開及透明之對話機制，俾透過公開諮詢等方式，以確保其內容不侵犯歐盟現有之隱私權及資訊保護之規定[229]。

另外對 ACTA 可能侵害個人基本權利的批評則是基於 ACTA 為提高執行標準而加強邊境措施時，無論各國如何宣示 ACTA 係著眼於影響商業利益甚鉅的商業性仿冒及盜版，而非一般公民的行為，但仍無法排除未來邊境檢查機構隨時檢查個人的電腦或者可攜式媒體播放器（portable media player），甚至對之進行扣押的可能，這些在公民團體看來就是對於個人的基本權利造成嚴重之侵害[230]。

最後對於 ACTA 加強執行標準的批評，則是擔心其會對科技創新帶來不利的影響，例如「自由軟體基金會」[231]（Free Software Foundation）就認為由於網路分享自由軟體的管道不再便利，且個人電腦設備將來可能被要求需加裝管理數位權利內容[232]（Digital Right Management，簡稱 DRM）使用的系統，而被用於管理數位內容之 DRM 可能使得自由軟體的使用受到限制等理由，都將阻礙資訊的流通並且限縮合理使用的空間[233]。代表歐洲超過 1700 家 ISP 業者的商業團體「歐洲網路服務供應協會」（EuroISPA）也認為 ACTA 對於網路使用的管制會嚴重侵蝕並且限制了產生創新可能性的自由與開放，而這些被限制的開放正是網路

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http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-03_ACTA_EN.pdf (Feb. 22, 2010).

[229] *Id*.

[230] Matthew Ingram, *Do We Need Copyright Cops?*, INGRAM 2.0, *at* http://www.theglobeandmail.com/blogs/ingram-2_0/do-we-need-copyright-cops/Article687387/ (May 27, 2008).

[231] 自由軟體基金會（Free Software Foundation，FSF）是一個致力於推廣自由軟體的美國民間非營利性組織，於 1985 年 10 月建立。主要宗旨是開發更多的自由軟體，並且處理與自由軟體運動相關的法律和結構問題。可參考其網站：http://www.fsf.org/。

[232] Digital Rights Management 是可於電腦、可攜式裝置或網路裝置上保護並安全傳送播放內容的平台，出版商可根據需求限制消費者對數位內容的使用方式與使用條件（時間、空間、頻率等）。

[233] Matt Lee, *Speak out against ACTA*, FSF, *at* http://www.fsf.org/campaigns/acta/ (Dec. 07, 2009).

成功的主因[234]。

第三節　反仿冒貿易協定草案概述

目前由各參與國官方正式對外公布的有關 ACTA 之談判文件，主要包括各回合談判的議程與會後聯合聲明及新聞稿、2009 年 4 月 6 日由參與國聯合公布的六頁談判重點摘要、2010 年 4 月公布的四月草案，以及 2010 年 12 月 3 日的最終版本。至於 2010 年 1 月、7 月及 8 月被披露的一月草案、七月草案及八月草案雖非由參與國正式公布而是由其他管道流出，仍可由此窺知各國立場、政策傾向等資訊。這些非最終版本的草案中，有許多條文文字皆置於括弧（[...]）內，表示各國談判當時的歧異尚未化解[235]，是未來各界研究 ACTA 談判歷程的重要紀錄文件。

2010 年 12 月公布了最終版本，各締約國將對此進行國內批准程序，未來生效的 ACTA 將以此最終版本為主要樣貌。本節以 2010 年 12 月的版本為基礎，針對 ACTA 規範架構及主要內容進行概述，條文主要分為六章：

第一章　基礎規定及定義（Initial Provisions and Definitions）

本章闡明 ACTA 目標、締約國義務[236]與協定適用範圍[237]、用語定義[238]，也規範 ACTA 與其他國際協定[239]、或與各締約國既存智慧財產權相關法律之競合[240]，以及個人隱私權維護與資訊揭露[241]。

第二章　智慧財產權執行之法律架構（Legal Framework for

[234] EuroISPA, *European ISPs Warn against A Trade Deal Threatening Internet Openness, at www.euroispa.org/files/0911_euroispa_pr_acta.pdf (Nov. 30, 2009).*
[235] 例如四月草案版本中第 2.1 條原文：In the context of this section, e] [E]ach Party shall make available to right holders [civil judicial] [or administrative] procedures concerning the enforcement of any [intellectual property right] [copyrights and related rights and trademarks].
[236] *ACTA Final* Art. 2.
[237] *ACTA Final* Art. 3.
[238] *ACTA Final* Art. 5.
[239] *ACTA Final* Art. 1.
[240] *ACTA Final* Art. 2.
[241] *ACTA Final* Art. 4.

Enforcement of Intellectual Property Rights）

第二章規定加強執行應建立之法律架構，包含對以下項目之建構或強化：與執行有關之一般義務（General Obligation）、民事執行、邊境措施、刑事執行以及和數位環境中智慧財產權的執行（Enforcement of Intellectual Property in the Digital Environment）。

第一節　一般義務

本章在第一節即明確規定了與執行相關之一般義務，要求 ACTA 所規範之執行程序於其各締約國國內法律應有所規定，且執行時應注意公正衡平原則，亦即執行程序不應無謂的繁瑣或存在過高的成本，或予以不合理之時限或任意的遲延，並且應該考量救濟、刑罰和侵權行為之嚴重程度間的比例原則[242]。

第二節　民事執行

本節為與民事執行程序有關之規範。首先規定各締約國應在國內法律體系提供使智慧財產權權利人可主張其權利的程序[243]，接著針對各個民事執行措施有具體規定。禁制令的部分，則規定司法機關應有權以禁制令命侵權人停止侵害行為，包括防止侵權商品進入一國商業管道流通或者由本國出口至他國[244]。並規定侵權行為人對權利人因其侵權行為所受之損害，需依損害賠償的規定計算賠償額度，且司法機關應令侵權行為人給付相當之損害賠償，包含權利人難以完整評估損害範圍，因此無法得到充分補償之案例；另外也規定各國應訂定條文供司法機關指示侵權行為人償付權利人合理的訴訟費用與成本[245]。除了前述程序之外，此節也規定司法機關應有權為其他救濟，具體內容包括為了有效遏阻侵害情事，對於經司法機關認定為侵害智慧財產權之物品或用於製造侵害物品之原料與器具，應有權在無任何形式補償下，將其移出本國的商業管道或予以銷毀[246]。同時規定民事

242 *ACTA Final* Art. 6.
243 *ACTA Final* Art. 7.
244 *ACTA Final* Art. 8.
245 *ACTA Final* Art. 9.
246 *ACTA Final* Art. 10.

程序進行中，司法機關應命侵權人告知與侵權行為有關資訊，例如涉及製造及散佈侵害物之其他第三人，以及散佈侵害物管道等，以利智慧財產權之保護與遏止侵權行為[247]。另外，本節也規定司法機關應有權採取迅速有效之暫時性措施[248]。

第三節　邊境措施

本節為與邊境措施有關之規範，第十三條確定了邊境措施適用範圍，並重申邊境措施的施行不應對合法貿易造成阻礙[249]。針對各締約國國民在旅行中所攜帶之少量、個人性物品，則以該物是否具有商業性為區分標準，各國可選擇將不具商業性者排除適用本節邊境措施之規定[250]。為了避免爭議，本節具體定義了何謂邊境措施，包括轉運中物品（in-transit goods）的情形[251]。至於邊境措施主管機關的權限則以各條文分述，首先，主管機關有權要求權利人提供相關資訊協助本節邊境措施之執行[252]，各國亦應提供權利人提請海關單位中止疑似侵權商品之進口、出口及轉運之相關程序[253]，且主管機關同時應有權要求申請人提供足夠保證金或相當擔保，以保護被告及主管機關，並防止其濫用權利，但該保證金或相當擔保不得阻礙對此等程序之行使[254]；各國應提供程序讓主管機關在合理期間內決定疑似侵權物品是否確實侵害某項智慧財產權[255]；主管機關亦擁有得依職權中止疑似侵權商品進口、出口及轉運之權限[256]，在此權限之下，主管機關有權對侵權商品採取銷毀措施；主管機關除特殊情況外，對於仿冒商標之侵權物品，不得允許該物品僅移除商標就流入商業通路。與本節措施有關之申請、貯存或銷毀費用不應成為對此等程序行使之阻礙[257]。最後，規定主管機關在未違反一國關於隱私和秘密資訊法律之前提下，有將侵權貨品關鍵資訊揭露給權利人之權限[258]。

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247 *ACTA Final* Art. 11.
248 *ACTA Final* Art. 12.
249 *ACTA Final* Art. 13.
250 *ACTA Final* Art. 14.
251 *ACTA Final* Art. 16.
252 *ACTA Final* Art. 15.
253 *ACTA Final* Art. 17.
254 *ACTA Final* Art. 18.
255 *ACTA Final* Art. 19.
256 *ACTA Final* Art. 20.
257 *ACTA Final* Art. 21.
258 *ACTA Final* Art. 22.

第四節　刑事執行

本節規定各締約國至少應對於具「商業規模」之商標權、著作權或鄰接權侵權行為提供刑事程序及課以刑罰，並定義此節商業規模意謂可獲得直接或間接財務、商業利得之商業侵權行為[259]，而所訂立之刑罰，其程度必須可對侵權行為發生有嚇阻效果[260]。本節也要求各締約國應給予刑事執行主管機關可扣押或銷毀侵權商品、設備、及生產原料之權限，以及扣押、沒收來自侵權行為之不法收益權限[261]。另外，為了進一步保護權利人，也規定主管機關應有主動依職權（EX OFFICIO）對侵權者進行調查的刑事執法權限[262]。

第五節　數位環境中智慧財產權的執行

本節一開始即開宗明義規定締約國應針對數位環境中侵害智慧財產權之行為提供相關民事、刑事執法程序，並強調這些執行程序應迅速有效，才能遏止侵權行為之發生[263]。本節規定主要可區分為三個類型：網路服務提供業者之責任、規避科技保護技術措施的行為（the circumvention of effective technological measures）、數位權利內容之管理。

各締約國應訂定程序，若網路服務提供業者的註冊用戶有進行侵權行為的情形，則該業者應遵循該程序提供權利所有人足夠資訊使該所有人得已採取行為保護其權利[264]；各締約國應對權利人所採取的科技保護技術提供有效的法律救濟與保護[265]；各締約國應對權利人所採取的數位權利內容之管理提供有效的法律救濟與保護[266]。

[259] *ACTA Final* Art. 23.
[260] *ACTA Final* Art. 24.
[261] *ACTA Final* Art. 25.
[262] *ACTA Final* Art. 26.
[263] *ACTA Final* Art. 27.1.
[264] *ACTA Final* Art. 27.4.
[265] *ACTA Final* Art. 27.5.
[266] *ACTA Final* Art. 27.7.

第三章　執法實踐（Enforcement Practices）

本章締約國應如何達成執法之目標做出規範。所提示的執法實踐包括：培養各國國內嫻熟執法體系之智慧財產權專家，以確保有效處理智慧財產權案件、收集並分析與執法相關的數據及資料、透過成立協調機構或其他機制以維繫各國執行 IPR 之政府機構間之合作、建立正式或非正式官方/民間顧問團體成為發聲管道[267]。締約國應採取並維持適當措施，使邊境措施執行機關更容易察覺、鎖定疑似載有仿冒與盜版商品之船隻[268]。締約國應公布有關國內與智慧財產權執行措施相關之執行程序與資訊，但所公開之資訊不應有損於公共利益、法律執行之機密資訊以及隱私權[269]。締約國應強化消費者對於保護智慧財產權重要性與侵權之危害的認知[270]。決定銷毀仿冒與盜版商品的方式時，應將環境因素列入考量[271]。

第四章　國際合作（International Cooperation）

本章規定不論權利人所在地或侵權商品來源為何，與締約國國內法制以及既有國際協定與協議一致之前提下，締約國應依本章規範進行國際合作[272]。此外，為維護隱私權與資訊秘密性，締約國應在其已加入之國際協定、內國法制與政策所容許的範圍內互相提供資訊，包括：彼此交換其執行行動最佳範例與資訊、政府及官方或民間諮詢團體定期會面並就最佳範例進行交流等[273]。為了加強國際合作，締約國得針對執行方面的改善提供能力建構與技術協助，例如提供本協定開發中國家成員或第三國訓練事宜[274]。

[267] *ACTA Final* Art. 28.
[268] *ACTA Final* Art. 29.
[269] *ACTA Final* Art. 30.
[270] *ACTA Final* Art. 31.
[271] *ACTA Final* Art. 32.
[272] *ACTA Final* Art. 33.
[273] *ACTA Final* Art. 34.
[274] *ACTA Final* Art. 35.

第五章　機構安排（Institutional Arrangements）

本章規範了與 ACTA 有關的機構安排。首先是 ACTA 委員會（Committee），明確定義其組織架構及職權範圍，ACTA 委員會將由締約國各派代表組成，負責監督 ACTA 適用狀況、協定之發展、協定因解釋或適用所生爭議之解決，以及其他可能影響 ACTA 運作之事項等[275]。另外，為了實現 ACTA 加強國際合作的宗旨，締約國應指定連絡點[276]（contact point）。同時也設計出協商（Consultations）程序[277]，各締約國可以書面要求與他國針對與 ACTA 執行有關事宜進行協商，但是此協商應保持機密，且不可損及一方在其他進行中協商程序（包括 WTO 的爭端解決程序）的政策立場

第六章　最終條文（Final Provisions）

本章規範 ACTA 協定應如何運作，例如協定簽署期間[278]、協定生效時間[279]、締約國退出方式[280]、協定之修正[281]、協定之參加[282]、採用之語言版本[283]、協定之存放處[284]等事項。

第四節　反仿冒貿易協定未來適用可能產生問題

本節將針對 ACTA 現階段談判成果進行討論，主要參考版本為業經參與談判國正式對外公布的四月草案版本及最終版本，可以藉著比較不同時期的草案版本找出爭議問題在協商歷程中之發展概況。惟於 2010 年亦分別有一月、七月及八月草案版本經由非正式管道對外流出，考慮到四月草案版本及最終版本並未公

[275] *ACTA Final* Art. 36.
[276] *ACTA Final* Art. 37.
[277] *ACTA Final* Art. 38.
[278] *ACTA Final* Art. 39.
[279] *ACTA Final* Art. 40.
[280] *ACTA Final* Art. 41.
[281] *ACTA Final* Art. 42.
[282] *ACTA Final* Art. 43.
[283] *ACTA Final* Art. 44.
[284] *ACTA Final* Art. 45.

開各國談判立場，因此在想更進一步了解 ACTA 的發展過程，實也可自行參酌各該草案版本。

各參與談判國尚未正式公布草案以前，各界已對 ACTA 可能的條文內容提出許多批評與質疑，藉由審視已公布的版本，可對這些批評是否言之有物抑或純屬過慮得到初步結論。由於 ACTA 各章節實體規範的主軸並不相同，本節將先針對 TRIPS 在執行面亦有類似規範的三個部分進行討論，包含：民事執行、邊境措施、刑事執行，最後簡要論及 ACTA 中組織架構於未來可能產生之問題。至於 TRIPS 未有涵蓋的數位環境中執法，則於下一節進行分析與概述。

以下將針對 ACTA 未來適用可能產生之問題進行探討，每一部分會先簡述問題點為何，並提出問題存在於四月草案版本中的哪一部分，該問題歷經數次回合談判後是否仍存在於最終版本中；若該問題於 TRIPS 中有類似的規定，再以 TRIPS 的現行內容為基準，比較是否真的如同 ACTA 參與談判國所宣稱的：ACTA 不會偏離 TRIPS 的規定。最後提出本節小結。

第一項　無過失責任之問題

侵權行為人需負民事責任，使得權利人所受損害可以獲得填補，民法典型侵權行為的成立須滿足主觀要件，亦即侵權行為出於「故意或過失」[285]。若侵權行為之成立不以「故意或過失」為要件之一，則為無過失責任[286]。侵權行為人因其故意或過失行為侵害他人權益所生之損害，應負賠償責任，為當然自明之法理，但是無過失責任，行為人並無於法可責難之過失，仍需負賠償責任之理由何在[287]？其基本思想在於現代社會經濟活動中，有特定企業、物品或設施之所有人會製造危險來源，例如原子設施、民用航空器或者商品的製造與銷售，通常僅這些所有人能夠控制這些危險，加上現代責任保險制度發達，因危險責任所生之損害賠償

[285] 王澤鑑，侵權行為法(1)，頁 287，2005 年 1 月。
[286] 同上註，頁 17。
[287] 同上註。

可經由保險制度分散，是以近代才發展無過失責任的概念，且通常規定在特別法中，例如我國的民用航空法、消費者保護法等[288]。

四月草案版本第 2.2.1 條(a)款規定司法機關有權命侵權行為人對權利人因其侵權行為所受之損害，給付賠償[289]，條文文字「明知或可得而知」仍為括號中的形式，表示參與談判各國尚未達成共識，亦即侵權行為之成立要件毋須滿足主觀要件，為無過失責任。因此，若將來的談判過程中「明知或可得而知」此要件未被納入正式條文，就會出現即使是非因故意或過失侵害他人權益之無辜侵權者（Innocent Infringer），仍需負無過失責任，對權利人所受之損害給付賠償。

TRIPS 第 45 條規定，明知或可得而知之情況下，侵害他人智慧財產權之行為人才需給付賠償，若與 TRIPS 第 45 條比較，則 ACTA 四月草案版本未考慮有無辜侵權者的情形，如前段所述，無過失責任的適用情況通常為可以控制造成侵害行為危險源之所有人，多數情況為企業，但無辜侵權者通常為純以自己使用為目的之個人，適用對象之差異性與可以承擔責任之能力差距非常大，ACTA 本條之適用範圍將引起爭議。

ACTA 最終版本針對此點已達成共識，第 9 條第 1 款正式把「明知或可得而知」列為條文文字[290]，亦即侵權行為之成立要件仍須滿足主觀要件，已不再是無過失責任。

第二項　損害賠償之問題

損害賠償為智慧財產權法律救濟最基本方式，為民事程序之一部分。由於智慧財產權類型不同，各個侵權案件中損害賠償額度如何估計往往成為重要問題，

[288] 同上註，頁 18。

[289] *ACTA April Draft* Art. 2.2.1(a)前段:" 1. Each Party shall provide that: (a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer [who knowingly or with reasonable grounds to know, engaged in [infringing activity] of [copyright or related rights and trademarks] [intellectual property rights] to pay the right holder…"

[290] *ACTA Final* Art. 9.1 前段:"1. Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order the infringer who, knowingly or with reasonable grounds to know, engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement. "

各國估算時列為應考慮在內之要件並不完全相同，且各國損害賠償制度亦有差異，例如並非各國都存在法定損害（Statutory Damages）制度。

一、損害賠償額之估算

四月草案版本第 2.2.1 條(b)款規定法院在估算損害賠償額（Assessment of Damages）時，應該要將權利人提出之合法估算價值方法考慮在內，包括所失利益、受侵權商品或服務的價值，後者應該要以市價、建議零售價或者侵權行為人自侵權行為所獲得之利益[291]。TRIPS 中對於損害賠償額度計算，並未明列法院應考慮在內之要素。這種估算方式適用在某些類型的案件中甚至容易引發爭議。例如在專利侵權案件，該如何決定專利侵權所受損害之適當比例及計算此種損害的方式，包括：損害賠償額是否要與合理的專利授權金相當？權利受侵害之商品或服務可能同時含有數種不同專利權，不同專利權的損害賠償額度要以何種比例分配[292]？

在網路侵權的案件中，判斷因侵權行為所產生的經濟損失時，主要考量關鍵為「替代率」（substitution rate），替代率為消費者若不購買一項盜版商品時會轉而購買一項合法商品的比例。根據美國國家審計總署（Government Accountability Office，簡稱 GAO）的一份分析報告，指出在多數情況下盜版商品的售價會比合法商品便宜非常多，因此考慮替代率時使用之「一對一」（one-to-one）條件在現實中不太可能成立[293]。特別是在網路侵權的案件，多數的侵權商品或服務以免費的方式在網路上流通，計算得出之替代率會非常低，因此於這種侵權案件採用一對一的替代率計算方式並不適當[294]。由於四月草案版本第 2.2.1 條(b)款規定的合

[291] *ACTA April Draft* Art. 2.2.1 (b):"(b) in determining the amount of damages for [copyright or related rights infringement and trademark counterfeiting] [infringement of intellectual property rights], its judicial authorities shall consider, *inter alia*, any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price, or [the profits of the infringer that are attributable to the infringement]."

[292] Kimberlee G. Weatherall, *ACTA in April 2010: Summary of Concerns*, The Selected Works of Kimberlee G. Weatherall, *at* http://works.bepress.com/kimweatherall/20, at 9 (April, 2010).

[293] United States Government Accountability Office, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, REPORT TO CONGRESSIONAL COMMITTEES, *at* http://www.gao.gov/new.items/d10423.pdf (April 2010).

[294] *Id.*

法估算價值方法包括以市價、建議零售價計算侵權商品服務之價值，採用的估算方式實質上等同用一對一條件為基礎計算替代率，故適用上可能會產生類似的疑義[295]。

ACTA 最終版本第 9 條第 1 款後段的條文文字大致與四月草案版本類似[296]，因此前述討論的疑義於未來適用時仍應留意。

二、法定損害

預設損害或稱為法定損害，在相關法規中設定損害賠償法定額度的範圍，主要目的有二：權利人不必舉證證明侵權人造成的實際損害、可遏阻侵權行為發生。四月草案版本第 2.2.2 條(a)款規定，締約國應（或）在民事程序中提供侵權人賠償權利人預設損害的機制[297]。TRIPS 第 45 條第 2 項後段規定於適當情況下，會員並得授權其司法機關，命侵害人賠償權利人因其侵害行為所失利益以及（或）預設損害。與 TRIPS 第 45 條第 2 項後段比較，可以看出 TRIPS 對於法定損害制度提供會員選擇之彈性，但是四月草案版本第 2.2.2 條(a)款的提案版本存在著使各國皆必須提供法定損害制度的可能性。

法定損害在適用上可能會引發幾個問題。第一，存在使損害賠償額度遠超過實際損害，又 ACTA 四月草案版本中並未規定法定損害的上下限，例如在網路侵權或者數位環境的侵權案件中，若採用以每個商品原則（per-work rule）為計算之基準，將因為此類侵權案件傳播與分享成本低廉、迅速且參與侵權行為人眾多（例如每一個純粹以自己使用為目的下載盜版電影之網路使用者）的特性，計

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[295] Australia Digital Alliance, *Anti-Counterfeiting Trade Agreement: Impact on Individuals and Intermediaries, at* http://www.digital.org.au/submission/documents/20100519ADA-ACTAimpactonindividualsandintermediaries.pdf, at 1(May, 2010).

