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

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REVIEW OF LEGISLATION

Responses from El Salvador to Questions Posed by Japan and Switzerland

By means of a communication from the Permanent Mission of El Salvador dated 31 May 2000, the Secretariat has received the following responses to questions posed by Japan and Switzerland.

QUESTIONS POSED BY JAPAN TO EL SALVADOR WITH REGARD TO INTELLECTUAL PROPERTY

I. COPYRIGHT

1. Please explain how the protection is provided for works, phonograms, performances and broadcasts from other WTO Members under the Law on Copyright and Neighbouring Rights of El Salvador (hereinafter referred to as "Copyright and Neighbouring Rights Law"). Please describe the provisions of the Copyright and Neighbouring Rights Law which provide for the National Treatment and Most-Favoured-Nation Treatment as required by Articles 3 and 4 of the TRIPS Agreement as well as Article 9.1 of the Agreement which incorporates Article 5.1 of the Berne Convention.

PROTECTION FOR WORKS

The Law on the Promotion and Protection of Intellectual Property protects all literary, artistic and scientific works whatever their type or form of expression, their merit or their use, provided that such works are original. Translations, adaptations, transformations or arrangements of works are also subject to protection, as well as anthologies or compilations of various works or data or other material including databases in machine-readable form or any other form. The period of protection if the author is a natural person lasts for the life of that person and for 50 years following his/her death for the benefit of his/her heirs or assignees; in the case of an anonymous work or a pseudonymous work whose authorship has not been disclosed, the period of protection will last for 50 years beginning from the first publication. If the holder of the rights in a work is a legal person the period of protection will last for 50 years beginning from 1 January of the year following its first publication or, failing that, following the making or dissemination of the work (Article 86(a), (b) and (c) of the Law on the Promotion and Protection of Intellectual Property).

PROTECTION FOR PERFORMANCES

The same law protects contracts for performances of plays and musical works, which may be on for a specific period of time or for a specific number of public representations or performances. Protection of the rights of performers will last for 50 years beginning from 1 January of the year following the performance, in the case of unfixed interpretations or performances, or beginning from

the time of publication, when the performance is recorded on a sound or audiovisual medium (Article 86 (f) of the Law on the Promotion and Protection of Intellectual Property).

PROTECTION FOR PHONOGRAMS

Phonographic recording contracts are also regulated, in the case where the author of a musical work authorizes – without giving sole rights – a producer of phonograms, on the basis of remuneration, to record or fix a work for purposes of reproduction. Such authorization does not include the right to public performance of the work. However, phonographic producers authorized on the basis of a phonographic recording contract may decide whether or not to authorize the reproduction of their phonograms, as well as the import, rental, distribution to the public or any other use, by any form or means, of the copies of their phonograms. The rights of the producers of phonograms are protected for 50 years beginning from 1 January of the year following that in which the sounds recorded on the phonogram were fixed for the first time (Article 86(e) of the Law on the Promotion and Protection of Intellectual Property).

PROTECTION FOR BROADCASTING ORGANIZATIONS

In accordance with the Law on the Promotion and Protection of Intellectual Property, broadcasting organizations are radio or television companies that broadcast programmes to the public, their rights being protected for a period of 50 years beginning from 1 January of the year following that in which the programme was broadcast (Article 86(g) of the Law on the Promotion and Protection of Intellectual Property).

NATIONAL TREATMENT AND MOST-FAVOURED-NATION TREATMENT

El Salvador has ratified the Berne Convention and the Rome Convention, which, pursuant to Article 144 of the Constitution, have become laws of the Republic.

The above-mentioned conventions were ratified without any reservations whatsoever so that the principles of National Treatment and Most-Favoured-Nation Treatment established therein are fully applied within the country. Thus, the obligations laid down in the TRIPS Agreement in Articles 3 and 4, which are also laws of the Republic, are respected.

Similarly, Article 11 of the Law on the Promotion and Protection of Intellectual Property grants national treatment to the "works" published by a foreigner in El Salvador, and also to works published abroad, in accordance with the terms laid down in the applicable international conventions ratified by El Salvador.

The principle of Most-Favoured-Nation Treatment enshrined in Article 4 of the TRIPS Agreement has also been in full effect since 1 January of this year, without any reservations; accordingly, by virtue of the application of that principle, any concession granted by El Salvador to another country will immediately be extended to all other WTO Members.

2. Please explain exceptions or exemptions of the National Treatment and Most-Favoured-Nation Treatment under the Copyright and Neighbouring Rights Law, if any, as permitted in Articles 3 and 4 of the TRIPS Agreement?