[296] *ACTA Final* Art. 9.1 後段:" In determining the amount of damages for infringement of intellectual property rights, a Party's judicial authorities shall have the authority to consider, inter alia, any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price."

[297] *ACTA April Draft* Art. 2.2.2 (a):" [2. At least with respect to works, phonograms, and performances protected by copyright or related rights, and in [cases of trademark counterfeiting], in civil judicial proceedings, [As an alternative to paragraph 1,] each Party [shall][may] establish or maintain a system that provides:
(a) pre-established damages; (b) presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement. [; or (c) additional damages]]."

算所得的損害賠償額度會相當高[298]。第二，法定損害賠償額歸權利人所有而非政府，因此高額法定損害存在的可能性會鼓勵興訟，且在民事程序中適用的法定損害使權利人不必負擔舉證責任，此制度本質上是否妥適不無爭議[299]。

美國原本堅持各締約國皆須在國內訂定出法定損害制度，而歐盟及瑞士等國則持相反意見，認為各國國內法律體制不同，應該由各國自行決定是否適合採取法定損害制度[300]。在 2010 年 6 月底於瑞士盧森舉行的第九回合談判中，談判國對此爭議達成共識，同意由各國自行決定是否採取此制度，四月草案版本中美國的提案被刪去。最終版本第 9 條第 3 款規定，各國在著作權、鄰接權與商標權侵權案件應提供以下一個或數個機制：預設損害、足夠賠償權利人因侵權行為而受損賠償、至少在著作權侵權案件中要求額外費用之賠償。由條文用語「應該提供以下一個或數個機制」，可看出締約國有權決定是否要適用法定預設損害[301]。

第三項　告知權之問題

司法機關在侵權案件審理過程中，若有權命侵權人提供相關資訊，對於侵權行為之制止與智慧財產權利執行有相當大的助益，惟命其提供資訊之涵蓋範圍為何，仍必須同時考量隱私權、個人資訊等其他法益，不可無限制的擴大。

四月草案版本第 2.4 條規定，司法機關應命侵權行為人提供與侵權行為相關的資訊，包括：任何與侵權行為有關的人、製造侵權物品或服務之方式、散佈侵權物品或服務之管道、涉及製造及散佈侵害物之其他第三人、散佈侵害物之管道等[302]。TRIPS 第 47 條有類似規定，要求會員得規定司法機關命侵害人告知權利

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298 Australia Digital Alliance, *supra* note 295, at 2.
299 Kimberlee G. Weatherall, *supra* note 292, at 13.
300 *ACTA Parties Made Progress on Pre-established Civil Damages*, INSIDE U.S. TRADE, Vol. 27 (Jul. 9, 2010).
301 *ACTA Final* Art. 9.3:" At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following:
(a) pre-established damages; or (b) presumptions3 for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or (c) at least for copyright, additional damages."
302 *ACTA April Draft* Art. 2.4:" [Without prejudice to other statutory provisions which, in particular, govern the protection of confidentiality of information sources or the processing of personal data,]Each

人涉及製造及散佈侵害物之其他第三人，以及散佈侵害物之管道。若與 TRIPS 第 47 條比較，可以看出四月草案版本第 2.4 條擴張了告知權之範圍，直接列舉了侵權行為人該提供之資訊。

當然，若能取得更多資訊對於實際執行更有利，但是同時需注意對於第三者的權利及隱私權之保護，否則在訴訟過程中可能會產生權利人利用此規定不當刺探消息的狀況[303]。對於此問題，由於各國國內訴訟法的一般原則仍當然適用，且四月草案版本中此條的括號文字已經對此問題提出解決方式，例如第 2.4 條開頭即要求不得侵害與隱私權、個人資料保護之相關法規，因此未來適用上也許不會成為問題[304]。

ACTA 最終版本針對此點已有明確的條文規定，第一章一般義務中的第 4 條為隱私權與資訊揭露之規範，該條第 1 款(a)項明定 ACTA 中的各項規定不會使各締約國須因此違反與其國內隱私權相關之法律或國際協定[305]。

第四項　邊境措施適用範圍之問題

智慧財產權執行重要課題之一，為如何使侵權貨品不至於進行跨國界商業流通，避免國際商業盜版與仿冒活動擴大，此項執行有賴各國賦予其邊境措施主管機關權限，以控制仿冒品進出國界。但是邊境措施適用範圍是否應該涵蓋所有類型的智慧財產權？即使主管機關接受了相當程度的訓練，但並非所有智慧財產權

Party shall provide that in civil judicial proceedings concerning the enforcement of [intellectual property rights][copyright or related rights and trademarks], its judicial authorities shall have the authority upon a justified request of the right holder, to order the [alleged] infringer [including an alleged infringer] to provide, [for the purpose of collecting evidence] any [relevant] information [information on the origin and distribution network of the infringing goods or services][in the form as prescribed in its applicable laws and regulations] that the infringer possesses or controls, [where appropriate,] to the right holder or to the judicial authorities. Such information may include information regarding any person or persons involved in any aspect of the infringement and regarding the means of production or distribution channel of such goods or services, including the identification of third persons involved in the production and distribution of the infringing goods or services or in their channels of distribution. [For greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege.]]"

303 Kimberlee G. Weatherall, *supra* note 292, at 15.

304 *Id.*

305 *ACTA Final* Art. 4.1.a:" Nothing in this Agreement shall require a Party to disclose: (a) information, the disclosure of which would be contrary to its law, including laws protecting privacy rights, or international agreements to which it is party."

之侵權行為皆可由商品表面直接辨別，若未對邊境措施適用範圍設有限制，則可能會發生執行過當反而干擾正常商業、貿易活動之情形。

一、適用範圍：專利權

一月草案版本第 2.X.1 條 Option1 條文用語未明確區分侵害的智慧財產權權利類型，此條規定實質上將邊境措施的適用範圍涵蓋了專利權在內[306]。若與 TRIPS 第 51 條作比較，TRIPS 第 51 條的適用範圍只有商標仿冒和著作權侵權兩種類型，因此 ACTA 擴張了邊境措施的適用範圍。商標仿冒和著作權之侵權，邊境措施的主管機關通常由商品表面即可判斷侵權是否存在，但是專利侵權則相反，無法僅依據商品表面作出判斷，因此容易產生爭議[307]，例如歐盟近期在海關扣押來自印度和巴西的學名藥所引發之糾紛就是一個例子[308]。此糾紛已經由印度向歐盟及其會員提出協商請求，在 WTO 爭端解決機制下進行[309]。可知並不適宜在一個國際條約中將適用範圍擴張到專利權。

各國在協商過程中對此做出決定，第九回合中同意專利權不屬邊境措施適用範圍，避免學名藥在運送過程中被某國主管機關扣押的爭議再次發生[310]。最終版本註腳 6 明確排除 ACTA 邊境措施此節的規範於專利權及營業秘密的適用[311]。

二、適用範圍：所有商標侵權的類型

直接仿冒的商標與產生混淆近似的商標是不同的法律概念，二者並非同一種商標侵權的類型。權利人依據一月草案版本第 2.6.1 條可以向主管機關申請扣押標示有疑似商標仿冒或者產生混淆近似商標（confusingly similar trademark）的物

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306 *ACTA January Draft* Art. 2.X.1 Option1:" This section sets out the conditions for action by the competent authorities when goods are suspected of infringing intellectual property rights, within the meaning of this agreement, when they are imported, exported, or in-transit."

307 Kimberlee G. Weatherall, *supra* note 292, at 26.

308 *See* India, *Brazil to Move WTO against EC over Drug Seizure Issue*, BUSINESS STANDARD, *at* http://www.business-standard.com/india/news/india-brazil-to-move-wto-against-ec-over-drug-seizure-issue/75571/on (Oct. 09, 2009).

309 Request for Consultation by India, *European Union and a Member State — Seizure of Generic Drugs in Transit*, WTO Doc. WT/DS408/1 (May 19, 2010).

310 *Released ACTA Text Highlights Four Sections Where Disagreements Remain*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Oct. 06, 2010) [hereinafter *Four Sections Where Disagreements Remain*].

311 *ACTA Final* footnote 6:" The Parties agree that patents and protection of undisclosed information do not fall within the scope of this Section."

品[312]。若與 TRIPS 第 51 條作比較，TRIPS 第 51 條的適用範圍只限於商標仿冒，因此 ACTA 擴張了邊境措施的適用範圍。這種擴張可能會造成商標權利人的濫用，使得不具有故意侵權意圖的合法商業行為也成為 ACTA 執行措施的打擊對象[313]。

ACTA參與談判國已經針對此疑義作出處理，四月草案版本第2.X.2條規定邊境措施的適用範圍只有商標仿冒[314]，不包括混淆近似的商標。最終版本亦維持相同規範方式。

三、適用範圍：進口、出口及轉運（in transit）

四月草案版本第2.X.1條規定進口、出口或轉運中的疑似侵權物品皆為主管機關採取邊境措施的範圍[315]。若與TRIPS第51條作比較，TRIPS第51條的適用範圍只限於出口的商品，因此ACTA擴張了邊境措施的適用範圍。特別是「轉運中」的商品，若該商品是在第三國製造生產、將運往第三國銷售販賣，則爭議點在於本國對於轉運中商品採取邊境措施的管轄權依據為何[316]？更進一步思考，是否會造成不合理貿易障礙？例如在TRIPS第41.1條後段就明示了權利執行應避免對合法貿易造成障礙，並應提供防護措施以防止其濫用。最終版本第16條第2款仍將轉運中物品涵蓋在邊境措施適用範圍內[317]。

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[312] *ACTA January Draft* Art. 2.6.1:" Each Party shall provide [procedures] [measures] for import, export [and in-transit] [Customs transit and transhipped] shipments, by which right holders may request the competent authorities to suspend release [at least in cases] of suspected counterfeit trademark goods or confusingly similar trademark goods, and suspected pirated copyright goods [goods suspected of infringing an intellectual property right] into free circulation."

[313] Kimberlee G. Weatherall, *supra* note 292, at 27.

[314] *ACTA April Draft* Art. 2.X.2:" For the purposes of this section, "goods infringing an intellectual property right" means goods infringing any of the intellectual property rights covered by TRIPS. However, Parties may decide to exclude from the scope of this section, certain rights other than trademarks, copyrights and GIs when [not protected exclusively by copyright and trade mark systems and] [protected by [non-product- or sector-specific] [registration] sui generis systems.]"

[315] *ACTA April Draft* Art. 2.X.1:" 1. This section sets out the conditions for action by the competent authorities when goods are suspected of infringing intellectual property rights, within the meaning of this agreement, when they are imported, exported, in-transit or in other situations where the goods are under customs supervision."

[316] Kimberlee G. Weatherall, *supra* note 292.

[317] *ACTA Final* Art. 16.2:" A Party may adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control under which: (a) its customs authorities may act upon their own initiative to suspend the release of, or to detain, suspect goods; and (b) where appropriate, a right holder may request its competent authorities to suspend the release of, or to detain, suspect goods."

四、適用範圍：地理標示

地理標示（Geographical Indication）係指因某地的自然或人文因素，所生產之產品具有優良品質及特性，且有別於其他地方所生產者，得直接或間接以地理名稱文字來表彰該地方該產品。在 TRIPS 第二十二條第一款的定義地理標示為：係指該產品源自於某一會員領域，或自該領域中之一地區或地點，而該產品的品質，名聲或其他特性主要來自於該地理來源者[318]。每個國家皆以自身經濟及貿易活動為考量，因各國歷史發展不同，而以不同目的保護其國內地理標示產品，因此各國國內對地理標示的保護政策與法律體系並不相同。歐盟有一套規範地理標示的獨特法律體系（*sui generis*），美國則把地理標示視為商標權的一種，以商標法規範地理標示。例如，依歐盟規定，僅有在瑞士 Emmental 地區生產的乳酪才可被稱為 Emmental 乳酪；依美國規定，只要遵循特定作法的乳酪就可以被稱為 Emmental 乳酪。

歐盟一直希望可以把地理標示納入 ACTA 中，且希望保護水準與商標權、著作權相同，並強調若未能擴張 ACTA 的智慧財產權保護種類，則歐盟會有隨時自談判過程中抽身的準備[319]。但是美國國內的商業團體持續反對，認為若把地理標示納入 ACTA 保護範圍，則美國產品，特別是農產品，很有可能會在歐盟國家境內因為被認違反地理標示規定而被扣押[320]。美國後來做出讓步，最終版本第 13 條定義邊境措施的範圍為：與各國國內智慧財產權保護體系一致且不會損及 TRIPS 的要求，但是不得對不同智慧財產權待遇形成不合理的歧視並避免創造出合法的貿易障礙[321]。由此條規定可解讀，雖然歐盟原先各締約國保護水準與

[318] TRIPS, Art. 22.1:" 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."

[319] *EU Taking A Hardline Approach on ACTA Scope Disagreement*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Sep. 09, 2010).

[320] *U.S., EU Reach Basic Agreement on ACTA Scope; Several Areas Not Finalized*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Oct. 05, 2010).

[321] *ACTA Final* Art. 13:" In providing, as appropriate, and consistent with its domestic system of intellectual property rights protection and without prejudice to the requirements of the TRIPS Agreement, for effective border enforcement of intellectual property rights, a Party should do so in a manner that does not discriminate unjustifiably between intellectual property rights and that avoids the

商標權、著作權相同之期待未實現，但是已經承認地理標示並且有獨立法律體系的國家，有權選擇加強國內的保護水準。

第五項　邊境措施主管機關依職權行為之問題

各國實施邊境措施的主管機關原則上為海關，TRIPS在相關條文中對於海關的職權與執行方式都有規定，但TRIPS僅規定一最低標準，條文內容仍留有相當程度的彈性空間，由各國國內執行時自行決定執行程度或具體細節。ACTA則限縮了這些在TRIPS條文中存在的彈性，作出更具體、更詳細的指示性規範[322]。以下有兩個例子。

第一，四月版本草案第2.6.3條中規定權利人可以向海關提出申請，要求海關對疑似侵權物品暫不放行，並明定權利人提出之申請有效期間至少為一年[323]。若與TRIPS第52條作比較，TRIPS第52條只提及主管機關應於「合理期間」內通知申請人是否已受理申請，合理期間的長短原則上留待各國自行決定。

第二，四月版本草案第2.7.1條Option1規定海關應依職權採取行為，毋須先由權利人提出申請[324]。若與TRIPS第58條作比較，TRIPS第58條對於會員是否要求主管機關應依職權採取行為未有硬性規定，同樣留有各會員可自行決定的空間。

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creation of barriers to legitimate trade."

322 Kimberlee G. Weatherall, *supra* note 292, at 28.

323 *ACTA April Draft* Art. 2.6.3:" 3. Each Party shall provide for applications to suspend the release of suspected infringing goods that apply to all goods under customs control in its territory and remain applicable to multiple [or in the alternative specified] shipments. Each Party may provide that, at the request of the right holder, the application to suspend the release of goods may apply to selected points of entry and exit under customs control. These applications for suspension shall remain applicable for a period of not less than [one year][or sixty days] from the date of application, or the period of protection of the relevant intellectual property rights under the laws of the Party providing border measures under this Section, whichever is shorter. Each Party may permit a right holder to specify that an application to suspend remain applicable for a period of less than [one year][or sixty days]."

324 *ACTA April Draft* Art. 2.7.1 Option1:" 1. Each Party [may] [shall] provide that its customs authorities may act upon their own initiative, to suspend the release of suspected counterfeit trademark goods or suspected pirated copyright goods with respect to imported, [exported] [, or in-transit] goods including suspected counterfeit trademark goods or suspected pirated copyright goods admitted to, withdrawn from, or located in free trade zones [goods suspected of infringing an intellectual property right]. [Each Party [may][shall endeavor to] provide its customs authorities the same authority as the foregoing provision of this Article in respect of [exported and] in-transit goods that are [suspected counterfeit trademark goods or suspected pirated copyright goods.]"

在最終版本中此部分問題獲得修正。第一點已與TRIPS第52條同調，最終版本第17條第3款規定主管機關仍只須在「合理期間」內通知申請人並告知申請的效力期間[325]。第二點亦有變動，最終版本第16條規定海關得依職權採取行為，毋須先由權利人提出申請[326]，條文用語由「應」修改為「得」，與TRIPS同樣留給各會員自行決定的空間。

第六項　「商業規模」要件之問題

刑事程序原則上係嚇阻侵害智慧財產權之最有效方法，但並非對所有侵害智慧財產權行為皆須課以刑罰。TRIPS 以「商業規模」此要件為其界限，第 61 條規定，針對商業規模而故意仿冒商標或侵害著作權之案件，需制定刑事程序與罰則，因此許多 WTO 會員內法都有類似的規定。亦即侵權行為若屬商業規模、侵權者可從中獲得商業利益的類型，即得以刑事處罰之。

「中國─視聽服務案[327]」一案為中、美之間於 2007 年與服務貿易有關之爭端案件。中國在其入會之服務業特定承諾表中，於「錄音產品配銷服務」之「國民待遇限制」欄位，表示對「模式三：商業據點呈現」「無限制」;但是中國自 2001 年底入會後，卻通過多項法令，明文禁止外國投資企業以數位傳輸方式提供錄音產品配銷服務，因此引發兩國間之貿易爭端。WTO 爭端解決機構在本案的小組報告中，提及「商業規模」一詞並作出以下定義：在一個特定市場中針對一項特

[325] *ACTA Final* Art. 17.3:" Each Party shall ensure that its competent authorities inform the applicant within a reasonable period whether they have accepted the application. Where its competent authorities have accepted the application, they shall also inform the applicant of the period of validity of the application."

[326] *ACTA Final* Art. 16:"1. Each Party shall adopt or maintain procedures with respect to import and export shipments under which: (a) its customs authorities may act upon their own initiative to suspend the release of suspect goods; and (b) where appropriate, a right holder may request its competent authorities to suspend the release of suspect goods.
2. A Party may adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control under which: (a) its customs authorities may act upon their own initiative to suspend the release of, or to detain, suspect goods; and (b) where appropriate, a right holder may request its competent authorities to suspend the release of, or to detain, suspect goods."

[327] 小組裁決於 2009 年 1 月 26 日公布。Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R, at 115 (Sept. 18, 2000).

定產品，以典型或通常認知的商業活動程度進行仿冒或盜版[328]。所謂的典型或通常認知商業活動程度，就字義與社會通常概念而言，應該可以推知並不涵蓋純以個人使用為目的之行為，亦不涵蓋非以獲利為目的之行為。

雖然小組報告只對爭端當事國有拘束力，但是小組報告中提出之論述與對法律要件之詮釋，往往會被後續之爭端案件沿用，具有相當程度之參考價值，因此本文可依此比較 TRIPS 中「商業規模」要件和 ACTA 的條文文字是否具有相同之概念。

一、著作權、鄰接權、商標權

四月版本草案第 2.14.1 條後段定義適用刑事程序的侵權行為類型，依該條規定，商業規模的著作權或鄰接權侵害行為包括：

1. 無直接或間接財務利得意圖而對著作權或其他相關權利（俗稱「鄰接權」）有重大的（significant）故意（willful）侵害；
2. 意圖獲得商業利益或財務利得而對著作權或鄰接權為故意（willful）之侵害[329]。

依據第一項定義，若為重大的故意侵權行為，則無論是否有財務利得之意圖，仍需適用刑事程序；依據第二項定義，若非重大的故意侵權行為，則需具有獲取商業利益或財務利得之意圖才需適用刑事程序。

ACTA 此條的可能問題在於，等同重新對商業規模作出定義且涵蓋範圍更廣。第一項定義中，不以具有財務利得意圖為要件，然而不以獲利為目的之行為是否與通常概念之商業活動相當不無疑問；第二項定義雖然將獲取商業利益或財務利得目的列為要件之一，但是卻不強調需達通常商業活動之規模，若是個人為

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[328] *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, at 115. 原文：”counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market.”

[329] *ACTA April Draft* Art. 2.14.1:” 1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. Willful copyright or related rights piracy on a commercial scale includes:
[(a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and
(b) willful copyright or related rights infringements for purposes of commercial advantage or financial gain.]”

了使用上的方便，多拷貝了一份自己購買的正版軟體，因此節省了多購買一份軟體的金額，儘管嚴格來說有財務利得存在，可是能否被視為通常之商業活動[330]？由這個角度來看，與 TRIPS 案例所揭櫫之商業規模顯然有所差異。

ACTA 參與談判國屢次重申 ACTA 的締約目的是為了打擊商業規模的仿冒與盜版，因為這種類型的侵權行為與組織性犯罪有連結且會危害社會公益，然而以上對著作權與其鄰接權之商業規模侵害的定義似乎與其宣稱之目的不盡然吻合。[331]

最終版本第 23 條第 1 款[332]修正了這個爭議，針對「商業規模」採取了較狹義的定義：至少是為了直接或間接經濟或商業利益而實施的商業性行為。不再區分是否為重大的故意侵權行為，只要有從中獲得財務利得之意圖就屬此條規範適用範圍。

二、拍攝錄影

四月版本草案第 2.14.3 條將拍攝錄影（cam cording）的行為納入適用刑事程序的範圍，要件可分為：未有權利人或劇院經理人之授權、明知、使用視聽錄影設備製作拷貝或向公眾傳輸、拍攝錄影客體為電影或其他視聽作品的全部或一部、在對大眾開放的電影院[333]。

TRIPS 對於拍攝錄影的行為未有規範，但考慮到現今電影及視聽作品的盜版盛行，許多電影在初上映甚至尚未上映前就會出現盜版光碟在市面上流通，視聽娛樂產業深受侵權行為所苦，不難猜測將拍攝錄影的行為納入適用刑事制裁的範

330 Kimberlee G. Weatherall, *supra* note 292, at 6.
331 *Id.*
332 *ACTA Final* Art. 23.1:" Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.9 For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage."
333 *ACTA April Draft* Art. 2.14.3:" 3. Each Party shall provide for criminal procedures and penalties to be applied [in accordance with its laws and regulations,] against any person who, without authorization of the holder of copyright [or related rights] [or the theatre manager] in a [motion picture or other audiovisual work], [cinematographic work] [knowingly] [uses an audiovisual recording device to transmit or make] [makes] a copy of [, or transmits to the public] the motion picture or other audiovisual work, or any part thereof, from a performance of the motion picture or other audiovisual work in a motion picture exhibition facility open to the public.]"