El Salvador has not established exceptions or exemptions of the national treatment for foreigners who publish their works in El Salvador. The law applies without distinction to nationals and foreigners.

3. Please explain whether and how El Salvador provides retroactive protection to works, phonograms, performances from other WTO Members, as required by Articles 9.1, 14.6 and 70.2 of the TRIPS Agreement which apply, *mutatis mutandis*, Article 18 of the Berne Convention. Please indicate the date to which such protection extends with respect to each category of subject-matter?

Salvadoran legislation recognizes the principle of the protection of copyright without requiring any special formalities to be followed. Article 96 of the Law on the Promotion and Protection of Intellectual Property stipulates that the formalities for the deposit of works protected in accordance with the law shall not be constitutive of rights, having mere declaratory character for the better legal security of the holders and as a means of proving their rights. Similarly, failure to deposit shall not affect either the enjoyment or the exercise of the rights recognized by the law.

Accordingly, the right holders enjoy the periods of protection established in the Law on the Promotion and Protection of Intellectual Property in accordance with the provisions of Article 86, except for those works which, under the previous Law, have passed into the public domain.

Similarly, the Law on the Promotion and Protection of Intellectual Property provides in Article 183 that the registration of copyright and patents for inventions granted under the previous legislation shall be governed by the provisions of that legislation, except for the provisions on actions for infringement of rights contained in the above-mentioned Law.

Likewise, Article 185 of that Law stipulates that those rights regulated in Title II relating to artistic, literary or scientific property that did not enjoy protection under the previous laws on account of not having been registered shall automatically enjoy the protection granted under the Law on the Promotion and Protection of Intellectual Property, without prejudice to the rights acquired by third parties prior to the entry into force of that Law, provided that the uses had already taken place or were taking place at the date on which that Law was promulgated.

4. Please explain whether protection of "computer programs" under the Copyright and Neighbouring Rights Law covers computer programs in both source and object code, as required by Article 10.1 of the TRIPS Agreement. Are those computer programs protected as literary works in accordance with Article 2.1 of the Berne Convention?

(a) The Law on the Promotion and Protection of Intellectual Property lays down in Article 32 that computer programs, whether in source or object code, are protected as literary works, enjoying protection for a period of 50 years beginning from their first publication or, failing that, from their termination (Article 86(d) of the above-mentioned Law). These provisions are in conformity with Article 10.1 of the TRIPS Agreement.

5. Please clarify whether "database" under the Copyright and Neighbouring Rights Law includes compilation of data in machine-readable form. Please explain how the Law complies with Article 10.2 of the TRIPS Agreement in this respect?

Article 14 of the Law on the Promotion and Protection of Intellectual Property provides that compilations of various works, data or databases in machine-readable form or any other form constitute original creations and are protected by the law. Consequently, the law complies with the provisions of Article 10.2 of the TRIPS Agreement.

(b) Trademarks

6. Please explain how legislation of El Salvador complies with Article 16.1 of the TRIPS Agreement which provides that the exclusive right covers use of identical or similar signs for goods and services which are similar to those in respect of which the trademark is registered.

The Central American Convention for the Protection of Industrial Property currently in force provides that the owners of marks, trade names and advertising slogans or signs that have been registered shall have the right to use, enjoy and employ them **exclusively** and that the ownership acquired relates to the goods, merchandise or services for which the application has been made (Articles 5 and 23 of the Central American Convention).

Taking into account the above-mentioned provisions, Article 10(p) of that Convention prohibits the registration of trademarks which through their graphic, phonetic and ideological similarity might be misleading or give rise to confusion with other trademarks already registered or in the process of being registered, if it is intended to use them to distinguish goods, merchandise or services of the same kind.

Furthermore, Article 9(a) and (b) of the preliminary draft Law on Trademarks and Other Distinctive Signs prohibits the use or registration of a sign that is identical or similar to a mark that is registered or in the process of being registered so as to distinguish products or services that are of the same kind.

Consequently, our legislation complies with Article 16.1 of the TRIPS Agreement.

7. Please explain how legislation of El Salvador provides protection of well-known marks when goods or services are not similar to those in respect of which a trademark is registered, as stipulated in Article 16.3 of the TRIPS Agreement.

Neither the Central American Convention for the Protection of Industrial Property nor any secondary national law expressly protects well-known marks. However, the Paris Convention, upon ratification, became a national law in conformity with Article 144 of the Constitution; thus well-known marks being protected under Article 6 *bis* thereof, in conformity with the obligation established under the TRIPS Agreement is ensured.