圍的背後動機。此條主要產生的問題在於：前述要件中，並未要求「有財務利得、有配銷的行為」，因此，無商業獲利的純粹個人使用亦違法[334]，將來在適用上會產生與前段著作權侵權討論中提到的相同質疑。

參與談判國對此有不同意見。美、日、南韓及加拿大希望可以維持四月草案版本中的提議，但歐盟、瑞士及新加坡則認為無需對拍攝錄影行為採取刑事執行[335]。最終版本第 23 條第 3 款顯示兩方陣營做出妥協[336]，條文文字由「應」修改為「得」，各締約國可自由決定是否對拍攝錄影行為課以刑罰，但是要件中仍未包含「有財務利得、有配銷的行為」。

第七項　刑事程序及刑罰擴張之問題

對所有之侵害智慧財產權行為課以刑事處罰會造成刑罰過度擴張之問題，需依侵害行為是否構成刑事上之可罰程度而定。

一、徒刑

四月版本草案第2.15.3條(a)款規定締約國應訂定刑罰，應包括足可產生嚇阻作用之徒刑及罰金[337]。若與TRIPS第61條比較，TRIPS第61條由會員選擇是否要對侵權行為人處以徒刑，會員適用時具有彈性，與ACTA直接規定需包括徒刑在內不同。ACTA的範圍較廣，但是屬於TRIPS留給會員的執行彈性，原則上不會產生爭議。最終版本第23條第1款條文用語大致類似[338]，惟該條其餘各款再進一

[334] Kimberlee G. Weatherall, *supra* note 292, at 33.
[335] *Four Sections Where Disagreements Remain*, *supra* note 310.
[336] *ACTA Final* Art. 23.3:" A Party may provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public."
[337] *ACTA April Draft* Art. 2.15.3(a):" [(a)] For the [offences] crimes referred to in [Article 2.14] [Article 2.14.1], each Party shall provide [effective, proportionate and dissuasive] penalties [. The available penalties shall] that include imprisonment [as well as] [and] monetary fines [sufficiently high to provide a deterrent to future acts of infringement, with a view to removing the monetary incentive of the infringer]."
[338] *ACTA Final* Art. 23.1:" 1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage."

步分別規定侵權行為的類型。

二、沒收因侵權行為之不法所得

四月版本草案第 2.16.2 條(d)款規定司法機關有權沒收與直接或間接自侵權行為產生之不法所得等值的資產[339]。雖 TRIPS 第 61 條中並未規定有此種刑罰類型，但是許多國家國內法中刑罰的種類也包含「沒收」在內，例如我國刑法第 34 條就規定從刑的種類有褫奪公權與沒收。因此雖非 TRIPS 明文規定的類型，原則上不會產生爭議。最終版本第 25 條第 4 款條文用語大致類似[340]，惟該款進一步強調至少在「程度嚴重」的侵權案件中必須適用。

第八項　機構安排

ACTA 第五章設立了一個 ACTA 委員會，委員會原則上以共識決的方式運作，職責涵蓋監督 ACTA 適用狀況、協定之發展、協定因解釋或適用所生爭議之解決，以及其他可能影響 ACTA 運作之事項等等。

有意見認為此舉如同在既存的國際組織之外，諸如 WTO、WIPO，又創設了一個獨立的智慧財產權保護機制，且擔憂如此一來將影響那些非 ACTA 締約國國家特別是開發中國家的權益。在 ACTA 委員會運作的過程中，各國國內的制衡和監督力量也可能無法有效發揮，公共利益和智慧財產權的保護二者間無法取得平衡[341]。這些質疑是否會實現，仍需視未來 ACTA 生效後委員會的實際運作情況而定。

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339 *ACTA April Draft* Art. 2.16.2(d):" (d) Each Party may provide that its judicial authorities have the authority to order the confiscation/ forfeiture [to the state] of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing activity."

340 *ACTA Final* Art. 25.4:" With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the forfeiture or destruction of materials and implements predominantly used in the creation of counterfeit trademark goods or pirated copyright goods and, at least for serious offences, of the assets derived from, or obtained directly or indirectly through, the infringing activity. Each Party shall ensure that the forfeiture or destruction of such materials, implements, or assets shall occur without compensation of any sort to the infringer."

341 FFII, *Analysis Anti-Counterfeiting Trade Agreement, at* http://action.ffii.org/acta/Analysis?action=print (May 24, 2010).

第九項　小結

ACTA 未來適用可能產生的問題，以最終版本和四月草案版本為主要分析基礎，前述各項爭議大約可以分為三類：第一類，以 TRIPS 的最低標準為依據，為了加強執行的效率或者填補實務的漏洞，ACTA 作出更詳細的規定，但仍在 TRIPS 條文給予各會員的彈性內，例如海關依職權行為、刑事程序及罰則之擴張等；第二類，以 TRIPS 的最低標準為基礎，為了加強執行的效率或者填補實務的漏洞，ACTA 有更詳細的規定，但是超出 TRIPS 條文給予各會員的彈性且適用上會引發爭議，例如損害賠償的法定損害、告知權等；最後一類，TRIPS 完全未有相關規範，ACTA 為了加強執行的效率或者填補實務的漏洞因而納入 ACTA 規範內容，例如對拍攝錄影課以刑罰及下一節將討論的數位環境中執法特別規定。

第一類未來適用時原則不會產生問題，因為 WTO 會員本來就有權提供比 TRIPS 更高的保護水準；第二類與第三類除了在適用上會產生爭議外，由於各國國內法律體系並不一致，即使法律體系相似程度高也會因為文化、社會價值而使各國體系存有差異，ACTA 生效後會使各國必須作出程度不一的修法，再者，目前 ACTA 參與談判國皆為 WTO 之會員，是否會因 ACTA 的適用而產生違反 WTO 義務的爭議，則仍待 ACTA 生效後才能觀察。至於與智慧財產權保護相關而 ACTA 未規範的部分 TRIPS 仍有適用，且也需注意與各參與談判國國內法律體系的一致性與國內重要法律原則之遵循，例如對人民基本權利的保護。

第五節　數位環境中智慧財產權執法的問題

ACTA 中引起許多爭議與討論的另外一部分，為與數位環境中智慧財產權執法有關之實體規範。由於科技發展日新月異，WTO 各會員當初談判 TRIPS 時，並未將任何與數位環境中智慧財產權有關之規範涵蓋在內。雖然 WIPO 後來注意

到科技發展對智慧財產權保護之影響，因而發展出幾個相關國際條約，例如 WCT 與 WPPT，但是會員數目較多之國際性條約其實為數不多，因此沒有辦法凝聚出相當程度的國際共識。

對於數位環境一節規定，談判過程中各參與談判國的立場歧異程度甚大，對於許多條文內容難以迅速達成一致之共識，加上美國試圖將國內法規範移植到該節，更引發各界不安與批評。依據 ACTA 最終版本，此部分規範規定在第二章第五節，但歷次草案版本條文差異頗多。本節將沿續前一節的討論方式，討論爭議問題時會比較歷次草案版本，仍以官方正式公布的四月草案版本及最終版本為主。

本節分為兩個主要的議題：與 ISP 業者有關之問題、科技保護技術措施的規避行為。以下將針對此兩個議題進行討論，並分析美國是否確實成功移植了其國內規範，以及未來適用可能之問題為何。

第一項　與 ISP 業者有關之問題

作為網路資訊媒介之 ISP 業者，當其所提供的服務或使用者之利用行為涉及不法或有爭議時，由於確認行為人身份之困難，且網際網路服務提供者目標顯著，往往容易產生網際網路服務提供者是否應對使用者不法行為負責之爭議。實務上可見網際網路服務提供者屢屢被要求需負擔此一不法行為在民事法上共同侵權行為人責任，或者在刑法上構成共犯或幫助犯的責任。

ACTA 數位環境中智慧財產權執法的規範，有很大一部分就是在處理與 ISP 業者責任有關之問題，規範內容包括：為了相關案件之審查，司法機關是否有權對 ISP 業者發出禁制令？一旦 ISP 業者的用戶有侵權行為，ISP 業者是否該為用戶的行為負責？若需負責，則負責的程度有多高？若不需負責，是無條件免責或需遵守某些要件才可主張免責？本文將先介紹 ISP 業者有關之概念，包括服務型態、侵權行為發生時其所需負之責任，接著討論這些提及之問題。

在此需先說明兩點：ACTA 四月草案版本在不同條文中對於服務提供者有不同的用語，例如在民事執行一節中，使用「媒介服務提供者」（intermediary），數位環境中執行的特別規定一節，則使用「線上服務提供者」（on-line service provider），但基本的內涵應該大致相同；另外，此部分的 ACTA 規定，ACTA 四月草案版本大體上與美國國內的 DMCA 類似，因此以下論述會著墨在 DMCA，而不再對其他 ACTA 參與談判國的國內法增加篇幅進行比較。

一、ISP 業者概述

(一)、 ISP 業者的類型

ISP 業者依其所提供之服務項目與內容，概念上一般可區分為以下三種服務類型[342]：

1. 網路連線服務提供者（Internet Access Provider，簡稱IAP），係指僅提供以數據機、專線方式之連線通路，讓使用人得以連接上網獲得服務之業者，例如中華電信之上網服務；
2. 網路平台服務提供者（Internet Platform Provider，簡稱IPP），指提供連線後的各項網路應用服務，包含但不限於檔案傳輸（File Transfer Protocol，簡稱FTP）、電子郵件（Electronic Mail）、網站目錄（Directory）、資料庫全文檢索等系統服務，有助於使用者取得網路資源，例如Google網路搜尋引擎；
3. 網路內容提供者（Internet Content Provider，簡稱ICP），本類型之服務係透過網路將資訊內容提供給使用者，例如業者提供電子布告欄、網路論壇、新聞電子報等資訊內容，例如中時電子報。

然因網路服務市場競爭激烈，大部分的網際網路服務提供者並不單純經營一項業務，可能兼有提供連線、應用系統或各類資訊內容服務，例如前述之 IAP，除提供網路撥接/ADSL/專線上網服務外，並於入口網站提供影音、旅遊、證券行情等資訊內容，以及電子郵件、網頁搜尋等應用服務功能，可認為是結合 IAP、

[342] 財團法人資訊工業策進會科技法律中心，網際網路服務提供者法律責任與相關法制之研究，頁 3-4，民國 92 年 12 月。

IPP 與 ICP 類型於一身之網際網路服務提供者[343]。在概念上區別網際網路服務提供者類型之實益，即在於如何區別網際網路服務提供者類型並賦予不同之責任範圍。雖然一般不刻意區分服務類型，而以 ISP 業者依泛稱上述服務之提供者[344]。

(二)、 ISP 業者責任

網路服務業者在提供網路服務的過程中，可能因為自己的行為或用戶的行為而侵害他人的權利。網路服務業者可能要承擔的責任可分為直接責任與間接責任，其中直接責任為第一層責任，而間接責任又稱為第二層責任（secondary liability）[345]。

直接責任指網路服務業者在提供服務時，如果因為自己的行為侵害他人的權利或造成他人的損失，在符合侵權行為要件的情形下，必須負直接侵權責任。例如FTP站的管理者將非法軟體放在FTP站供不特定人下載，則可能侵害著作權人的公開傳輸權而應負直接侵權責任[346]。

第二層責任係指網路服務業者本身並未從事侵權行為，但卻因他人的侵權行為而須承擔責任的責任型態，通常是由於網路服務業者的用戶利用其所提供的網路服務來從事侵權行為，因而使網路服務業者必須負責[347]。由於網路服務業者本身並未從事侵權行為，要求其為他人的行為負責，必須網路服務業者與該他人或與該他人侵權行為之間有一定關係，才不致於過度擴張其責任。

(三)、 DMCA 之安全港規定

美國DMCA法案中，Title II的「網路著作權侵權責任限制法」（Online Copyright Infringement Liability Limitation Act）即為處理前述提及之網路服務提供者在其用戶著作權侵權時所應負擔何種責任的問題，旨在平衡著作權人及網路

[343] 同上註。
[344] 同上註。
[345] 張淑美，網路服務業者之侵權責任—以著作權侵權為中心，國立交通大學科技法律研究所碩士論文，頁 19，民國 95 年 11 月。
[346] 同上註。
[347] 同上註。

服務提供者的利益。DMCA針對不同類型的網路服務提供者提供不同的安全港條款，亦即屬於法案中所列之網路服務提供者在其用戶有著作權侵權之虞時，只要符合條款中所列要件，即可免除所有的金錢賠償，而在禁制令的負擔上亦有所限制，因而本法案的通過，相當於提供了網路服務提供者一個得遵循法規以免責的規範[348]。

DMCA依據ISP的服務或設備提供的行為態樣，服務提供者提供不一樣的功能便會對應不同的責任限制條款，免責型態分為四類：

「暫時性的數位化網路傳輸」[349]（transitory digital network communication）、「系統自動存取」[350]（system caching）、「因使用者之要求，資訊存取於系統或網路」[351]（information residing on system or networks at direction of users）與「資訊搜尋工具」[352]（information location tools）。

其中，針對因使用者之要求，資訊存取於系統或網路此類別，另有所謂的「通知及取下程序」[353]（notice-and-takedown）。著作權利人或是被授權代表著作權利人者，應以書面通訊方式（written communication）向服務提供者的指定代理人發出通知書，且該通知書內容包含：著作權利人的實體或電子簽章、述明被指控為侵害著作權之資訊；述明應移除或應被阻斷連結的侵害著作權資料或侵害著作權活動之主旨，使得服務提供人得以迅速地找到該筆資料；提供充足資訊使服務提供者得以聯繫投訴人，諸如：住址、電話或電子郵件等；一份陳述，表明投訴人善意相信該通知書所指侵害著作權資料皆未獲著作權利人、其代理人或法律的授權；一份宣誓書，表明通知書內容係屬正確，且投訴人已獲被侵害資料之專屬權利人的授權[354]。

通知書若未能大體上（substantially）符合上述內容時，即便服務提供者已接

[348] 財團法人資訊工業策進會科技法律中心，前揭註 342，頁 19。
[349] 17 U.S.C. § 512(a).
[350] 17 U.S.C. § 512(b).
[351] 17 U.S.C. § 512(c).
[352] 17 U.S.C. § 512(d).
[353] 17 U.S.C. § 512(g)(3).
[354] 財團法人資訊工業策進會科技法律中心，前揭註 342，頁 22。

收該通知書，亦不得認為服務提供者已確實知悉該侵權活動[355]。但是，假若該通知書已符合上述內容，服務提供者卻未立刻嘗試與通知人接觸，或是採取合理的步驟接收符合形式要件要求的通知，則該不完全的通知仍可作為評價服務提供者對於事實、情況是否具備認知要件的考量因素。服務提供者因信任該通知書之陳述，誤而移除或阻斷被宣稱為侵權之資料或活動的存取，服務提供者原則上毋庸負擔任何責任。例外情況：服務提供者係應使用者指示之資訊存取於系統或網路，該服務提供者因接獲著作權利人或經著作權利人授權之人所為的通知，而刪除或阻斷該資料的接取後，服務提供者應將該通知轉通知使用人，於使用者為「交互通知」（counter-notification）時再轉知著作權利人[356]。如此，不論該筆資料是否被確認為侵害著作權，網路服務業者對於該刪除或阻斷資料接取的行為毋庸負擔責任。著作權利人接獲交互通知時，應於10至14個工作天內向法院提起侵害著作權之訴。未提起者，服務提供者應於10個工作天內回復原先刪除或阻斷接取的資料[357]。

「通知及取下程序」主要目的在於建立服務提供者、著作權利人與被指控為侵權人間的合作模式，恰與DMCA 安全港條款的立意呼應。藉由著作權利人主動發現侵權活動並踐行通知義務，免除網路服務提供者的監控義務，但課予網路服務提供者的後續取下及轉通知義務，再藉由轉通知程序使得使用者有為自己行為主張抗辯之權利[358]。

二、ACTA中與ISP業者相關之規定

(一)、 禁制令

ACTA規定可對媒介服務提供者申請禁制令。四月版本草案第2.X.2條規定，各國應確保權利人可以對所提供之服務被第三人用於侵權行為的服務提供者申

[355] 17 U.S.C. § 512(g)(1).
[356] 財團法人資訊工業策進會科技法律中心，前揭註 342，頁 22。
[357] 同上註。
[358] 同上註。

請禁制令[359]；四月版本草案第2.5.X條規定，各國司法機關有權對所提供之服務被第三人用於侵權行為的服務提供者發出臨時禁制令（interloctuory）[360]。禁制令原則上由司法機關在訴訟前下令，臨時禁制令則是在訴訟中認為有保全證據或者某項事物現狀之必要時發出[361]。

此兩條規定在適用上會產生幾點爭議。第一，條文用語中並未規定限於該服務提供者本身有法律責任時才適用，例如服務提供者授權侵權行為之進行，也未規定該服務提供者本身需為侵權行為之參與者，這種要件在一般民事程序中並不合理；第二，適用的結果似乎將服務提供者視為法院執行時的協助機關，過去並未有對郵政機關要求拒絕對侵權人提供郵政服務、或對電信業者要求對侵權人中止電信服務的案例；第三，禁制令的申請該具備哪些要件？例如法院應要求提供哪種程度的證據、有無比例原則之限制、侵權行為人有無受到正當程序（due process）原則保護等等，這些要件目前在ACTA四月草案版本中都未有明確的設定[362]；第四，所謂「服務提供者」的定義，有沒有一個合理的限制？如此一來才可以確保大專院校、圖書館等類型的機構不會受到類似的限制[363]。

另外，禁制令與臨時禁制令的規定，也引發了是否會變相鼓勵三振條款適用的疑慮。三振條款目前已有一些國家採用，雖然各國的詳細規定與執行方式不完全相同，但基本原則為要求網路服務提供者對重複實行侵權行為的使用者，應中止對其提供全部或部分連線服務，在某些國家由於可能侵害人民之言論、傳播自

[359] *ACTA April Draft* Art. 2.X.2:" [2. The Parties [may] shall also ensure that right holders are in a position to apply for an injunction against [infringing] intermediaries whose services are used by a third party to infringe an intellectual property right.]"

[360] *ACTA April Draft* Art. 2.5.X:" [X. Each Party shall provide that its judicial authorities shall have the authority, at the request of the applicant, to issue an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right [copyright or related rights or trademark]. An interlocutory injunction may also be issued, under the same conditions, against an [infringing] intermediary whose services are being used by a third party to infringe an intellectual property right. Each Party shall also provide that provisional measures may be issued, even before the commencement of proceedings on the merits, to preserve relevant evidence in respect of the alleged infringement. Such measures may include inter alia the detailed description, the taking of samples or the physical seizure of documents or of the infringing goods.]"

[361] Australia Digital Alliance, *supra* note 295, footnote 43.

[362] Kimberlee G. Weatherall, *supra* note 292, at 14.

[363] Australia Digital Alliance, *supra* note 295, at 12.

由等基本人權而被法院宣布違憲[364]。權利人可能會選擇不對個別侵權行為人提起訴訟，反而向法院申請對服務提供者之禁制令，藉以確認以該服務提供者服務進行侵權行為的相關個人身分，並可進一步要求服務提供者警告或中止對這些使用者提供之服務[365]。

最終版本在第8條、第12條的相關規定中，都已移除了可向執法機關申請對媒介服務提供者執行禁制令與臨時禁制令的條文文字，前述爭議於最終版本已被排除。

(二)、 ACTA之ISP業者責任

四月版本草案第2.18.3條規定各締約國應該要在國內法律體系中提供與第三方責任相關的民事救濟、限制或者例外[366]。四月版本草案註腳47則對於何謂第三方責任作出定義，包括為了直接財務利得而授權侵權行為、促使侵權行為之發生或者明知為侵權行為仍對他人提供物質上的協助[367]。

在ACTA此一複邊貿易協定中對於第三方責任作出規定有幾個問題：第一，第三方責任是一個實體權利的概念，並非執行相關的程序性事項，很難在不同國家間針對所有智慧財產權權利類型找出適當且統一的定義，例如美國國內標準僅反映出美國的社會發展情況，若以美國法規為基準要求各國遵守，對各國國內此

[364] 目前各國國內的相關立法例可以參考：元貞律師事務所，ISP 業者協力防止網路侵權責任問題之外國立法趨勢及立法例之初析（上）（下），http://www.justuslaw.com.tw (最後瀏覽日：2010 年 5 月 31 日)。

[365] Kimberlee G. Weatherall, *supra* note 292, at 15.

[366] *ACTA April Draft* Art. 2.18.3:" 3. Without prejudice to the rights, limitations, exceptions, or defenses to [[patent, industrial design, trademark and][copyright or related rights]][intellectual property rights] infringement available under its law, including with respect to the issue of exhaustion of rights, each Party [confirms that] [shall provide for] [civil remedies as well as limitations, exceptions, or defenses with respect to the application of such remedies, are available in its legal system in cases of third party liability[47][or liability for those who authorize infringement, or both] for [[patent, industrial design, trademark and][copyright or related rights]][intellectual property rights] infringement."

[367] *ACTA April Draft* footnote 47:" [For greater certainty, the Parties understand that third party liability means liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids any act of copyright or related rights infringement by another. Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] At least one delegation opposes this footnote."

議題的長期發展未必有利；第二，目前未有任何國際條約對於第三方責任作出規範， 且各國在執行時應留有彈性空間，各國立場目前仍有歧異，若要在ACTA中決定出單一的執行基準，時機仍尚未成熟[368]。

最終版本第27條第4款直接刪去了第二層責任的文字，僅規定各締約國在與國內法律規範一致的前提下，得提供國內執法機關權限，於權利所有人已經提出商標權、著作權或鄰接權之侵權案件控訴的情形，要求線上服務提供者迅速地向權利所有人揭露充分資訊以資辨別特定被非法地使用進行侵權行為的註冊用戶，國內機關所採取的程序應該避免對合法行為造成障礙，該款並強調應與締約國國內保障基本權利之法律一致[369]。ACTA不再對第二層責任做出定義，也已刪去此一概念與用語，條文同時放寬規定讓各締約國有自行決定是否提供相關法律制度的空間。

(三)、 ACTA之安全港規定

四月版本草案第2.18.3條對於ISP業者的責任限制條款─安全港作出規定，侵權行為若符合以下要件，則ISP業者得免除民事賠償責任，包括：係透過自動化科技程序執行；使用者的行為並非由服務提供者發起或指示且服務提供者並未選擇資料；資訊之儲存是由使用者上傳或者由使用者提出要求，且服務提供者於得知有侵權行為發生時，服務提供者迅速移除或阻斷侵權資料或活動的存取[370]。

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[368] Kimberlee G. Weatherall, *supra* note 292, at 19.

[369] *ACTA Final* Art. 27.4:" A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy."

[370] *ACTA April Draft* Art. 2.18.3:"

Option1：

[3. Each Party recognizes that some persons49 use the services of third parties, including online service providers,[50] for engaging in [patent, industrial design and trademark,] copyright or related rights infringement. Each Party also recognizes that legal uncertainty with respect to application of copyright and related rights, limitations, exceptions, and defenses in the digital environment may present barriers to the economic growth of, and opportunities in, electronic commerce.] Accordingly, in order to facilitate the continued development of an industry engaged in providing information services online while also ensuring that measures to take adequate and effective action against copyright or related rights infringement are available and reasonable each Party [shall][may]:

四月版本草案第2.18.3條(b)款Option 1對於適用安全港責任限制條款，另外又規定服務提供者尚須遵守幾項規定，其中(ii)項規定服務提供者一旦收到了來自權利人的依法律規定且有效的通知，就必須移除或阻斷被宣稱為侵權之資料或活動的存取，但是若未收到相關使用者的回覆，則應認為權利人的通知源於錯誤或指認身分有誤[371]。與前述DMCA的「通知及取下程序」類似，不同處在於增加了「若未收到相關使用者的回覆，則應認為權利人的通知源於錯誤或指認身分有誤」此要件，對於使用者的保護較為周全。

但是目前仍有數個提案版本且條文用語尚未能一致，可以看出各參與談判國對於安全港規定的立場歧異。雖然由四月草案版本尚未能觀察出安全港規定的確

(a) provide limitations on the scope of civil remedies available against an online service provider for infringing activities that occur by
(i) automatic technical processes, and
(ii) the actions of the provider's users that are not directed or initiated by that provider and when the provider does not select the material, and
(iii) the provider referring or linking users to an online location,
when, in cases of subparagraphs (ii) and (iii), the provider does not have actual knowledge of the infringement and is not aware of facts or circumstances from which infringing activity is apparent; and]
Option 2：
[Each Party recognizes that some persons use the services of third parties, including online service providers,[55] for engaging in intellectual property rights infringements.
(a) In this respect, each Party shall provide limitation on the [liability of] [scope of civil remedies available against an] on-line service provider[s] for infringing activities that occur by
(i) automatic technical processes [that keep the provider from taking measures to prevent the infringement], or
(ii) the actions of the provider´s users that are not initiated nor modified by that provided and when the provider does not select the material or
(iii) the storage of information provided by the recipient of the service or at the request of the recipient of the service,
when exercising the activities as stipulated in paragraph 3(a)(ii) and/or (iii) the online service providers act [takes appropriate measures] expeditiously, in accordance with applicable law [s], [such as those] to remove or disable access to infringing material or infringing activity upon obtaining actual knowledge of the infringement [or the fact that the information at the initial source has been removed or disabled.] [or having reasonable grounds to know that the infringement is occurring]]"

[371] *ACTA April Draft* Art. 2.18.3 (b) Option 1:" (b) condition the application of the provisions of subparagraph (a) on meeting the following requirements:
(i) an online service provider adopting and reasonably implementing a policy[58] to address the unauthorized storage or transmission of materials protected by copyright or related rights [except that no Party may condition the limitations in subparagraph (a) on the online service provider's monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring]; and
(ii) an online service provider expeditiously removing or disabling access to material or [activity][alleged infringement], upon receipt [of legally sufficient notice of alleged infringement,][of an order from a competent authority] and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of mistake or misidentification.
except that the provisions of (ii) shall not be applied to the extent that the online service provider is acting solely as a conduit for transmissions through its system or network.]"

定版本，仍可由四月草案版本不夠明確的條文判斷出大致方向，也可以觀察出幾個可能的爭議。

首先，四月版本草案第 2.18.3 條目前特定了幾種安全港類型，是否意味只有這些類型構成安全港，因而排除了其他類型的安全港被創造並適用之可能性[372]？第二，四月版本草案第 2.18.3 條(b)款 Option 1(ii)項直接規定適用「通知及取下程序」，雖然對使用者的保護較為周全，卻使得適用其他保護程度更高的程序為不可能，例如加拿大國內的「通知及通知程序」[373]（notice-and-notice）。「通知及通知程序」於當服務提供者接獲著作權人依法律規定之通知後，並不立即將侵權資料移除或阻斷接觸，但仍應立即告知使用者著作權人已為合法通知之情事，服務提供者不須做任何行為[374]。此程序可有效保障使用者的言論自由，不會僅因著作權人單方面的通知就將使用者的資料移除或阻斷接觸，服務提供者也無須將提供使用者的個人資料給權利人，且當服務提供者通知使用者其已收到著作權人的通知時，使用者通常會心虛並配合自行移除侵權資料[375]。第三，四月版本草案第 2.18.3 條(b)款 Option 1(i)項要求服務提供者採取且合理地執行特定政策，處理受權利保護資料未經授權儲存或傳輸之情形，亦即服務提供者有義務阻止網路侵權行為，同樣引發了前述討論是否會變相鼓勵三振條款適用的疑慮[376]。因為權利人可能會根據此項條文主張服務提供者若要能遵守此義務，最好的方式就是主動辨認有重覆侵權行為的使用者，並且中止對其提供全部或部分連線服務。由於是服務提供者本身採行的「政策」，意謂此項政策不須由法律明文規定且不受司法機關或政府單位之監督[377]。

安全港是ISP業者的責任限制條款，最終版本已刪除第二層責任的概念，作為配套規定的安全港也當然全部刪除，本段前述爭議已不存在於ACTA的最終版

[372] Kimberlee G. Weatherall, *supra* note 292, at 22.
[373] *Id*.
[374] Michael Geist, *The Effectiveness of Notice and Notice, at* http://www.michaelgeist.ca/content/view/1705/125/ (Feb. 15, 2007).
[375] *Id*.
[376] Kimberlee G. Weatherall, *supra* note 292, at 23.
[377] *Id*.

本中。

第二項　反規避條款之問題

由於科技之發展，現今透過電子媒介可非常輕易進行複製，且傳輸容易更使得傳輸數量驚人，再加上複製品可多重使用，因而對於著作權保護帶來嚴重衝擊。著作財產權人為了保護自己的著作，或者防止他人的競爭例如競爭者開發功能相同的著作權商品，以便對自己的權利做最有效的管理或確保自己的經濟收益，可能會設下某種保護的設備或措施，例如在傳統上有衛星節目的鎖碼設備及電視遊樂程式的保護裝置，在網際網路的運用上就有所謂的註冊制度等，這些皆為科技保護措施之態樣。簡而言之，科技保護措施乃指著作權利人為控制其著作可否被接觸（access）、重製（copy）或傳輸（transmit），而以有效的科技方法採取保護措施[378]。

ACTA 數位環境中智慧財產權執法的規範，有一部分是針對科技保護措施與規避科技保護措施之行為。本文將先介紹何謂科技保護措施與類型，以及規避行為之型態與反規避條款之實體內涵，最後討論 ACTA 中反規避條款於未來適用之問題。

一、科技保護措施概述

權利人所可利用之科技保護措施，包含各種不同方法與模式，可以是一種設備、一組器材，或是在機器上加裝之某個零件、一種鎖碼的技術、或是一組序號或者一個密碼，甚至可能是一種特殊之保護方法，例如：數位信封（Digital envelopes）、時間炸彈（time-bombs）、自我報告軟體（self-reporting software）、加密裝置（encryption devices）、數位浮水印（digital watermarks）等，不論其所用方法為何，只要能夠有效地禁止或限制他人在未經同意或授權之情形下任意接觸或利用著作，皆屬科技保護措施[379]。

[378] 洪慕芳，科技保護措施規範之研究，交通大學科技法律研究所碩士論文，九十五年，頁 7。
[379] 馮震宇，數位內容之保護與科技保護措施—法律、產業與政策的考量，月旦法學雜誌，第 105

(一)、 科技保護措施之類型

有關科技保護措施之型態甚多，若以功能取向分類，可分為四大類[380]：

1. 接觸之控制（access of control），此種科技保護措施乃係用以防免對資訊內容之接觸與使用；
2. 利用之控制（usage control），此類型科技保護措施可以控制著作之利用；
3. 同一性保護（integrity protection），此類科技保護措施在於防止著作被竄改；
4. 利用紀錄（usage metering），此類型科技保護措施並不能防免或禁止著作之接觸或利用，但能記錄或追蹤著作被接觸或作其他利用的次數，透過此類型科技保護措施之利用，就能監視並記錄其著作每一次之利用情形。

(二)、 反規避條款

針對著作權利人為保護其權利所採取之科技保護措施，一般認為應以法律遏止之行為，可區分為二：一是「直接規避行為」，亦即任何未經授權而規避該等科技保護措施之行為；二是「直接規避行為」前階段之「準備行為」，亦即對於主要供規避該等科技保護措施之用，或以達到該規避目的為行銷訴求，或除供作規避該等科技保護措施之用外，僅具些微經濟價值之設備或服務，進行任何的製造、散佈或提供等行為[381]。

二、ACTA中反規避條款之規定

四月草案第2.18.4條規定各國應立法以民事程序與刑事罰則禁止規避行為，規範之規避行為類型包含直接規避行為與直接規避行為以前之準備行為[382]。其中

期，頁 72（2004）。

[380] 洪慕芳，前揭註 378，頁 7-10。

[381] 同上註，頁 14。

[382] *ACTA April Draft* Art. 2.18.4:" [4. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, [performers or producers of phonograms] [the right holder of any copyright or related rights or owner of an exclusive license] in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, [performances, and phonograms] [or other subject matters specified under Article 14 of the TRIPS Agreement], each Party shall provide for civil remedies, [or] [as well as] criminal penalties in appropriate cases of willful conduct, that apply to:
[Each Party shall provide for adequate legal protection and effective legal remedies, in the form of civil remedies or criminal penalties in appropriate cases of willful conduct, against the circumvention of effective technological measures that are used by authors, performers or producers or phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works,

直接規避行為之類型，在四月草案是傾向包含所有的科技保護措施類型，而非僅限於控制未經授權而接觸著作此類。規範方式基本上同樣與美國DMCA類似。

WIPO希望透過國際公約的力量，促使會員國進一步保護著作權人在數位時代的權利，各國於1996年12月簽署了WCT與WPPT，兩條約於2002年分別生效，就科技保護措施均有所規範[383]。美國於DMCA中貫徹了WIPO條約的執行。雖然WIPO兩條約僅要求締約國對規避有效科技保護措施之直接規避行為做規範，但DMCA除對直接規避行為規範外，對於直接規避行為之前的「準備行為」亦加以規範[384]。若由DMCA第1201條所禁止之反規避行為進行分析，可分為下列三種類型[385]：

1. 基本條款（basic provision）：規定任何人均不得規避可有效控制「接觸」（access）本章保護之著作之科技保護措施（第1201條(a)(1)）[386]；
2. 違法交易之禁止（ban on trafficking）：規定任何人均不得製造、進口、提供、銷售或其他任何方式之交易任何用以規避「防止接觸著作」之科技保護措施之任何技術、產品、服務、裝置、組件或其零件（第1201條(a)(2)）[387]；
3. 特別侵權行為之禁止（additional violations）：規定任何人均不得製造、進口、

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performances, and phonogram. These shall apply to:]
(a) the unauthorized circumvention of an effective technological measure [that controls access to a protected work, performance, or phonogram]; and
(b) the manufacture, importation, or circulation of a [technology], service, device, product, [component, or part thereof, that is: [marketed] or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure.]]"

383 WCT Art. 11:" Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

WPPT Art. 18:" Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law."

384 洪慕芳，前揭註 378，頁 16。

385 馮震宇，前揭註 379，頁 73-74。

386 原文："(a) Violations regarding circumvention of technological measures.--(1)(A)No person shall circumvent a technological measure that effectively controls access to a work protected under this title."

387 原文："(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or pArt thereof…"

提供、銷售或其他任何方式之交易任何用以規避「防止重製著作」之科技保護措施之任何技術、產品、服務、裝置、組件或其零件（第1201條(b)(1)）[388]。

由前述禁止規定可知DMCA所指之科技保護措施可分二類：一為控制未經授權而接觸（access）著作之科技保護措施；一為防止未經授權而侵害著作權法所保護權利之科技保護措施。違反DMCA相關規定者應負擔民事責任與刑事責任[389]。

ACTA四月草案中反規避措施的主要問題在於，將保護類型擴張為包含所有科技保護措施類型，而非如WIPO兩相關條約僅規範基本條款之類型，有意見主張，如此一來會過分的限制了公民取得資訊之自由；另外，ACTA規定各國應提供民事程序與刑事罰則，但是許多國家僅對規避行為處以民事責任，擴張刑事罰責之適用是否妥適仍有爭議[390]。

最終版本反規避措施規定在第27條第5款、第6款[391]，規範之規避行為類型包含直接規避行為與直接規避行為以前之準備行為，此點基本上與四月草案一致，亦即仍與美國DMCA一致。但是有意見認為，ACTA最終版本採取和DMCA類似的規定卻未加入DMCA的免責條款如合理使用原則，公益和私益未獲得衡平；另外，對於反規避措施罰則之爭議，最終版本採取放寬的態度，不再強制要求締約

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388 原文：" (b) Additional violations.--(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or pArt thereof…"

389 洪慕芳，前揭註 378，頁 21。

390 Australia Digital Alliance, *supra* note 295, at 13.

391 *ACTA Final* Art. 27.5, 27.6:" 5. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.
6. In order to provide the adequate legal protection and effective legal remedies referred to in paragraph 5, each Party shall provide protection at least against:
(a) to the extent provided by its law: (i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and (ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and
(b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that: (i) is primarily designed or produced for the purpose of circumventing an effective technological measure; or (ii) has only a limited commercially significant purpose other than circumventing an effective technological measure."

國須針對反規避行為提供民事程序與刑事罰則，改由各國自行決定適當的法律保護和有效的法律救濟[392]。

第三項　小結

本節與上一節在論及每一爭議問題時，皆會提出談判歷程中各官方公布草案進行比較，可以發現最終版本和四月草案版本甚至是稍早的一月草案版本，盡管ACTA主要規範架構仍大致相同，但是條文文字變動幅度頗大，許多公民團體所提出之爭議、各參與談判國立場幾近相反之處都已消弭。談判過程後期因為一月草案版本自非正式管道對外洩漏之壓力，使得參與談判國不得不逐漸對外界公布草案內容與談判資料，再加上各國利益和政策不完全相同，為了使ACTA可以盡速定案、生效，美國作為ACTA主要倡議者，談判歷程中其實做出了不少妥協。

已偏離了原本提案內容的ACTA，最終版本是否還能達到各參與談判國所預期之成效呢？特別是本節所討論的數位環境中智慧財產權的執行，ACTA最初宗旨之一就是想要處理現今既存多邊國際協定未能有效規範的數位環境，美國當初的提案版本也非常雄心壯志的想把國內法規移植到ACTA此一複邊協定中，但是最終版本僅成功保留了極小的一部分，第二層責任和安全港條款甚至是完全被刪除，得以被保留的提案其拘束力也降低，如是否針對反規避行為提供民事程序與刑事罰則改由各國自行決定。數位環境中智慧財產權執行此節似乎不能達成多大的成效，而是僅具宣示性質的在複邊協定中提及締約國在網路時代對智慧財產權保護的關注，已開發國家主導的ACTA未來到底能發揮多大價值實仍有待觀察。

第六節　反仿冒貿易協定的可能成效

ACTA 的倡議動機是建立智慧財產權執行共同標準以打擊全球的智慧財產權侵權，各締約國希望可以憑藉此協定加強國際性合作、強化智慧財產權執行層

[392] *Nearly Final ACTA Text Shows Series of U.S. Compromise over Three Years*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Oct. 07, 2010).

面，ACTA 被期待成為一個得有效率地解決與日俱增的侵權挑戰的利器。但是已開發國家真的可以藉由 ACTA 此複邊貿易協定的生效，改善國際間智慧財產權保護之缺失嗎？

ACTA 在談判過程就受到許多關注，有意見期待 ACTA 可以為國際間智慧財產權之保護帶來新局面，有意見則抨擊 ACTA 會變成一個侵害社會公益、貿易利益的工具。隨著歷時三年的談判回合終了，ACTA 最終版本也已成形，到底 ACTA 的真實面貌及其所可能發揮的影響到底為何？本篇文章行文至此，綜合前述各章節的論述和觀察，嘗試在本節對於 ACTA 的可能成效提出初步的評估。本節評估成效分成四個層面：目標、成員、過程、條文內容。先由 ACTA 的談判目標為出發點，討論是否可以填補智慧財產權保護執行面的缺失，接著論及參與國家的組成對於 ACTA 的正、負面影響，而過程中談判形式的選擇是減損抑或加強了 ACTA 的談判成果，以及 ACTA 條文內容是否具備與國際、國內法規範之合致性。

第一項　填補智慧財產權保護執行面的缺失

目前關於智慧財產權保護的國際條約，執行面之規定最詳細、最具體者當屬 TRIPS。本文第貳章結尾在簡單評論 TRIPS 生效以來的執行成效時，曾提出 TRIPS 兩個執行面的缺失，第一是協商時未能考慮網際網路和資訊科技發展所衍生的問題；第二是侵權行為之態樣多變，加上 TRIPS 的執行規範在某些國家之國內實踐時流於空白和模糊，使得智慧財產權之保護不夠有效率。

美國由 FTAs 到現在的 ACTA，皆有將填補 TRIPS 執行面的缺失列為考量點之一。前述的第一點，FTAs 和 ACTA 都有處理，方式是將有關的規定直接納入條文範圍中，例如 ISP 業者的責任、安全港規定與反規避條款等。前述的第二點，FTAs 和 ACTA 也都嘗試提出解決方式，例如使執行面的規範更詳細、更具體且保護水準更高。但是，這樣就可以填補 TRIPS 執行面的缺失了嗎？

與網路及資訊科技相關的智慧財產權法規本來就會隨著時代進步和社會所需而逐漸發展，但是 FTAs 和 ACTA 於這一部分所產生的問題在於，直接移植了美國國內的規範體系並且半強迫式的要求對手國接受，所可能引發的爭議和適用上的問題前面各個部份皆已述及。TRIPS 的執行規範在某些國家之國內實踐流於空白和模糊的問題，在 FTAs 與 ACTA 中適用更詳細、更具體且保護水準更高的規範，亦即 TRIPS-Plus，就是解決之道嗎？也許未必。首先，某些國家尚未能成功有效的在國內執行 TRIPS 規定，要如何預期他們可以更進一步成功執行 TRIPS-Plus[393]？再者，許多國家未能成功執行 TRIPS 之原因在於人才、技術與資源的不足，訂定了 TRIPS-Plus 的規範並不代表這些所需資源可以同時增加；最後，TRIPS 和 TRIPS-Plus 會使得國際間智慧財產權的執行產生越來越大的鴻溝，對於國際合作和國際體系中規範水準的一致並無產生任何正面效益[394]。

ACTA 最終版本公布之後，可以觀察到許多提案都已在談判回合中被刪除，包括：數位環境中執行該節的 ISP 業者責任與反規避措施、民事執行該節的法定預設損害與邊境措施該節的執行範圍等等被美國視為重要進展的條款，被刪除的主因正是在於美國半強迫要求對手國接受其國內法規，且各參與談判國國內法律體系不一，並非所有 ACTA 條款都適合在各國施行。ACTA 參與談判國想要提升智慧財產權執行面水準的目標，由最終版本的內容我們可以悲觀的宣布，這些國家僅僅只達到原先預期目標的一小部分。

其實，針對 TRIPS 此執行面的缺陷，真正重要之處應在於技術協助與提供，由以下幾個例子可以說明此主張。例如，對一國國內的法院而言，擴張智慧財產權保護範圍是很大的負擔，因為變化快速的網路和資訊科技，都使得與其相關之智慧財產權案件日漸複雜，國內法院需要有持續的訓練，一國是否有足夠的資源？再者，作為主要執行單位之主管機關，例如警察、檢察官等，必須對智慧財產權有一定程度的認知和了解才能採取適當的行動與作出合適的決策。另外，若要擴

393 Timothy P. Trainer, *supra* note 88, at 12.
394 *Id.*

大邊境措施的適用範圍，也會使得海關的職責加重，因而需要投注更多行政資源。以上這些情況都說明了僅提高執行面規範的水準是不夠的，必須同時有技術協助與足夠之資源才能填補起執行面的缺失[395]。

ACTA 架構中的第三章執法實踐、第四章國際合作，此兩個章節中其實都已強調技術之協助與提供，例如規定各國應該互相提供執行行動之最佳範例與資訊、締約國應關注改善執行方面的能力建構與技術協助，對象包括 ACTA 締約國開發中國家成員或 ACTA 以外的第三國等。但此部分規範是否真能填補 TRIPS 執行面缺失，仍需視 ACTA 未來生效後各締約國在此部分的落實程度而定。

第二項　參與談判國的組成

ACTA 的談判過程中，談判國多數為已開發國家，只有少數開發中國家得以參與，這些國家宣稱彼此間具有相似的目標與價值觀，而此種談判成員組成，無庸置疑地可以加快談判的進展，並且達成更詳細、更高保護水準的談判成果。

本文前述討論美國 FTAs 政策時，曾論及此種政策背後的主要目的之一為將藉由簽訂多個 FTAs 將其國內智慧財產權保護法規範推展到其他國家，也推論美國藉由 ACTA 此複邊貿易協定欲採取類似的作法，期望未來可以將 ACTA 規定推展成多邊貿易體系的標準。不具經貿實力與談判籌碼的開發中國家面對來自 ACTA 締約國的壓力，也許會被迫同意遵守相關規定，甚至進一步同意簽署具有與 ACTA 類似規定的雙邊貿易協定；但是，如巴西、中國或印度等重要開發中國家的缺席將形成問題，因為這些國家除了缺少遵守更高保護水準規範的動機外，也具有政治上可以抗衡已開發國家的實力。

隨著 ACTA 條文逐漸成形，以巴西、中國和印度為首的開發中國家也開始對 ACTA 提出抗議與抨擊。這些國家已數次公開反對 ACTA，主張 ACTA 中存在許多 TRIPS-Plus 規定，伴隨 ACTA 的生效，這些規範會侵蝕多邊貿易體系中

[395] *Id.*

其他國家的利益[396]。例如，近期於 2010 年 10 月 26 日到 27 日所舉行的 TRIPS 理事會會議中，這些國家一致對當時已幾近談判完成階段的 ACTA 發表反對意見，有各自政策立場和產業利益的雙方陣營都態度強硬。中國主張應該要檢驗 ACTA 與 WTO 規範框架的一致性，包括是否對 WTO 會員要求遵守 WTO 以外的義務、是否侵害 WTO 會員所享有的權力與彈性空間；印度主張 ACTA 對於非其締約國的出口國家會有直接的負面影響，並且違背 WTO 維護貿易自由的核心價值；巴西主張 ACTA 會破壞智慧財產權所有人與使用者雙方的衡平，也創設了可能會對 WIPO 和 WTO 造成不可預期影響的新國際組織的種子[397]。美國則回應中、印、巴西等國無意於 WTO 場域中針對智慧財產權執行的改善進行更進一步的討論，卻指責美國與其他有意追求更高保護與執行水準的國家不得不做出尋求協商其他國際協定的決定[398]。

ACTA 排除開發中國家參與，開發中國家亦欠缺參與意願，更遑論 ACTA 締約國讓具有可抗衡實力的開發中國家遵守 ACTA 相關規定。缺少了中國、印度、巴西等國家的配合，ACTA 生效後是否能達成預期目標不免令人懷疑。

第三項　談判形式的選擇

智慧財產權相關議題由於一直以來的推動力量，都是由利益團體進行遊說與已開發國家在國際間強勢主導，致使許多人對於智慧財產權議題的觀感不佳[399]。因此，ACTA 談判過程一直採取對外保密的形式，直到談判後期才因草案版本經非正式管道洩漏而不得不逐漸對外公開，導致外界對於 ACTA 的評價傾向負面，認為 ACTA 沒有在公益和私益之間取得平衡，談判過程也無法讓各國民意機關進行監督與制衡，將來生效後會成為一個侵害公民權利、剝奪開發中國家利益的

[396] *China Slams Nearly Completed ACTA, Questions Its WTO Compatibility*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Nov. 02, 2010) [hereinafter *Questions Its WTO Compatibility*].
[397] *Id*.
[398] *Id*.
[399] Kimberlee G. Weatherall, *The Anti-Counterfeiting Trade Agreement: An Updated Analysis*, The Selected Works of Kimberlee G. Weatherall, *at* http://works.bepress.com/kimweatherall/19, at 5 (November, 2009) .

國際協定。

智慧財產權法律若要能有效執行，必須倚賴社會大眾自願性的遵守與支持，因此須使社會大眾認為相關法律是公平且有意義的。ACTA 的負面形象很顯然使其無法獲得上述所需的社會大眾認同，將來生效後，各國若因此要修改國內法律、執行相關規定，必然會面對許多質疑和阻力[400]。當然，若 ACTA 的規範範圍只限於改善執行的程序性法規，例如規定海關該如何處理疑似含有侵權物品貨櫃之方式，是否有社會大眾的支持也許影響不大[401]。但是由四月草案版本到最終版本皆可以看出 ACTA 的規範範圍不僅限於此，無論是數位環境中的權利執行，或是散佈於各章節的規定都會對公民權利有所干涉。缺乏社會大眾的普遍支持加上許多公民團體的反對，勢必增加各國履行 ACTA 相關規定的困難。

談判過程維持保密原本一直是參與談判國的選擇，早期保密遭致批評，後期存在許多因素迫使其對外公開，但是公開的結果卻導致了 ACTA 的談判成果被削弱[402]。2010 年 1 月草案外洩，ACTA 談判形式大幅改變，利益團體和公民團體把握機會對 ACTA 草案依據各自立場進行遊說[403]。例如網路服務業者主張數位環境中執行該節中的第二層責任會嚴重影響其利益；公民團體則針對其認為會破壞權利所有與使用之間衡平狀態的條款大力抨擊，例如將專利權涵蓋於邊境措施執行範圍，會使得學名藥可能在轉運過程中被扣押因而影響他國人民的健康權。各國政府面對這些壓力，不得不自原先的談判政策和立場退讓，所以最終版本中許多爭議條款被刪除、拘束力被放寬留有讓各國決定是否執行規定的空間。談判形式的選擇對於參與談判國而言似乎是個兩難，保密使得外界對於 ACTA 的評價傾向負面，公開卻又迫使各國放棄許多原先的談判立場，由保密轉向公開已讓 ACTA 偏離了原本的目標，未來生效後的效力將被大幅削弱。

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400 *Id.*
401 *Id.*
402 *Transparency, Focus on Limits of Domestic Laws Weakened ACTA*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Nov. 24, 2010) .
403 *Id.*

第四項　法規範之合致性

一、與既存國際規範之合致性

當前既存智慧財產權保護相關國際規範最具代表性的為 TRIPS，本章第四節反仿冒貿易協定未來適用可能產生問題已討論 ACTA 特定規範與 TRIPS 之合致性，本段不再贅述，惟可再就 ACTA 此協定整體與 TRIPS 原則之合致性進行討論。

TRIPS 第 7 條闡明協定之宗旨，智慧財產權之保護及執行必須有助於技術發明的提昇、技術移轉和散播以及技術知識創造者與使用者的相互利益，並有益於社會及經濟福祉，及權利與義務之平衡；第 8 條規定 TRIPS 之原則，該條第 2 款重申會員承認為防止智慧財產權權利人濫用其權利，或不合理限制貿易或對技術之國際移轉有不利之影響，而採行符合 TRIPS 規定之適當措施者，可能有其必要。第 7 條與第 8 條揭示了智慧財產權保護與執行須顧及權利與義務間之平衡為 TRIPS 核心價值之一，而 TRIPS 歷經多年來 WTO 會員協商談判後，已在智慧財產權所有人與整體社會福利間取得一個平衡。開發中國家主張，ACTA 制定出一套較 TRIPS 更為嚴格之保護標準，較有利於智慧財產權所有人之保護，ACTA 此特點與 TRIPS 協定之宗旨不符，甚至會破壞 TRIPS 多年來的保護成果與平衡秩序[404]。若由此觀點出發，則 ACTA 此協定整體可能有違反前述 TRIPS 第 7 條、第 8 條之虞。

二、與各國國內規範之合致性

或許有人認為，ACTA 參與談判國都是對智慧財產權保護具有類似立場的國家，價值觀和國內法律體系類似，應該可以達成一定程度的共識，ACTA 實體規範未來適用之問題不一定會造成各國立場的分歧。但是，並非只有開發中國家、低度開發國家與已開發國家間才會因為經濟發展和談判實力之差異產生許多爭

[404] *Questions Its WTO Compatibility*, *supra* note 396.

議。即便是一般認知中的已開發國家，面對 ACTA 此種實質為 TRIPS-Plus 的規範，在國內適用時也會引發出許多問題。

澳洲和美國兩國皆為 ACTA 參與談判國，雙方 2004 年簽署 FTA 在澳洲國內所引發的爭議可以做為例子。澳洲在 2004 年 8 月與美簽署了「澳洲─美國自由貿易協定」（Australia-United States Free Trade Agreement，簡稱 AUSFTA），AUSFTA 中的智慧財產權專章主要規範內容為著作權，內容大致可以分類為三個部分：第一類為多邊體系的智慧財產權規範架構，雙方在此部分重申會遵守既存的國際公約；第二類為 TRIPS-Plus 之規範，例如將著作權保護期間延長為 70 年；第三類為與數位環境相關之規範，這部分的規定非常詳盡且具有高度法規範性質，包含反規避措施、權利管理資訊、ISP 業者責任與安全港之規定、臨時重製（temporary reproduction）等未能涵蓋在 TRIPS 中的相關規定[405]。AUSFTA 中的智慧財產權專章是許多澳洲國內意見主張不該與美國簽署 FTAs 的主因，之所以會引起爭議，原因如下：數位環境部分之規範與美國國內法相似程度很高，AUSFTA 規範內容之詳細程度在國際條約中非屬常態，美國和澳洲的經濟發展程度與價值觀也許類似，但是兩國的國內法體制仍當然會存在差異，美國未考慮此點，就把許多美國國內適用時也曾引發諸多討論之規定加在 AUSFTA 中，使澳洲必須遵守，因此引發澳洲國內許多反彈[406]。

由上例可知，TRIPS-Plus 規範可能也會成為已開發國家立法或執行的負擔。ACTA 參與談判國中的美國、歐盟曾表示 ACTA 生效不會造成國內法律規範的變動，但是有些國家仍必須修改國內法律才能符合 ACTA 的要求，例如加拿大與墨西哥近期就修法賦予邊境措施主管機關權限，使其得依職權主動扣押疑似侵權的商品[407]。

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[405] Robert Burrell, Kimberlee Weatherall, *Exporting Controversy? Reactions to The Copyright Provisions of The U.S-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, U. ILL. J.L. TECH & POL'Y 259, 284-289 (Fall 2008).

[406] *Id.*

[407] *Implementing ACTA Text Will Require Legal Changes in Some Countries*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Oct. 14, 2010) .

宣布無須修改國內法律的美國、歐盟則引發國內質疑，懷疑政府宣示的真實性。歐盟為了回應這些質疑，歐洲議會 2010 年 11 月 24 日通過一項決議，該決議不具法律拘束力，但決議中表達了歐洲議會對於 ACTA 的支持，確認 ACTA 不會違反或者修改歐盟的共同體既存原則[408]（*acquis communautaire*），雖然未要求歐盟執行委員會（European Commission）須提供一份明確的報告完整評估 ACTA 的影響，卻要求執行委員會應確認 ACTA 未來適用時不會對基本權利、資訊保護、歐盟調和智慧財產權執行措施一致的努力等造成影響，否則不會於未來通過表決同意 ACTA[409]。歐洲議會原則上表示同意 ACTA 時，卻也附帶條件要求須評估 ACTA 的影響，希望此舉可平息各界的質疑。美國將 ACTA 定位為行政協定（executive agreement）無須再經國會同意，因此 ACTA 的規定必須與現行國內法規一致且不得導致國內法須做出實質改變[410]。但是其他政府機關並不同意 ACTA 可被定位為行政協定[411]，甚至有國會議員要求應該提供一份正式報告完整評估 ACTA 是否與美國國內法一致[412]；美國國內的公民團體和科技產業則擔憂 ACTA 未來適用時可能會因為條文解釋方向的差異，而對國內法的實質規定有影響，因此主張美國政府須同時發表「簽署法案書面聲明」（signing statement），確保 ACTA 的解釋與適用會與美國現行國內法相符[413]。

ACTA 在歐盟若要生效須經過許多程序，歐盟執行委員會簽署後須送交歐盟外交部長會議（Foreign Affairs Council of Ministers）、歐洲議會表決，再經 27 個歐盟成員各自國內程序批准，ACTA 才能在各個歐盟成員國內生效，這個階段可能會有很多變數[414]。美國試圖以行政協定避免國會審查 ACTA，但是這個政策定

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[408] acquis communautaire 指的是歐盟在發展過程中所取得之法律成就，申請加入的候選國家必須修改國內法規進一步整合，必須遵從歐盟法律，並跟從歐洲聯盟政治、經濟及貨幣的一致目標。

[409] European Parliament, *Resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement* (Nov. 24, 2010).

[410] *Companies Seek ACTA Signing Statement to Ensure U.S. Law Compliance*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Oct. 14, 2010) .

[411] *ACTA Countries Finalize Agreement, Adopt U.S.-EU Compromise*, WORLD TRADE ONLINE, *at* http://insidetrade.com/ (Nov. 18, 2010) .

[412] *Implementing ACTA Text Will Require Legal Changes in Some Countries, supra* note 407.

[413] *ACTA Countries Finalize Agreement, Adopt U.S.-EU Compromise, supra* note 411.

[414] *Id*.

位可能會被改變，即便成功的以行政協定形式生效，美國國內各界仍要求政府須同時發表簽署法案書面聲明。由歐盟、美國目前的國內反應可以看出各國國內對於 ACTA 是否具備與國內規範之合致性仍有疑慮與不安，而這些疑慮與不安也將影響 ACTA 最終版本的簽署與生效。

第五項　小結

基於國內產業之利益，已開發國家對於提升國際間智慧財產權保護一向採取非常積極主動的態度，尤其是美國，不同時期的貿易政策雖然有差異，智慧財產權一直是政策主軸，由 WIPO、WTO 開始進行，接著移轉重心到自由貿易協定，目前的推動重點則為 ACTA。這個過程中，其實可以看出美國除了提升自己國內的保護規範水準外，也同時嘗試提升國際間保護規範水準。美國常常採取移植本國國內規範到國際性協定方式，因為智慧財產權與貿易的關係越來越密切，若只在自己國內加強保護，保護效果其實相當有限。要提升保護水準，執行面是一個重要的環節，但是執行面的缺失和各國執行水準之落差，從 TRIPS 到美國眾多的 FTAs，似乎都無法將這個重要環節順利提高到美國所期待的水準，因此，ACTA 的倡議其實是可以預期的美國政策走向。

ACTA 協商過程歷時約三年，各締約國希望可以憑藉此協定加強國際性合作、強化智慧財產權執行層面，ACTA 被期待成為一個有效率地解決與日俱增的侵權挑戰的利器。但是，談判過程中針對某些部分各參與談判國的立場歧異程度甚大，對於許多條文內容難以迅速達成一致之共識，加上美國試圖將移植國內法到 ACTA 中，也引發各界之不安與批評；談判結束後，ACTA 仍須再經各國國內程序批准，於此階段也許還會出現變數，ACTA 能否順利的、及時的生效還是未定數。本節分成四個層面評估成效：目標、成員、過程、條文內容，隨著 ACTA 歷時三年的談判回合終了，綜合以上討論，可以發現 ACTA 相當程度偏離了已開發國家原本的預期，成果僅是一個弱化的複邊貿易協定。

第伍章　結論

隨著智慧財產權與國際貿易的關係越來越密切，要能有效保護智慧財產權僅採取國內立法保護的方式並不足夠，各國於是開始思考在國際貿易體系建立出國際的保護基準，作為智慧財產權保護的框架。

本文主張國際智慧財產權保護貿易架構中存在一個各國政策反覆於多邊、複邊架構間來回擺盪的分合現象。自 19 世紀以降，各國體認以國內法律為基礎的保護方式具有侷限性，因此開始朝建構國際保護的方式調整，嘗試以國際條約的方式對智慧財產權進行規範，後來也陸續針對不同類型的智慧財產權訂定了不同的國際條約，產生了巴黎公約、伯恩公約、羅馬公約等國際協定，可定位為智慧財產權保護多邊貿易架構形成的第一階段，也是第一次各國國內立法朝國際保護靠攏的現象。1967 年 WIPO 成立提供了一個國際性平台，讓各國可以透過國際合作促進全世界智慧財產權的保護，使多邊貿易架構顯得較為完備，然而在 WIPO 之運作架構下又因為不同國家的立場分歧未能進一步修正智慧財產權公約，多邊架構發展出現瓶頸，但是已開發國家未因此退出多邊貿易架構，反而選擇持續完善此多邊架構。已開發國家為了自身國家利益成為推動主力，經過數年的談判協調，烏拉圭回合談判後在 WTO 得到了這些國家期待的成果─TRIPS，其效力不但較先前相關的國際智慧財產權保護條約廣泛，也是當前國際間提供智慧財產權保護態樣最為廣泛之多邊貿易協定。TRIPS 生效後，國際間智慧財產權保護的多邊體系大致已建立完成。

但是多邊架構未能於 TRIPS 生效後再取得重大成果，已開發國家和開發中國家在智慧財產權利益之立場分歧使得多邊架構之發展陷入僵局。TRIPS 規範僅為提供 WTO 會員一個「最低基準」，各 WTO 會員國內社會概況不同使得執行保護的水準不一致，盜版、仿冒等侵害智慧財產權之行為在許多 WTO 會員境內仍然非常猖獗，特別是開發中國家與低度開發國家。以美國、歐盟為首的已開發國

家陣營在智慧財產權領域享有相當大的經濟利益，除了希望可以在多邊貿易體系中針對 TRIPS 實體規範內容作出修改，同時則考量多國間之國際談判不易達成共識、TRIPS 生效後多邊體系的國際貿易發展有遲滯現象，努力嘗試在 WTO 或 WIPO 等多邊架構以外之場域尋求其他方式提升國際間智慧財產權的保護水準。已開發國家於 TRIPS 後的時期選擇了另一種途徑，本文舉美國 FTAs 貿易政策為例，用本國的經濟、政治實力為後盾和誘因，與位於不同地理區域的國家簽訂為數眾多的 FTAs，並且把 TRIPS-Plus 規範列為 FTAs 的一部分，使 FTAs 對手國必須遵守。這些保護水準高於 TRIPS 的規範引發了許多爭議。藉著討論美國 FTA 貿易政策的推動，我們發現此時出現了暫時偏離多邊架構改以雙邊架構為政策重心的分離，惟雙邊貿易政策經本文分析並無法產生預期效果。美國為了尋求重大進展，下一步的政策選擇是什麼？

美國希望可以在當前的多邊貿易體系、複邊貿易體系之外，嘗試找出一個新架構處理國際間智慧財產權保護之議題，且著重的目標為執行面相關之規範，於是在美國倡議之下於 2007 年開始反仿冒貿易協定之談判。ACTA 的規範範圍包含：民事執行、邊境措施、刑事執行、數位環境中與智慧財產權執行有關措施、國際合作與執法實踐等。除了智慧財產權保護執行面之規定，ACTA 也將跨國合作與執法經驗交流列為規範項目。美國與其他重要已開發國家合作，少了逐漸崛起的重要開發中國家參與，談判國的數目限縮在一個相當微妙的組合，ACTA 僅代表已開發國家的智慧財產權保護之政策傾向，但是 ACTA 參與談判國的目標是否只限於此？除了宣示一個具體的、一致的政策態度，參考美國 FTAs 的貿易政策脈絡我們可以推測參與談判國於 ACTA 生效後，會想辦法將 ACTA 延伸成許多國家都必須遵守或實施的保護標準，將此複邊協定效力擴張到多邊貿易架構。但是 ACTA 在談判過程中就引發了許多爭議，包含開發中國家的權益被忽略、要求協商過程應該透明化、可能侵害公民權利等，都使得 ACTA 尚未生效前就受到許多質疑。ACTA 參與談判國陸續於 2010 年 4 月公布四月草案版本、2010

年 12 月公布最終版本，實體規範內容之揭露並未平息這些質疑，各界反而指出反仿冒貿易協定許多內容都具有 TRIPS-Plus 的本質，ACTA 參與談判國皆為 WTO 會員，雖然 WTO 會員本來就有權提供比 TRIPS 更高的保護水準，但未來適用時可能會產生違反 WTO 義務的爭議。本文分成四個層面評估 ACTA 成效，包括目標、成員、過程、條文內容，認為智慧財產權保護執行面的缺失無法僅仰賴制訂新貿易協定就可填補，且參與談判國的組成缺少重要開發中國家，又談判形式選擇保密使得大眾的觀感不佳，而被迫公開後來自外界壓力又使參與談判國政府放棄所堅持談判立場，加上 ACTA 實體規範是否具備與國際協定、各國國內法規範合致性之疑慮等問題，都使得 ACTA 的成果打了折扣。ACTA 的發展可以定位出美國目前的政策走向，並非因雙邊架構的挫敗就選擇回到多邊架構，而是改採協商複邊貿易協定的方式，但已公布最終版本的 ACTA 能否順利生效仍屬未知數，即便順利生效，依其談判成果可以推定，已無法達到所有參與談判國的預期。

不論已開發國家如何選擇之後的政策走向，我們可以發現擁有智慧財產權利益國家的最終目標仍是提升國際間智慧財產權保護水準，過程中則變動地、持續地在多邊貿易架構、複邊貿易架構中，選擇能達成最終目標的政策去執行，因此出現了智慧財產權保護體系的分合情形， TRIPS 的生效不是終點，ACTA 的最終版本也不是終點，智慧財產權保護多邊貿易架構之分合情形會反覆地、不間斷地出現。

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This draft text does not identify participants' positions in respect of square bracketed options.

CHAPTER ONE
INITIAL PROVISIONS AND DEFINITIONS

[[1]: Section A: Initial Provisions

ARTICLE 1.1: RELATION TO OTHER AGREEMENTS

Nothing in this Agreement shall derogate from any international obligation of a Party with respect to any other Party under existing agreements to which both Parties are party.

ARTICLE 1.2: NATURE AND SCOPE OF OBLIGATIONS[2]

1. Members shall give effect to the provisions of this Agreement. A Party may implement in its domestic law more extensive protection and enforcement of intellectual property rights than is required by this Agreement, provided that such protection and enforcement 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. Nothing in this Agreement creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.

ARTICLE 1.3: RELATION TO STANDARDS CONCERNING AVAILABILITY AND SCOPE OF INTELLECTUAL PROPERTY RIGHTS

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

2. It is understood that this Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under the laws and regulations of that Party.

ARTICLE 1.4: PRIVACY AND DISCLOSURE OF INFORMATION

[A suitable provision needs to be drafted that would ensure nothing in the Agreement detracts from national legislation regarding protection of personal privacy. In the same

[1] This Section A has been proposed as an initial discussion draft, to receive detailed reactions at the next Round.

[2] Negotiator's Note: Provisions on transitional arrangements (i.e., entry into force) and application to prior acts will be included in Chapter 6.

way, a suitable provision needs to be drafted regarding disclosure of commercial information]

[Section B[3]: General Definitions

ARTICLE 1.X: DEFINITIONS

For purposes of this Agreement, unless otherwise specified:

days means calendar days;

intellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Council means the ACTA Oversight Council established under Chapter Five;

measure includes any law, regulation, procedure, requirement, or practice;

person means either a natural person or a juridical person;

right holder includes a federation or an association having the legal standing and authority to assert rights in intellectual property, and also includes a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property;

territory means customs territory of a Party and all free trade zones of that Party;

TRIPS Agreement means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement;[4]

WTO means the World Trade Organization; and

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

[3] Section B of the Initial Provisions is still to be discussed.

[4] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

CHAPTER TWO
LEGAL FRAMEWORK FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

[General Obligations[5]

ARTICLE 2.X: GENERAL OBLIGATIONS WITH RESPECT TO ENFORCEMENT

1. Procedures adopted, maintained, or applied to implement this Chapter shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. In respect of civil remedies and criminal penalties for enforcement of intellectual property rights, each Party shall take into account the need for proportionality between the seriousness of the infringement and the remedies or penalties ordered.

[3. Those measures, procedures and remedies shall also be [effective, proportionate][fair and equitable] and [deterrent]][6]]

4. [Provision on limitations on remedies available against use by governments as well as exemptions of public authorities and official from liability to be inserted here at a later date.]

5. [Define scope of the intellectual property rights covered in the Agreement]] [The scope of intellectual property rights will be defined at the start of each chapter.]

Section 1: Civil Enforcement

ARTICLE 2.1: AVAILABILITY OF CIVIL PROCEDURES

In the context of this section, e] [E]ach Party shall make available to right holders [civil judicial] [or administrative] procedures concerning the enforcement of any [intellectual property right] [copyrights and related rights and trademarks].

ARTICLE 2.X: INJUNCTIONS

[1. **]**In civil judicial proceedings concerning the enforcement of [copyright or related rights and trademarks] [intellectual property rights], each Party shall provide that its judicial authorities shall have the authority [subject to any statutory limitations under its domestic law] to issue [against the infringer an injunction aimed at prohibiting the continuation of the] [an order to a party to desist from an] infringement, including an order to prevent infringing goods from entering into the channels of commerce [and to

[5]This General Obligations Section has been proposed as an initial discussion draft, to receive detailed reactions at the next Round.

[6][Move (with adjustments) Art. 2.1.2 to General Obligations.]

prevent their exportation].[7]

[2. The Parties [may] shall also ensure that right holders are in a position to apply for an injunction against [infringing] intermediaries whose services are used by a third party to infringe an intellectual property right.[8]][9]

ARTICLE 2.2: DAMAGES

1. Each Party shall provide that:

(a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer [who knowingly or with reasonable grounds to know, engaged in [infringing activity] of [copyright or related rights and trademarks] [intellectual property rights] to pay the right holder

(i) damages adequate to compensate for the injury the right holder has suffered as a result of the infringement; or

(ii) [at least in the case of copyright or related rights infringement and trademark counterfeiting,] [in the case of IPR infringements] the profits of the infringer that are attributable to the infringement, [which may be presumed to be the amount of damages] [and that are not taken into account in computing the amount of damages] [referred to in clause (i)][10]

[which may be presumed to be the amount of damages referred to in clause (i)]; and

(b) in determining the amount of damages for [copyright or related rights infringement and trademark counterfeiting] [infringement of intellectual property rights], its judicial authorities shall consider, *inter alia*, any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price, or [the profits of the infringer that are attributable to the infringement].

[7 A Party may comply with its obligation relating to exportation of infringing goods through its provisions concerning distribution [or transfer].]

[8 The conditions and procedures relating to such injunction will be left to each Party's legal system.]

9 At least one delegation opposes paragraph 2 and is considering its placement

10 At least one delegation proposes to delete (ii) as originally proposed and move (ii) into paragraph 2.2.1(b).

[2. At least with respect to works, phonograms, and performances protected by copyright or related rights, and in [cases of trademark counterfeiting], in civil judicial proceedings, [As an alternative to paragraph 1,] each Party [shall][may] establish or maintain a system that provides:

(a) pre-established damages;

(b) presumptions for determining the amount of damages[11] sufficient to compensate the right holder for the harm caused by the infringement.[12] [; or

(c) additional damages]]

[3. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, each Party may [lay down that] [establish] [may authorize its] the judicial authorities may [to] order the recovery of profits or the payment of damages, which may be pre-established.]

[4. Where a Party provides one of the options described in paragraph 2(a) or 2(b), that Party shall ensure that a right holder has the right to choose that option [[13]] as an alternative to the remedies referred to in paragraph 1.]

Option 1

[5. Each Party shall provide that its judicial authorities, except in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings [[at least in cases] concerning copyright or related rights infringement, [patent infringement,] or trademark infringement] that the prevailing party be awarded payment by the losing party of [[reasonable and proportionate] legal] court costs or fees. [Each Party shall also provide that its judicial authorities, [except in exceptional circumstances], [in proceedings concerning copyright or related rights infringement or willful trademark counterfeiting,] shall have the authority to order, [in appropriate cases], that the prevailing party be awarded payment by the losing party of reasonable attorney's fees [, and other expenses as provided for under that Party's domestic

[11] Such measures may include the presumption that the amount of damages is (i) the quantity of the goods infringing the right holder's intellectual property right and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement or (ii) a reasonable royalty [or (iii) a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question].

[[12] No Party is required to apply paragraph 2 to actions for infringement against a Party or a third party acting with the authorization or consent of the Party.]

[[13] No Party is required to provide the right holders with more than one of the options referred to in paragraph 2.]

law].[14]]

Option 2

[5. Each Party shall provide that its judicial authorities, [in appropriate cases], shall have the authority to order, at the conclusion of civil judicial proceedings [[at least in cases] concerning copyright or related rights infringement, [patent infringement,] or trademark counterfeiting] that the prevailing party be awarded payment by the losing party of court costs or fees and reasonable [and proportionate] attorney's fees [, and any other expenses as provided for under that Party's domestic law].[15]]

ARTICLE 2.3: OTHER REMEDIES

1. With respect to goods that have been found to be [pirated or counterfeited] [infringing an intellectual property right], each Party shall provide that in civil judicial proceedings, at the right holder's request, its judicial authorities shall have the authority to order that such goods be [recalled, definitively removed from the channel of commerce, or] destroyed, except in exceptional circumstances, without compensation of any sort.

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

[3. The judicial authorities shall order that those remedies be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.]

[4. [In ordering those remedies, the judicial authorities][Each Party shall further provide that its judicial authority in ordering these remedies] shall take into account the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interest of third parties.][16]

ARTICLE 2.4: INFORMATION RELATED TO INFRINGEMENT

[Without prejudice to other statutory provisions which, in particular, govern the protection of confidentiality of information sources or the processing of personal

[14 For greater certainty, the term "reasonable attorney's fees" is not intended to require a higher amount than the amount of "appropriate attorney's fees" under the TRIPS Article 45.2.]

[15 For greater certainty, the term "reasonable attorney's fees" is not intended to require a higher amount than the amount of "appropriate attorney's fees" under the TRIPS Article 45.2.]

16 This provision is to be reflected in the General Obligations Section.

data,][17] Each Party shall provide that in civil judicial proceedings concerning the enforcement of [intellectual property rights][copyright or related rights and trademarks], its judicial authorities shall have the authority upon a justified request of the right holder, to order the [alleged] infringer [including an alleged infringer] to provide, [for the purpose of collecting evidence] any [relevant] information [information on the origin and distribution network of the infringing goods or services][in the form as prescribed in its applicable laws and regulations] that the infringer possesses or controls, [where appropriate,] to the right holder or to the judicial authorities. Such information may include information regarding any person or persons involved in any aspect of the infringement and regarding the means of production or distribution channel of such goods or services, including the identification of third persons involved in the production and distribution of the infringing goods or services or in their channels of distribution. [For greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege.]]

ARTICLE 2.5: PROVISIONAL MEASURES

[X. Each Party shall provide that its judicial authorities shall have the authority, at the request of the applicant, to issue an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right [copyright or related rights or trademark]. An interlocutory injunction may also be issued, under the same conditions, against an [infringing] intermediary whose services are being used by a third party to infringe an intellectual property right. Each Party shall also provide that provisional measures may be issued, even before the commencement of proceedings on the merits, to preserve relevant evidence in respect of the alleged infringement. Such measures may include *inter alia* the detailed description, the taking of samples or the physical seizure of documents or of the infringing goods.]

1. Each Party shall [provide][ensure] that its judicial authorities [shall]act [expeditiously][on requests] for provisional measures *inaudita altera parte*, and shall endeavor to make a decision[on such requests] without undue delay, except in exceptional cases.

2. [In civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting[18]], each Party shall provide that its judicial authorities shall have the authority to order the seizure or other taking into custody of suspected infringing goods, materials, and implements relevant to the act of infringement [and, at least for trademark counterfeiting, documentary evidence relevant to the infringement].

[3. Each Party shall provide that its [judicial][competent] authorities have the authority to require the plaintiff, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of

[17][Negotiators Note: Study moving this clause to General Provisions section]

[18]At least one delegation raises issue of scope of this provision.

certainty that the plaintiff's right is being infringed or that such infringement is imminent, and to order the plaintiff to provide a reasonable security or equivalent assurance [set at a level sufficient] to protect the defendant [, ensuring compensation for any prejudice suffered when the measure is revoked or lapses due to any reason,]and to prevent abuse. [Such security or equivalent assurance shall not unreasonably deter recourse to such procedures].

Section 2: Border Measures[19] [[20]] [[21]]

[ARTICLE 2.X: SCOPE OF THE BORDER MEASURES

1. This section sets out the conditions for action by the competent authorities when goods are suspected of infringing intellectual property rights, within the meaning of this agreement, when they are imported, exported, in-transit or in other situations where the goods are under customs supervision.

2. For the purposes of this section, "goods infringing an intellectual property right" means goods infringing any of the intellectual property rights covered by TRIPS[22]. However, Parties may decide to exclude from the scope of this section, certain rights other than trade marks, copyrights and GIs when [not protected exclusively by copyright and trade mark systems and] [protected by [non-product- or sector-specific] [registration] *sui generis* systems.]

3. [Parties shall provide for the provisions related to border measures to be applied [at least]in cases of trade mark counterfeiting and copyright piracy. [Parties may provide for such provisions to be applied in other cases of infringement of intellectual property rights.]]

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

[[20] Each Party shall implement the obligations in respect of importation and exportation set out in this Section so as to be applied to shipments of goods consigned to {a local party/a party in the territory} but destined for outside the territory of the Party**]**.

[21] No Party shall be obliged to apply this section to any goods that do not infringe an intellectual property right held within the territory of that Party**]**. [Negotiator's note: Study moving to General Provisions section.]

[[22] The provisions of this section shall also apply to confusingly similar trademark goods [, which means any goods, including packaging, bearing without authorization a trademark that is similar to the trademark validly registered in respect of such or similar goods where there exists a likelihood of confusion on the part of the public between the trademark borne and the trademark validly registered, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in this Section are invoked**.]**

ARTICLE 2.X: *DE MINIMIS* PROVISION

Parties may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travelers' personal luggage [or sent in small consignments.]

ARTICLE 2.X: PROVISION OF INFORMATION FROM THE RIGHT HOLDER

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

ARTICLE 2.6: APPLICATION BY RIGHT HOLDER

Option 1

1. Each Party shall provide procedures for import [and in-transit[23]] shipments and [may] [shall] provide procedures for export shipments, by which right holders may request the competent authorities to suspend release [24] of suspected counterfeit trademark goods[25] and suspected pirated copyright goods[26] [goods suspected of infringing an intellectual property right]into free circulation.

[23] For the purposes of this Section, **in-transit** goods means goods under "Customs transit" and under "transhipment". "Customs transit" means the Customs procedure under which goods are transported under Customs control from one Customs office to another. "Transhipment" means the Customs procedure under which goods are transferred under Customs control from the importing means of transport to the exporting means of transport within the area of one Customs office which is the office of both importation and exportation.]

[[24]For the purpose of this Section, where the competent authorities suspend the release of suspected counterfeit trademark or pirated copyright goods, the authorities shall not permit the goods to be released into free circulation, exported, or subject to other customs procedures, except in exceptional circumstances.**]**

[25] For purposes of this Section, **counterfeit trademark goods** means any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in this Section are invoked.

[It is to be 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.]

[26] For purposes of this Section, **pirated copyright goods** means any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set out in this Section are invoked.

Option 2

[1. Each Party shall provide procedures by which right holders may request the competent authorities to suspend the release of goods suspected of infringing intellectual property rights.]

2. The competent authorities shall require a right holder requesting the procedures described in paragraph 1 to provide adequate evidence to satisfy themselves that, under the laws of the Party providing the procedures, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected infringing goods reasonably recognizable by the competent authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to the procedures described in paragraph 1.

3. Each Party shall provide for applications to suspend the release of suspected infringing goods that apply to all goods[27] under customs control in its territory and remain applicable to multiple [or in the alternative specified] shipments. Each Party may provide that, at the request of the right holder, the application to suspend the release of goods may apply to selected points of entry and exit under customs control. These applications for suspension shall remain applicable for a period of not less than [one year][or sixty days] from the date of application, or the period of protection of the relevant intellectual property rights under the laws of the Party providing border measures under this Section, whichever is shorter. Each Party may permit a right holder to specify that an application to suspend remain applicable for a period of less than [one year][or sixty days].

4. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application. Where the competent authorities have accepted the application, they shall also make known to the applicant the period of validity of the application.

5. Each Party may provide, where the applicant has abused the process, or where there is due cause, that an application may be denied, suspended, or voided.

ARTICLE 2.7: EX-OFFICIO ACTION

Option 1

1. Each Party [may] [shall] provide that its customs authorities may act upon their own initiative, to suspend the release of suspected counterfeit trademark goods or suspected pirated copyright goods with respect to imported, [exported] [, or in-transit] goods including suspected counterfeit trademark goods or suspected pirated copyright goods admitted to, withdrawn from, or located in free trade zones [goods suspected of infringing an intellectual property right]. [Each Party [may][shall endeavor to] provide

[27]Whether this applies to imports, exports and/or in transit goods depends on paragraph 1.

its customs authorities the same authority as the foregoing provision of this Article in respect of [exported and] in-transit goods that are [suspected counterfeit trademark goods or suspected pirated copyright goods.]

Option 2

[1. Each Party shall provide that its competent authorities may act upon their own initiative, to suspend the release of goods suspected of infringing an intellectual property right.]

2. [Each Party may also provide that its customs authorities may act, upon their own initiative, to suspend the release of goods suspected of infringing other intellectual property rights [, not covered by this section].]

ARTICLE 2.X:

[As an alternative to procedures in Article 2.6.1 and 2.7.1 relating to export or in-transit shipments, each Party shall provide that where shipments are exported from that Party, or shipments are in-transit through that Party, it shall cooperate to provide all available information to the destination Party, upon request of the destination Party, to enable effective enforcement against shipments of infringing[28] goods.]

ARTICLE 2.9: SECURITY OR EQUIVALENT ASSURANCE

Each Party shall provide that its competent authorities shall have the authority to require a right holder requesting procedures described under Article 2.6 to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. Each Party may provide that such security may be in the form of a bond conditioned to hold the defendant harmless from any loss or damage resulting from any suspension of the release of the goods in the event the competent authorities determine that the good [is not a counterfeit trademark good or a pirated copyright good] [does not infringe intellectual property rights covered by this section]. Only in exceptional circumstances [or pursuant to a judicial order] may a Party permit a defendant to post a bond or other security to obtain possession of suspected counterfeit trademark goods or suspected pirated copyright goods.

ARTICLE 2.10: DETERMINATION AS TO INFRINGEMENT

Each Party shall adopt or maintain a procedure by which competent authorities may determine, within a reasonable period of time after the initiation of the procedures described under Article 2.X or 2.X, whether the suspected infringing goods infringe an intellectual property right[29].

[28]Subject to scope.

[29]Subject to scope.

ARTICLE 2.11: REMEDIES

1. Each Party shall provide its competent authorities with the authority to order the destruction of goods following a determination under Article 2.10 that the goods are infringing[30]. [In cases where such goods are not destroyed, each Party shall ensure such goods are disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder.] [or that they be disposed of outside the channels of commerce in such a way as to preclude injury to the right holder, except in exceptional circumstances.]

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

3. Each Party may provide its competent authorities with the authority to impose administrative penalties following a determination under Article 2.10 that the goods are infringing.

ARTICLE 2.12: FEES [31]

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

ARTICLE 2.13: DISCLOSURE OF INFORMATION

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

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

(b) Each Party may authorize its competent authorities to provide right holders with information about goods including, but not limited to, the description and quantity of the goods and the name and address of the consignor, importer, exporter or consignee, and, if known, the country of origin and name and address of the manufacturer of the goods to assist in the determination under Article 2.10 of whether goods infringe rights

[30]Subject to scope.

[31]At least one delegation may come back with a possible additional paragraph for Article 2,12, depending upon the progress of discussion in the Civil Enforcement Section.

covered by this Section;

(c) Unless a Party has granted authority under subparagraph (b), at least in the case of imported goods, where competent authorities have seized or, in the alternative, made a determination under Article 2.10 that goods infringe rights covered by the section, each Party shall authorize its competent authorities to provide right holders within 30 days[32] of seizure or determination, with information about goods including, but not limited to, the description and quantity of the goods and the name and address of the consignor, importer, exporter, or consignee, and, if known, the country of origin and name and address of the manufacturer of the goods.[33]

[Article 2.X: LIABILITY OF THE COMPETENT AUTHORITIES

[1. With respect to the border measures covered by this Section, each Party shall provide measures concerning the liability of competent authorities in the execution of their duties.]

Option 1

2. The acceptance of an application on its own shall not entitle the right-holder to compensation in the event that goods infringing an intellectual property right [copyright, related rights and trademarks]are not detected by [competent authorities]a customs office and are released or no action is taken to detain them.

Option 2

[2. Each Party may limit remedies sought by a right holder or other persons against a Party's competent authorities as a result of mere acceptance of an application under Article 2.[6], where the competent authorities release, or fail to detect, detain, or take action against or in connection with, goods that may infringe [IPR] covered by this Section.]

[3. The competent authorities shall not be liable towards the persons involved in the situations referred to in Article 2.6 for damages suffered by them as a result of the authority's intervention, except where provided for by the law of the Party in which the application is made or in which the loss or damage is incurred.]]

[32]For purposes of the Article, "days" shall mean "business days".

[33]Subject to agreement by at least one delegation.

Section 3: Criminal Enforcement[34]

ARTICLE 2.14: CRIMINAL OFFENSES

1.[35] Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.[36] Willful copyright or related rights piracy on a commercial scale includes:

[(a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and

(b) willful copyright or related rights infringements for purposes of commercial advantage or financial gain.[37]]

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

(a) to which a mark has been applied [without consent of the right holder] which is identical to or cannot be distinguished [in its essential aspects] from a trademark registered in [its territory] [the Party in respect of certain goods or services], and

(b) which are intended to be used [by the importer or user or, by a third party with the knowledge of the importer or user, for willful trademark counterfeiting] [on [either] the goods or [in relation to] services [for which is registered] [which are identical to goods or services for which the trademark is registered.]

[3. Each Party shall provide for criminal procedures and penalties to be applied [in

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[34] Negotiator's Note: Definitions of "counterfeit trademark goods" and "pirated copyright goods" provided for in footnotes 12 and 13 of Section 2 (Border Measures) should be used as context for this Section.

[35]This provision is under internal examination by at least one delegation. Subparagraphs (a) and (b) are still under examination by at least one delegation. At least one is still considering paragraphs 1 and 2.

[36] Each Party shall treat willful importation [or exportation] of counterfeit trademark goods or pirated copyright goods on a commercial scale [in accordance with its laws and regulations,] as unlawful activities subject to criminal penalties under this Article. A Party may comply with its obligation relating to [exportation] of pirated copyright or counterfeit trademark goods through its measures concerning distribution.

[37]For purposes of this Section, **financial gain** includes the receipt or expectation of receipt of anything of value.

accordance with its laws and regulations,] against any person who, without authorization of the holder of copyright [or related rights] [or the theatre manager] in a [motion picture or other audiovisual work], [cinematographic work] [knowingly] [uses an audiovisual recording device to transmit or make] [makes] a copy of [, or transmits to the public] the motion picture or other audiovisual work, or any part thereof, from a performance of the motion picture or other audiovisual work in a motion picture exhibition facility open to the public.][38]

ARTICLE 2.15: [CRIMINAL] LIABILITY AND PENALTIES [AND SANCTIONS]

[1. *Liability of Legal Persons*

(a) Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for the offences referred to in Article 2.14.

(b) Subject to the legal principles of the Party, the liability of legal persons may be criminal or non-criminal.

(c) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences.]

[2. *Inciting, Aiding and Abetting*
The provisions of this section shall apply to [inciting,] aiding and abetting the offences referred to in Article 2.14.]][39]

[3. *Penalties and Sanctions*]

[(a)] For the [offences] crimes referred to in [Article 2.14] [Article 2.14.1], each Party shall provide [effective, proportionate and dissuasive] penalties[40] [. The available penalties shall] that include imprisonment [as well as] [and] monetary fines[41] [sufficiently high to provide a deterrent to future acts of infringement, with a view to removing the monetary incentive of the infringer].

[(b) For legal persons held liable under Article 2.15.1, each Party shall

[38]At least one delegation has asked for the deletion of paragraph 3.

[39]At least one delegation opposes paragraph 2, 'Inciting, Aiding and Abetting'.

[40][It is understood that there is no obligation to provide penalties of imprisonment against legal persons for the crimes set forth in Article 2.14.].

[41][Negotiator's note: [It is understood that there is no obligation for a Party to impose both imprisonment and monetary fines in parallel] [This does not imply an obligation for a Party to provide for the courts a possibility to impose both penalties in parallel.]

provide for effective, proportionate and dissuasive sanctions, including monetary sanctions.]

[ARTICLE 2.16. SEIZURE, FORFEITURE[/CONFISCATION] AND DESTRUCTION

[1. *Seizure*]

(a) In case of an offence referred to in Article 2.14 [.1], each Party shall provide that its competent authorities shall have the authority to order [authorise] [at least for serious offences] the seizure of suspected counterfeit trademark goods or pirated copyright [or related rights] goods, any related materials and implements used in the commission of the alleged offence, documentary evidence relevant to the alleged offence and any assets derived from, or obtained directly or indirectly through the infringing activity [[42]].

(b) Each Party shall, if a prerequisite for such an order, according to its national law, is the identification of the items, ensure that the order need not determine the items that are subject to seizure in more detail than necessary to allow their identification for the purpose of the seizure.] [Each Party shall provide that such orders need not individually identify the items that are subject to seizure, so long as they fall within specified categories in the relevant order.]

[2. *Forfeiture/Confiscation and Destruction*]

(a) For the offences referred to in Article 2.14[.1], each Party shall provide that its competent authorities shall have the authority to order [confiscation/][forfeiture[43] [and/]or] destruction [where appropriate] of all counterfeit trademark goods or pirated copyright [or related right] goods, of materials and implements [predominantly] used in the creation of counterfeit trademark goods or pirated copyright goods [or related rights goods], and [at least for serious offences] [forfeiture to the State] of the [any] assets derived from, or obtained directly or indirectly, through the infringing activity.

(b) Each Party shall [provide that its competent authorities shall have the authority to] ensure that the counterfeit trademark goods and pirated copyright [or related rights] goods that have been [confiscated/] forfeited [to the state] under this subparagraph shall, if not destroyed, be disposed of outside the channels of commerce, [under the condition that the goods are not dangerous for the health and security of persons.] [in such a

[42]Each Party may provide that its judicial authorities have the authority to order [fines or] the seizure of assets the value of which corresponds to that of such assets derived from or obtained, directly or indirectly, through the infringing activity.

[43]At least one delegation to propose wording to clarify whether forfeiture to right holder or to state.

manner as to avoid any harm caused to the right holder.]

(c) Each Party shall further ensure that [confiscation/]forfeiture and destruction under this subparagraph shall occur without compensation of any kind to the defendant.

(d) Each Party may provide that its judicial authorities have the authority to order the confiscation/ forfeiture [to the state] of assets the value of which corresponds to that of such assets derived from or obtained directly or indirectly through the infringing activity.

ARTICLE 2.17: *EX OFFICIO* CRIMINAL ENFORCEMENT

Each Party shall provide that its competent authorities may act upon their own initiative to initiate investigation [or] [and/or] legal action with respect to the [criminal] offenses described in [Article 2.14] [Sections 3 and 4.] [at least in cases of significant public interest, in accordance with national law.]

[ARTICLE 2.X. RIGHTS OF THE DEFENDANT AND THIRD PARTIES

Each Party shall ensure that the rights of the [defendants and] third parties shall be duly protected and guaranteed.][44]

Section 4: [Special Measures Related to Technological Enforcement of Intellectual Property in the Digital Environment]

ARTICLE 2.18 [ENFORCEMENT PROCEDURES IN THE DIGITAL ENVIRONMENT][45]

1. Each Party shall ensure that enforcement procedures, to the extent set forth in the civil and criminal enforcement sections of this Agreement, are available under its law so as to permit effective action against an act of [trademark, copyright or related rights][intellectual property rights] infringement which takes place [by means of the Internet][in the digital environment] , including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement.

2. [Those measures, procedures and remedies shall also be fair and proportionate.][46] *

[44]At least one delegation proposes that this provision be reflected in the General Provisions of the Agreement.

[45]At least one delegation reserves its right to revisit elements of this Section at a later date.

[46][See identical comment on the draft Chapter 2, Section 1 "Civil Enforcement" and Section 3 "Criminal Enforcement". A suggestion is to move these provisions into Chapter 1, Section A which applies to the whole Agreement. Direct reference to TRIPS might also clarify the scope of these obligations.]

3. Without prejudice to the rights, limitations, exceptions, or defenses to [[patent, industrial design, trademark and][copyright or related rights]][intellectual property rights] infringement available under its law, including with respect to the issue of exhaustion of rights, each Party [confirms that] [shall provide for] [civil remedies as well as limitations, exceptions, or defenses with respect to the application of such remedies, are available in its legal system in cases of third party liability[[47]][or liability for those who authorize infringement, or both] for [[patent, industrial design, trademark and][copyright or related rights]][intellectual property rights] infringement.[48]

Option 1

[3. Each Party recognizes that some persons[49] use the services of third parties, including online service providers,[[50]] for engaging in [patent, industrial design and trademark,] copyright or related rights infringement. Each Party also recognizes that legal uncertainty with respect to application of copyright and related rights, limitations, exceptions, and defenses in the digital environment may present barriers to the economic growth of, and opportunities in, electronic commerce.][51] Accordingly, in order to facilitate the continued development of an industry engaged in providing information services online while also ensuring that measures to take adequate and effective action against copyright or related rights infringement are available and reasonable each Party [shall][may]:

(a) provide limitations[52] on the scope of civil remedies available against an

[47][For greater certainty, the Parties understand that third party liability means liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids any act of copyright or related rights infringement by another. Further, the Parties also understand that the application of third party liability may include consideration of exceptions or limitations to exclusive rights that are confined to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder, including fair use, fair dealing, or their equivalents.] At least one delegation opposes this footnote.

[48] Negotiator's Note: This provision may be moved and located in the civil enforcement section.

[49] Negotiator's Note: Definition of person still pending in General Provisions.

[50][For purposes of this Article, **online service provider** and **provider** mean a provider of online services or network access, or the operators of facilities therefore, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.]

[51]At least one delegation suggests moving the second and third sentences of paragraph 3. At least one delegation suggests moving the first and second sentences of paragraph 3.

[52]For greater certainty, the Parties understand that [these limitations are not intended to harmonize the liability of online service provider, but exclude liability in certain situations. Thus] the failure of an online service provider's conduct to qualify for a limitation of liability under its measures implementing

online service provider for infringing activities that occur by

(i) automatic technical processes, and

(ii) the actions of the provider's users that are not directed or initiated by that provider and when the provider does not select the material, and

(iii) the provider referring or linking users to an online location,

when, in cases of subparagraphs (ii) and (iii)[53], the provider does not have actual knowledge of the infringement and is not aware of facts or circumstances from which infringing activity is apparent; and]

Option 2

[Each Party recognizes that some persons[54] use the services of third parties, including online service providers,[[55]] for engaging in intellectual property rights infringements.

(a) In this respect, each Party shall provide limitation on the [liability of] [scope of civil remedies available against an] on-line service provider[s] for infringing activities[56] that occur by[57]

(i) automatic technical processes [that keep the provider from taking measures to prevent the infringement], or

(ii) the actions of the provider´s users that are not initiated nor modified by that provided and when the provider does not select the material or

(iii) the storage of information provided by the recipient of the service or at the request of the recipient of the service,

when exercising the activities as stipulated in paragraph 3(a)(ii) and/or (iii) the online service providers act [takes appropriate measures] expeditiously, in accordance with applicable law [s], [such as those] to remove or disable access to infringing material or infringing activity upon obtaining actual knowledge of the infringement [or the fact that

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this provision shall not bear adversely upon the consideration of a defense by the provider that the provider's conduct is not infringing or any other defense.

[53]Clarify which conditions apply to which activities.

[54] [Negotiator's Note: Definition of "person" still pending in General Provisions.]

[[55] For purposes of this Article, **online service provider** and **provider** mean a provider of online services or network access, or the operators of facilities therefore, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.]

[[56] The activities covered in paragraph 3(a)(i) cover the mere conduit and the activities covered in paragraph 3(a)(ii) and (iii) cover respectively caching and hosting in accordance with parties legal systems.]

[57]At least one delegation proposes to redraft this sub-paragraph.

the information at the initial source has been removed or disabled.] [or having reasonable grounds to know that the infringement is occurring]]

Option 1

(b) condition the application of the provisions of subparagraph (a) on meeting the following requirements:

(i) an online service provider adopting and reasonably implementing a policy[58] to address the unauthorized storage or transmission of materials protected by copyright or related rights [except that no Party may condition the limitations in subparagraph (a) on the online service provider's monitoring its services or affirmatively seeking facts indicating that infringing activity is occurring]; and

(ii) an online service provider expeditiously removing or disabling access to material or [activity][alleged infringement], upon receipt [of legally sufficient notice of alleged infringement,][of an order from a competent authority] and in the absence of a legally sufficient response from the relevant subscriber of the online service provider indicating that the notice was the result of mistake or misidentification.

except that the provisions of (ii) shall not be applied to the extent that the online service provider is acting solely as a conduit for transmissions through its system or network.]

Option 2:

[Paragraph 3(a) shall not affect the possibility for a judicial or administrative authority, in accordance with the Parties legal system, requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility of the parties establishing procedures governing the removal or disabling of access to information

The Parties shall not impose a general monitoring requirement on providers when acting in accordance with this paragraph 3.]

[3 *ter*. Each Party shall enable right holders, who have given effective notification to an online service provider of materials that they claim with valid reasons to be infringing their copyright or related rights, to expeditiously obtain from that provider information on the identity of the relevant subscriber**.**

[58]At least one delegation proposes to include language in this footnote to provide greater certainty that their existing national law complies with this requirement.

3 *quater*. Each Party shall promote the development of mutually supportive relationships between online service providers and right holders to deal effectively with patent, industrial design, trademark and copyright or related rights infringement which takes place by means of the Internet, including the encouragement of establishing guidelines for the actions which should be taken.]

[4.[59] In order to provide adequate legal protection[60] and effective legal remedies against the circumvention of effective technological measures that are used by authors, [performers or producers of phonograms] [the right holder of any copyright or related rights or owner of an exclusive license[61]] in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, [performances, and phonograms] [or other subject matters specified under Article 14 of the TRIPS Agreement], each Party shall provide for civil remedies, [or] [as well as] criminal penalties in appropriate cases of willful conduct [[62]] , that apply to:

[Each Party shall provide for adequate legal protection[63] and effective legal remedies, in the form of civil remedies or criminal penalties in appropriate cases of willful conduct, against the circumvention of effective technological measures that are used by authors, performers or producers or phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonogram. These shall apply to:]

(a) the unauthorized circumvention of an effective technological measure[64] [that controls access to a protected work, performance, or phonogram]; and

(b) the manufacture, importation, or circulation of a [technology], service, device, product, [component, or part thereof, that is: [marketed] or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially

[59]At least one delegation has reservations about several elements in paragraph 4.

[60]At least one delegation opposes inclusion of 'adequate legal protection'.

[61]At least one delegation opposes inclusion of 'or owner of an exclusive license'.

[62][For the purpose of this Article, willful conduct means actual knowledge or reasonable grounds to know that he or she is pursuing the objective of circumventing any effective technological measure.]

[63]At least one delegation opposes inclusion of 'adequate legal protection'.

[64] For the purposes of this Article, effective technological measure means any technology, device, or component that, in the normal course of its operation, [controls access to a protected work, performance, phonogram, or protects any copyright or any rights related to copyrights.][is controlled by the right holders through application of an access control or protection process such as encryption, scrambling, or other transformation of their works, performances or phonograms, or a copy control mechanism, which achieves the protection objective.]

significant purpose or use other than circumventing an effective technological measure.]]

[5. [4.2] Each Party shall provide [that a] [adequate legal protection against a] violation of a measure implementing paragraph (4) [is a separate civil or criminal offense,] independent of any infringement of copyright or related rights.[65]][66]

Option 1
[Further, [each Party may adopt exceptions and limitations to measures implementing paragraph 4 so long as they do not significantly impair the adequacy of legal protection of those measures or the effectiveness of legal remedies for violations of those measures.][67]

Option 2
[5. Each Party may provide for measures which would safeguard the benefit of certain exceptions and limitations to copyright and related rights, in accordance with its legislation.]

[6. [In order to] [Each Party shall] provide adequate and effective legal remedies to protect [electronic] rights management information[, e]
[E]ach Party shall provide for civil remedies, [or] [as well as] criminal penalties] in appropriate cases of willful [[68]] conduct, that apply to any person performing [without authority] any of the following acts knowing [or with respect to civil remedies having reasonable grounds to know] that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right:

(a) to remove or alter any [electronic] right management information[69]

[65][The] [In accordance with the applicable national legislation, the] obligations in paragraphs (4) and (5) [are][may be] without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement. Further, [in implementing paragraph (4), no Party may][paragraph (4) does not imply any obligation to] require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing paragraph (4).

[66]At least one delegation is to reflect on appropriate location for this provision.

[67]Negotiator's Note: This provision is subject to broader government action/sovereign immunity provision elsewhere in the Agreement.

[68][For the purpose of this Article, willful conduct means knowingly performing without authority any of the following acts listed under subparagraph 6 (a) or (b), if such person knows or has reasonable grounds to know that by so doing he is inducing, enabling, facilitating, or concealing an infringement of any copyright or any rights related to copyright.]

[69]For purposes of this Article, [electronic] rights management information means: (a) information that identifies a work, [or other subject matters specified under Article 14 of the TRIPS Agreement] [performance, or phonogram]; the author [of the work, the performer of the performance, or the producer of the phonogram] [or any other right holders of the subject matters specified under Article

(b) to distribute, import for distribution, broadcast, communicate, or make available to the public copies of works, [or other subject matters specified under Article 14 of the TRIPS Agreement] [performances, or phonograms], knowing that [electronic]rights management information has been removed or altered without authority.]

[7.] [6.2] Each Party may adopt [limitations or] exceptions to the requirements of subparagraphs (a) and (b) [of paragraph (6)] [so long as they do not significantly impair the adequacy of legal protection or effectiveness of legal remedies for violations of those measures.]

14 of the TRIPS Agreement]; or the owner of any right in the work, performance, or phonogram; (b) information about the terms and conditions of the use of the work, [performance, or phonogram] [or any other right holders of the subject matters specified under Article 14 of the TRIPS Agreement]; or (c) any numbers or codes that represent the information described in (a) or (b) above,when any of these items is attached to a copy of the work, [performance, or phonogram] [or other subject matters specified under Article 14 of the TRIPS Agreement] or appears in connection with the communicator or making available of a work, [performance, or phonogram] [or other subject matters specified under Article 14 of the TRIPS Agreement] to the public.

CHAPTER THREE
INTERNATIONAL COOPERATION

ARTICLE 3.1: INTERNATIONAL ENFORCEMENT COOPERATION

1. Each Party recognizes that international [enforcement] cooperation [is vital [to realize [fully] effective protection of intellectual property rights] [in order to deal with the increasingly global problem of the trade in counterfeit and pirated goods]] [plays an important role in the protection of copyright and trademark rights]and should be [undertaken] [encouraged] regardless of the origin of the infringing goods or the location [or nationality] of the right holder [of the intellectual property rights.

2. In order to combat [intellectual property right infringement, in particular,] trademark counterfeiting and copyright piracy, each Party shall promote [may, as it deems appropriate,] cooperation [measures, where appropriate,] among the [relevant] competent authorities of the Parties [concerned with] [responsible for] enforcement of intellectual property rights. Such [cooperation includes][measures may include] [cooperation shall include][may include] law enforcement cooperation with respect to criminal investigation or prosecution [concerning] [relating to] the offences covered by this Agreement and [border measures] [cooperation at the border], [which may be conducted bilaterally or multilaterally] Particular attention shall be devoted to the circulation of IPR infringing goods detrimental to the health and safety.]

3. Each Party [shall][may], consistent with the [existing][domestic law and policy and the] [international agreements and arrangements to which such Party is a party], [conduct][undertake] enforcement cooperation [foreseen] [activities as provided] [international cooperation as set out] in this Chapter [,in line with the international agreements and arrangements to which such Party is a party.] [Each Party may also conduct enforcement cooperation or provide assistance to another Party pursuant to other international agreements, arrangements, and practices, and in accordance with its domestic law and policies.]

[4. Nothing in this Chapter and Chapter 4 shall require any Party to disclose confidential information which would be contrary to its laws, regulations, policies, legal practices and applicable international agreements and arrangements, including laws protecting investigative techniques, right of privacy or confidential information for law enforcement, or otherwise be contrary to public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.]

[4. The Parties understand that obligations under this Chapter and Chapter 4 are subject to the domestic laws, policies, resource allocation and law enforcement priorities of each Party.]

ARTICLE 3.2: INFORMATION SHARING

1. [In order to ensure effective enforcement of the provisions of this Agreement,] each Party [[shall][may] promote sharing or exchanging] [may, as it deems appropriate, share or exchange] with other Parties [of the following information][as appropriate and mutually agreed]:

(a) information collected by the Party under provisions of Chapter 4, including statistical data and information on best practices including those relating to[risk analysis] [risk management]; and

(b) information on [the] development [and implementation] of legislative and regulatory measures [of the] [by the] Party [related to the protection and enforcement of intellectual property rights].

For this purpose, the Parties shall endeavour to establish appropriate modalities including holding of periodical meetings.

[Parties shall endeavor to establish an observatory as a tool for collecting information]

2. Each Party shall ensure, as appropriate and mutually agreed, [within the limits of [its] national legislation][consistent with its domestic laws] , policies, [legal] practices, and applicable [existing] international agreements and arrangements, that its competent authorities have the [ability] [authority] to provide the competent authorities of any other [Parties][Party], either on request or on its own initiative, with information [[necessary to ensure][to facilitate][to allow] a proper application of laws concerning enforcement of intellectual property rights and to prevent, investigate, [and repress acts of intellectual property right infringements][or prosecute infringement of Intellectual property rights] [related to the enforcement of intellectual property rights].

ARTICLE 3.3: CAPACITY BUILDING AND TECHNICAL ASSISTANCE

1. [In order to facilitate the implementation of this Agreement or the accession thereto,] [Developed country] Parties shall [endeavour to] provide, on request and on mutually agreed terms and conditions, assistance in capacity building and technical assistance[in improving enforcement of intellectual property rights,] [focused on initiatives to combat the trade in counterfeit and pirated goods] in favour of developing country Parties to this Agreement and [, where appropriate,] [for third countries][for countries not a Party to this Agreement.][Parties shall make all reasonable efforts to ensure that such capacity building and technical assistance are compatible and do not overlap with similar activities provided by international organizations active in the field of intellectual property.] [The provision of assistance under this Article and Articles 3.3.2 and 3.3.3 is subject to the availability of resources on the part of the donor Party.]

2. For the purpose of paragraph 1, [developed country]Parties shall [, at the request of developing country Parties and on mutually agreed terms and conditions,] work

closely with [developing country] [other]Parties [and, where appropriate, countries not a Party to this Agreement or separate customs territories,] [to enact] [implement and to] or strengthen their [domestic] [national] legislation, as appropriate, and assist them in improving their national intellectual property law enforcement capacities through sharing best practices concerning intellectual property law enforcement and providing relevant technical training for enforcement officials.

3. [[Developed country][Developed and developing country] Parties] [Each Party] may undertake the obligations under this Article in conjunction with relevant private sector or international organizations.

[4. Parties shall put in place a special allocation Fund to finance ACTA initiatives on capacity building and technical assistance]

[5. Parties shall, in the implementation and administration of this Agreement, take into account developing countries needs in the field of financing and technical assistance. In this respect, States Parties to the Agreement agree:

(a) To support, developing countries efforts, for the implementation of the Agreement and the integration of anti-counterfeiting and anti-hacking actions in national development strategies. This assistance shall be designed to help developing countries to harmonize their laws, to carry out their obligations and to exercise their rights as Members.

(b) To ensure predictable and sustainable financing.

(c) To promote coordination of technical assistance activities with the bilateral donors, WTO Secretariat, WIPO as well as with other relevant international intergovernmental institutions.

(d) States Parties shall review annually the implementation of this Article].

[5. State parties shall endeavour to provide technical assistance in the following areas:

(a) Promoting the culture of intellectual property.

(b) Training professionals in charge of the protection of the rightholders involved in the protection of intellectual Property.

(c) Capacity building and experience sharing among institutions in charge of fighting counterfeiting and piracy.

(d) Tools for measuring the economic impact of counterfeiting on the market and evaluating the anti counterfeiting and anti-hacking actions.

(e) Conducting joint operations at the regional and international levels.

(f) Enforcement of laws regarding fighting counterfeiting and piracy trough the Internet.

Technical assistance shall be extended to all other types of actions facilitating the implementation and the applicability of the ACTA Agreement].

CHAPTER FOUR
ENFORCEMENT PRACTICES

ARTICLE 4.1: ENFORCEMENT EXPERTISE, INFORMATION AND DOMESTIC COORDINATION

1. Each Party shall [[facilitate] [encourage][as it deems appropriate foster the] development of] [develop] specialized expertise [of][in its] competent authorities concerned with enforcement of [intellectual property rights] [copyright and trademark rights] , in order to [ensure] [promote] effective enforcement of [intellectual property rights] [copyright and trademark rights] [One means of implementation is through specialized law enforcement authorities for the investigation and prosecution of cases concerning the infringement of intellectual property rights.]

2. Each Party shall [promote collection and analysis of] [endeavor to collect] statistical data and other [relevant] information [, which such Party determines is useful and relevant,] [concerning infringement of intellectual property rights [within its territory], especially] trade in counterfeit trademark goods and pirated copyright goods. Each Party shall [further] promote collection of information on best practices to prevent and combat [intellectual property right infringement] [trademark counterfeiting and copyright piracy].

3. Each Party shall [, as it deems appropriate,] [, as appropriate,] **[**endeavour to enhance] [promote] internal coordination among, [and facilitate joint actions by], [such Party's] [the] competent authorities [concerned with][responsible for] enforcement of intellectual property rights [through an appropriate coordinating [body][bodies] or other relevant mechanisms]

4. [In order to promote effective enforcement of intellectual property rights,] each Party shall [, as it deems appropriate,] [endeavour to encourage][promote] [the] establishment and maintenance of formal or informal mechanisms, [as appropriate,] such as public and/or private advisory groups, whereby competent authorities may hear [the views of] right holders and other relevant stakeholders [where appropriate] [foster dialogue and information exchanges with shareholders in its territory] .

ARTICLE 4.2: MANAGEMENT OF RISK AT BORDER[70]

1. Each Party shall adopt and maintain appropriate measures that facilitate activities of custom authorities for better identifying and targeting for inspection at its border, shipments [that [could] contain] [which are suspected to contain] [counterfeit trademark goods or pirated copyright goods] [goods infringing intellectual property rights.] Such activities may include,[subject to paragraph 2 of Article 3.2] [clause in article 3.4. is applicable]:

[70][Article 4.2 should be reviewed in relation to other proposal on Chapter 2 regarding Information Exchange between Customs Authorities.]

(a) contact with relevant stakeholders and with relevant authorities to identify and address risks;

(b) exchanging available data with custom authorities of other Parties regarding significant seizures of [counterfeit and pirated] [infringing] goods by customs, wherever possible; and

(c) sharing information with custom authorities of other Parties on approaches that are developed to provide greater effectiveness in targeting shipments that could contain [counterfeit and pirated] [infringing] goods.

[2. To better identify and target shipments for inspection that are suspected to contain counterfeit trademark goods or pirated copyright goods, each Party may:

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

(b) when appropriate, exchange data with border authorities of other Parties; and

(c) share information with border authorities of other Parties on approaches that are developed to provide greater effectiveness in the border enforcement of intellectual property rights, including approaches for targeting shipments that could contain counterfeit and pirated goods.

3. Each Party shall provide that its competent authorities may conduct audits of an importer's business records, including methods of payment and purchase contracts, as well as its internal controls to track illicit financial gains and expose business practices related to trademark counterfeiting and copyright piracy.]

ARTICLE 4.3: TRANSPARENCY/PUBLICATION OF ENFORCEMENT PROCEDURES AND PRACTICES

Option 1

[1. For the purpose of [further] promoting transparency in the administration of [the] intellectual property right enforcement system, each Party shall take appropriate measures [pursuant to domestic laws and policies,] [available] to publish or make available to the public information [within a reasonable period of time] on:

(a) procedures [available] regarding the enforcement of intellectual property rights including competent authorities for enforcement of intellectual property rights and contact points for assistance to right holders;

[(b) relevant laws, regulations, [final judicial decisions] and administrative rulings of general application pertaining to enforcement of intellectual

property rights;]

[(c) applications [forms]for the suspension by the competent authorities of the release of goods [infringing intellectual property right] [suspected counterfeit and pirated goods] as a border measure;] and

(d) its efforts to ensure effective enforcement of intellectual property rights and [an effective][intellectual property protection system] including any statistical data that the Party may collect.]

Option 2

[1. For the purpose of promoting transparency in the administration of its intellectual property rights enforcement system, each Party shall:

(a) provide that final judicial decisions or administrative rulings of general applicability pertaining to the enforcement of intellectual property rights shall be in writing and shall state any relevant findings of fact and the reasoning or the legal basis upon which the decisions are based. Each Party shall also provide that such decisions or rulings shall be published[71], or otherwise made publicly available, in a national language in such a manner as to enable governments and interested persons to become acquainted with them.

(b) identify in a manner readily available to the public, the competent authorities for intellectual property enforcement and contact points where right holders may seek assistance;

(c) [publish applications for the suspension by the competent authorities of the release of suspected counterfeit and pirated goods as a border measure;] and

(d) publicize information on its efforts to ensure effective enforcement of intellectual property rights in its domestic intellectual property rights system, including any statistical information that the Party may collect for such purposes.[72]]

Option 1

[2. Nothing in this [Chapter and Chapter 3][Agreement] shall require any Party to disclose {confidential} information which would impede the enforcement of its laws and regulations, including laws protecting investigative techniques, right of privacy or

[71] [For greater certainty, a Party may satisfy the requirement in [Article 5.3] to publish a measure by making it available to the public on the Internet.]

[72][For greater certainty, nothing in [this sub-paragraph] is intended to prescribe the type, format, and method of publication of the information a Party must publicize.]

confidential information for law enforcement, or otherwise be contrary to [its domestic laws or policy, or] the public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Option 2

[2. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose personal information, or confidential information which would impede law enforcement or otherwise be contrary to the public interest or could prejudice the legitimate commercial interests of particular enterprises, public or private.]

[3. In civil legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Parties may apply this provision to other judicial and administrative proceedings.]

ARTICLE 4.4: PUBLIC AWARENESS

Each Party shall [take [necessary] [such][appropriate]] [promote the adoption of appropriate] measures [as it deems appropriate] to enhance] [will promote] [including educational projects, designed to raise] public awareness of the importance of [the protection of][protecting] intellectual property rights and the detrimental effects of intellectual property right infringement, including educational [and dissemination] projects. [Such measures may include joint initiatives with the private sector.]

[ARTICLE 4.5: DESTRUCTION OF INFRINGING GOODS

In cases where confiscated goods found to be infringing intellectual property rights are to be destroyed, Parties shall endeavour to take environmental concerns into account when deciding on the destruction method.]

CHAPTER FIVE
INSTITUTIONAL ARRANGEMENTS[73]

ARTICLE 5.1: THE [OVERSIGHT] [STEERING] [COMMITTEE]

1. The [Contracting] Parties [hereby establish][[shall have a] the [Oversight][ACTA] [Steering] Committee, comprising [[representatives of] [each of] the Parties] [one delegate from each Party who may be assisted by alternative delegates, advisors and experts.]

2. The Committee shall:

(a) supervise the implementation of this Agreement; [including a periodic mutual evaluation process of the implementation of the Agreement by the parties, according to the principles of equal treatment and a fair hearing.]

(b) [oversee [its][the] [the Agreement's] further elaboration [or development?] [of this Agreement], [deal with matters concerning the amendment and development of this Agreement] while ensuring that such[elaboration][development]does not duplicate other international efforts regarding the enforcement of intellectual property rights;

(c) [[resolve][facilitate the avoidance of] disputes that may arise regarding [its][the] interpretation or application[[74]] [of this Agreement];]and

(d) consider any other matter that may affect the operation of this Agreement.

3. The Committee may:

(a) [establish,] [and delegate [tasks] tasks/responsibilities] to, ad hoc or standing committees working groups or [Government] experts groups;][to assist the Committee in accomplishing its tasks;][a Task-Force to undertake the monitoring and the evaluation of the Agreement, namely by reviewing the implementation of Parties' obligations, as defined in Article 5.1.2.a) and assisting candidate countries to join the Agreement. This Task-Force should consist of experts appointed by the Parties and agreed upon by the Oversight Committee;]

(b) seek the advice of non-governmental persons or groups [from the State

[73]At least one delegation reserves its right to revisit elements of this chapter at a later date.

[74] The application of this provision shall not conflict with the rules and implementation of the Dispute Settlement Understanding of the World Trade Organization.

Parties];

(c) [make recommendations regarding the implementation of the Agreement [including endorsing best practice guidelines for implementing the Agreement, identifying and monitoring techniques of piracy and counterfeiting and their evolution]];

(d) assist non-Party governments in assessing the benefits of accession to the Agreement [and share information and best practices on reducing IPR infringements];

(e) [support international organizations in the enforcement of intellectual property rights;] and

(f) take such other action in the exercise of its functions as the Parties may decide.

[4. One-half of the members of the Committee shall constitute a quorum.]

5. The Committee shall [establish its rules and procedures][at its first meeting adopt its rules of procedures] [including rules for the convocation of extraordinary sessions]. All decisions of the Committee shall be taken by consensus, [except as the Committee may otherwise decide [by consensus]]. [The working language of the Committee shall be English.]

6. The Committee shall convene [at least [once a year]] [once every two years] [in regular session]. [T]he Committee shall be chaired [and hosted][successively by each Party][by a volunteering Party] [in English alphabetically] . [assisted by a Vice-Chair from the Party due to chair and host the subsequent meeting.] [A Special session may be called for by one Party and convened if the majority of the Parties does not oppose such request. The Special session shall be chaired by the Party chairing the Regular session of that year. The Committee shall preferably meet in Geneva.]

[7. The Committee's role as set forth in Article 5.1 shall not include any oversight or supervision relating to domestic or international criminal investigations or enforcement of specific intellectual property cases.]

ARTICLE 5.2: THE SECRETARIAT

1. The Party that is the Chair of the Committee shall provide the Secretariat to the Committee for [the calendar year][the two calendar years beginning with the calendar year [immediately prior to that]] in which the Committee shall be convened with that Party as Chair.

2. The functions of the Secretariat shall be:

(a) to provide assistance to the Committee [as required, and];

(b) [to provide administrative support to the Chair][to perform the administrative tasks concerning this Agreement.]

(c) [to elaborate all documents resulted from ordinary or extraordinary sessions]

(d) [to submit documents derived from ordinary or extraordinary sessions to all parties]

ARTICLE 5.3: CONTACT POINTS

1. [Each Party shall designate a [current] contact point to facilitate communications [between the][with other] Parties on any matter covered by this Agreement.] [The][Each Party shall transmit the] [name, [and][physical] address, telephone number [and e-mail address]] of that contact point [shall be transmitted] to the Depositary [prior to the entry into force of the Agreement for that Party], who shall circulate the information to the Parties.

2. On the request of [another][one] Party, the contact point [of another Party] shall identify [the] [according to the matter concerned, an appropriate] office or official [responsible for the matter concerned] and assist, as necessary, in facilitating communication between the [responsible] office or official concerned with the requesting Party.

[ARTICLE 5.4: TRANSPARENCY

Option 1
[1. Each Party shall ensure that its laws, regulations,[procedures] [final judicial decisions], and administrative rulings of general application respecting any matter covered by this Agreement are promptly [in an appropriate time] published or otherwise made publicly available [in a national language,] in such a manner as to enable governments and interested persons to become acquainted with them.]

Option 2
[1. Each Party shall ensure that final judicial decisions or administrative rulings of general applicability pertaining to the enforcement of intellectual property rights shall be in writing and shall state any relevant findings of fact and the reasoning or the legal basis upon which the decisions are based. Each Party shall also ensure that such decisions or rulings shall be published[75] , or otherwise made publicly available, in a national language in such a manner as to enable governments and interested persons to become acquainted with them.]

[[75]For greater certainty, a Party may satisfy the requirement in [Article 5.3] to publish a measure by making it available to the public on a publically accessible Internet site.]

[2. Each Party shall notify the laws and regulations referred to in [paragraph (1)][Article 4.3] to the Oversight Committee in order to assist that Committee in its review of the operation of this Agreement.]

3. Each Party shall supply, in response to a written request from another Party, information regarding its laws, regulations, [procedures][final judicial decisions] and administrative rulings of general application [respecting][with respect to] any matter covered by this Agreement.

4. Nothing in paragraphs [1, 2 and 3][1 and 2] shall require a Party to disclose {confidential} information which would impede law enforcement or otherwise be contrary to [domestic laws and policies, or] the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

ARTICLE 5.5: CONSULTATION

Each Party shall [accord sympathetic consideration to, and shall] afford adequate opportunity for consultation regarding, such representations as may be made [to it] by another Party with respect to any matter affecting the operation of this Agreement.

[ARTICLE 5.6: OBSERVERS

Countries candidate to become a Party to the Agreement may be invited [by the Committee] to attend sessions or parts thereof of the Oversight Committee as observers. An invitation under the same status may be extended [by the Committee] to international organizations active in the field of intellectual property and to non-governmental groups of intellectual property stake-holders]

CHAPTER SIX
FINAL PROVISIONS[76]

[ARTICLE X : TRANSPARENCY

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made publicly available in such a manner as to enable governments and interested persons to become acquainted with them.

2. Each Party shall notify the laws and regulations referred to in paragraph (1) to the Oversight Committee in order to assist that Committee in its review of the operation of this Agreement.

3. Each Party shall supply, in response to a written request from another Party, information regarding its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement.

4. Nothing in paragraphs 1, 2 and 3 shall require a Party 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 6.1: BECOMING PARTY TO THE AGREEMENT

1. [Any member of the [World Intellectual Property Organisation] [World Trade Organization] [or the World Trade Organization (WTO)] [or of the United Nations] may become party to this Agreement.[Decisions on accession shall be taken by the Oversight Committee. The Oversight Committee shall approve the agreement on the terms of accession by [unanimity][a two-thirds majority of the Parties]].

2. Any Intergovernmental Organization which [the Committee decides] meets the requirements of paragraph 5 may become party to this Agreement. The Organization shall inform the Depositary of its competence [in respect of matters governed by this Agreement], and any subsequent changes in its competence, with respect to the matters governed by this Agreement. The Organization and its member States may, without, however, any derogation from the obligations under this Agreement, decide on their respective responsibilities for the performance of their obligations under this Agreement [without, however, any derogation from the obligations under this Agreement].

3. A [State or Intergovernmental Organization][member of any organization identified in paragraph 1] may become party to this Agreement by:

[76]At least one delegation reserves its right to revisit elements of this chapter at a later date.

(a) signature followed by the deposit of an instrument of ratification, acceptance or approval, or
(b) the deposit of an instrument of accession.

4. The instruments referred to in paragraph (3) shall be deposited with the Depositary.

5. In this Article, "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 Agreement, has its own legislation providing for intellectual property protection 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 Agreement.

ARTICLE 6.2: ENTRY INTO FORCE OF THE AGREEMENT

1. This Agreement shall enter into force, with respect to each of the [first five States or Intergovernmental Organizations] [[five] members of either organization identified in Article 6.1.1] which have deposited their instruments of ratification, acceptance, approval or accession, [three months] [90 days] after the date on which the [fifth] instrument of ratification, acceptance, approval or accession has been deposited.

2. With respect to any [State or Intergovernmental Organization][member of either organization identified in Article 6.1.1] not covered by paragraph (1), this Agreement shall enter into force [three months][90 days] after the date on which that [State of Intergovernmental Organization][member of either organization identified in Article 6.1.1] has deposited its instrument of ratification, acceptance, approval or accession.

ARTICLE 6.3: WITHDRAWAL

A Party may withdraw from this Agreement by means of a written notification to the Depositary. Such withdrawal shall take effect [one year][six months] after the notification was received by the Depositary.

ARTICLE 6.4: AMENDMENTS

1. [Any Party may initiate a proposal to amend the provisions of this Agreement by submitting such proposal [to the Oversight Committee]]. This Agreement may be amended by the Parties on the basis of a [previous] text adopted by the [Oversight][ACTA][Steering] Committee.[Each Party may propose amendments to the Agreement to the Committee. The Committee shall decide upon the proposed amendments by consensus.]

2. The Parties shall deposit their respective instruments of ratification, acceptance or approval of any such amendment with the Depositary.

3. Such amendment shall enter into force on the [first day of the third month following] [90 days after the date of] [three months after the date of] the deposit of the last of the instruments of ratification, acceptance or approval of all the Parties.

ARTICLE 6.5: TEXTS OF THE AGREEMENT

[This Agreement is established in [a single original in the][English][, French][, Spanish][, Arabic] languages, all texts being equally authentic.] [In case of any inconsistency between the texts, the English version shall prevail.]

ARTICLE 6.6: DEPOSITARY

[Name of [State][entity]] shall be the Depositary of this Agreement.

ARTICLE 6.7: SIGNATURE

This Agreement shall be open for signature between [date] and [date] with the [Government of] ……. [the [country][entity]] that exercises the functions of Depositary].

Anti-Counterfeiting Trade Agreement

3 December 2010

The Parties to this Agreement,

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

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

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

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

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

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

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

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

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

Hereby agree as follows:

CHAPTER I
INITIAL PROVISIONS AND GENERAL DEFINITIONS

Section 1: Initial Provisions

ARTICLE 1: RELATION TO OTHER AGREEMENTS

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

ARTICLE 2: NATURE AND SCOPE OF OBLIGATIONS

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

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

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

ARTICLE 3: RELATION TO STANDARDS CONCERNING THE AVAILABILITY AND SCOPE OF INTELLECTUAL PROPERTY RIGHTS

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

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

ARTICLE 4: PRIVACY AND DISCLOSURE OF INFORMATION

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

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

which it is party;

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

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

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

Section 2: General Definitions

ARTICLE 5: GENERAL DEFINITIONS

For the purposes of this Agreement, unless otherwise specified:

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

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

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

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

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

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

(g) **days** means calendar days;

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

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

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

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

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

(m) **territory,** for the purposes of Section 3 (Border Measures) of Chapter II (Legal Framework for Enforcement of Intellectual Property Rights), means the customs territory and all free zones[1] of a Party;

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

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

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

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

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

CHAPTER II
LEGAL FRAMEWORK FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Section 1: General Obligations

ARTICLE 6: GENERAL OBLIGATIONS WITH RESPECT TO ENFORCEMENT

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

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

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

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

Section 2: Civil Enforcement[2]

ARTICLE 7: AVAILABILITY OF CIVIL PROCEDURES

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

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

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

ARTICLE 8: INJUNCTIONS

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

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

ARTICLE 9: DAMAGES

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

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

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

(a) pre-established damages; or

(b) presumptions[3] for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or

(c) at least for copyright, additional damages.

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

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

ARTICLE 10: OTHER REMEDIES

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

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

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

ARTICLE 11: INFORMATION RELATED TO INFRINGEMENT

Without prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of

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

intellectual property rights, its judicial authorities have the authority, upon a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. Such information may include information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of such goods or services and of their channels of distribution.

ARTICLE 12: PROVISIONAL MEASURES

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

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

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

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

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

4. Each Party shall provide that its authorities have the authority to require the applicant, with respect to provisional measures, to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not

unreasonably deter recourse to procedures for such provisional measures.

5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

Section 3: Border Measures[4, 5]

ARTICLE 13: SCOPE OF THE BORDER MEASURES[6]

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

ARTICLE 14: SMALL CONSIGNMENTS AND PERSONAL LUGGAGE

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

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

ARTICLE 15: PROVISION OF INFORMATION FROM THE RIGHT HOLDER

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

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

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

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

ARTICLE 16: BORDER MEASURES

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

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

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

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

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

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

Article 17: APPLICATION BY THE RIGHT HOLDER

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

2. Each Party shall provide for applications to suspend the release of, or to detain, any suspect goods[7] under customs control in its territory. A Party may provide for such applications to apply to multiple shipments. A Party may provide that, at the request of the right holder, the application to suspend the release of, or to detain, suspect goods may apply to selected points of entry and exit under customs control.

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

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

period of validity of the application.

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

ARTICLE 18: SECURITY OR EQUIVALENT ASSURANCE

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

ARTICLE 19: DETERMINATION AS TO INFRINGEMENT

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

ARTICLE 20: REMEDIES

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

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

3. A Party may provide that its competent authorities have the authority to impose administrative penalties following a determination referred to in Article 19

(Determination as to Infringement) that the goods are infringing.

ARTICLE 21: FEES

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

ARTICLE 22: DISCLOSURE OF INFORMATION

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

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

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

(c) unless a Party has provided its competent authorities with the authority described in subparagraph (b), at least in cases of imported goods, where its competent authorities have seized suspect goods or, in the alternative, made a determination referred to in Article 19 (Determination as to Infringement) that the goods are infringing, the Party shall authorize its competent authorities to provide a right holder, within thirty days[8] of the seizure or determination, with information about such goods, including, but not limited to, the description and quantity of the goods, the name and address of the consignor, importer, exporter, or consignee, and, if known, the country of origin of the goods, and the name and address of the manufacturer of the goods.

Section 4: Criminal Enforcement

[8] For the purposes of this Article, **days** means business days.

ARTICLE 23: CRIMINAL OFFENCES

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale.[9] For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.

2. Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation[10] and domestic use, in the course of trade and on a commercial scale, of labels or packaging:[11]

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

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

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

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

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

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

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

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

ARTICLE 24: PENALTIES

For offences specified in paragraphs 1, 2, and 4 of Article 23 (Criminal Offences), each Party shall provide penalties that include imprisonment as well as monetary fines[12] sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity.

ARTICLE 25: SEIZURE, FORFEITURE, AND DESTRUCTION

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

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

3. With respect to the offences specified in paragraphs 1, 2, 3, and 4 of Article 23 (Criminal Offences) for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the forfeiture or destruction of all counterfeit trademark goods or pirated copyright goods. In cases where counterfeit trademark goods and pirated copyright goods are not destroyed, the competent authorities shall ensure that, except in exceptional circumstances, such goods shall be disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Each Party shall ensure that the forfeiture or destruction of such goods shall occur without compensation of any sort to the infringer.

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

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

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

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

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

ARTICLE 26: *EX OFFICIO* CRIMINAL ENFORCEMENT

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

Section 5: Enforcement of Intellectual Property Rights in the Digital Environment

ARTICLE 27: ENFORCEMENT IN THE DIGITAL ENVIRONMENT

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

2. Further to paragraph 1, each Party's enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.[13]

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

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

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

5. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures[14] that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.

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

(a) to the extent provided by its law:

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

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

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

[14] For the purposes of this Article, **technological measures** means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party's law. Without prejudice to the scope of copyright or related rights contained in a Party's law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.

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

(ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.[15]

7. To protect electronic rights management information,[16] each Party shall provide adequate legal protection and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights:

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

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

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

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

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

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

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

CHAPTER III
ENFORCEMENT PRACTICES

ARTICLE 28: ENFORCEMENT EXPERTISE, INFORMATION, AND DOMESTIC COORDINATION

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

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

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

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

ARTICLE 29: MANAGEMENT OF RISK AT BORDER

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

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

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

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

ARTICLE 30: TRANSPARENCY

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

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

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

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

ARTICLE 31: PUBLIC AWARENESS

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

ARTICLE 32: ENVIRONMENTAL CONSIDERATIONS IN DESTRUCTION OF INFRINGING GOODS

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

CHAPTER IV
INTERNATIONAL COOPERATION

ARTICLE 33: INTERNATIONAL COOPERATION

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

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

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

ARTICLE 34: INFORMATION SHARING

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

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

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

(c) other information as appropriate and mutually agreed.

ARTICLE 35: CAPACITY BUILDING AND TECHNICAL ASSISTANCE

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

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

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

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

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

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

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

CHAPTER V
INSTITUTIONAL ARRANGEMENTS

ARTICLE 36: THE ACTA COMMITTEE

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

2. The Committee shall:

(a) review the implementation and operation of this Agreement;

(b) consider matters concerning the development of this Agreement;

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

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

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

3. The Committee may decide to:

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

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

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

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

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

4. All decisions of the Committee shall be taken by consensus, except as the Committee may otherwise decide by consensus. The Committee shall be deemed to

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

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

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

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

6. The Committee may amend the rules and procedures.

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

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

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

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

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

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

ARTICLE 37: CONTACT POINTS

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

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

ARTICLE 38: CONSULTATIONS

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

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

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

CHAPTER VI
FINAL PROVISIONS

ARTICLE 39: SIGNATURE

This Agreement shall remain open for signature by participants in its negotiation,[17] and by any other WTO Members the participants may agree to by consensus, from 31 March 2011 until 31 March 2013.

ARTICLE 40: ENTRY INTO FORCE

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

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

ARTICLE 41: WITHDRAWAL

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

ARTICLE 42: AMENDMENTS

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

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

ratification, acceptance, or approval.

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

ARTICLE 43: ACCESSION

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

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

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

ARTICLE 44: TEXTS OF THE AGREEMENT

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

ARTICLE 45: DEPOSITARY

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

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