Furthermore, it should be pointed out that the preliminary draft Law on Marks and Other Distinctive Signs expressly guarantees full protection of well-known marks.

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

8. Please indicate the remedies which the judicial authorities order regarding intellectual property rights, including injunctions, damages, expenses, destruction or disposal of infringing goods, materials or implements for their production. Please explain the criteria for and the way of calculation to decide the amount of the damages which judicial authorities order to the person who infringes intellectual property rights to pay to the right holder.

With regard to industrial property (marks, trade names and advertising slogans or signs), prudential measures may be ordered on the basis of Article 68 of the Central American Convention for the Protection of Industrial Property which establishes that once an action for unfair competition has been initiated the judge or authority before which it is brought may order, as long as the complainant provides a security, such prudential measures as he deems appropriate, including preventive seizure or confiscation of the infringing goods.

With regard to copyright, Article 91 of the Law on the Promotion and Protection of Intellectual Property stipulates that the holder of a right that has been infringed may, upon prior deposit of security to the infringer, request the judge to order such prudential measures as may be necessary. In calculating damages arising from loss of earnings the relevant criteria laid down in Article 90 apply.

Anyone requesting prudential measures must lodge the relevant request within eight days following the day on which any such measures were ordered, failing which he will be liable for damages.

With regard to patents and industrial designs, Article 174 of that same Law grants similar rights and in calculating damages resulting from loss of earnings the relevant criteria laid down in Article 173 applies. In that case, anyone requesting prudential measures must lodge the relevant request within ten days following the day on which any such measures were ordered, failing which he will be liable for damages.

Judges have the power to order an offender to pay damages resulting from the infringement of intellectual property rights (Article 2065 et seq. of the Civil Code and Article 439 of the Code of Civil Procedure, which includes the payment of the cost of the proceedings by the losing party, whether the complainant or the defendant, and the payment of the attorney's fees). This is based on Articles 26 and 70 of the Central American Convention for the infringement of a mark, trade name and advertising slogan or sign, and Articles 90, 172 and 173 for the infringement of a copyright, patent or industrial design.

(a) However, with regard to industrial property, the judge may, in those cases where a commercial action has been brought on the basis of Articles 65 and 71 of the Central American Convention, remove from the market the materials and implements used for the production of the infringing goods. Likewise, with regard to copyright, Article 90 stipulates that the holder of the right may request the withdrawal from the market of the unlawful materials, the disablement of moulds, plates, printing blocks, negatives and other elements used predominantly for the unlawful reproduction, and the removal or keeping under lock and seal of the equipment used for unauthorized public communication, and the destruction of the unlawful copies. With regard to the infringement of patents and industrial designs, Article 172 of that same law provides for the possibility of requesting the transfer of ownership of the goods or means used predominantly to commit the infringement, and the measures necessary to prevent the continuation or repetition of the infringement, including destruction of the means seized.

9. Please indicate titles of laws and regulations and their provisions in which the suspension of the release of counterfeit trademark of pirated copyright goods is prescribed, as stipulated in Article 51 of the TRIPS Agreement. Please explain types of intellectual property rights about which the suspension can be made upon an application by a right holder.

(b) The Law on the Promotion and Protection of Intellectual Property provides, in Article 91, that the judge shall have the power to order a precautionary measure so as to prevent customs clearance of goods that infringe the copyright of a third party. Furthermore, Article 174 of that same Law provides that an order may be given for the preventive seizure, withholding or deposit of the infringing goods and of the means used predominantly to commit the infringement.

Similarly, the Central American Convention currently in force grants the owner of a trademark the right to require the competent authorities to prohibit the importation or entry of the merchandise or goods involved as long as they continue to display that mark (Article 26(c)).

Moreover, the preliminary draft of the Law on Marks and Other Distinctive Signs provides in Article 91(c) for the authority to prevent customs clearance for goods that infringe a registered mark.

10. Please explain the kind and amounts of criminal penalties including imprisonment and fines regarding intellectual property rights. In particular, are the crimes persecuted only when the injured party has made a formal accusation? Please also explain whether penalties are consistent with Article 61 of the TRIPS Agreement which requires the penalties to be sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.

(c) In accordance with the terms of Articles 90 and 184 of the Law on the Promotion and Protection of Intellectual Property right holders are entitled to request in the commercial courts the termination of the infringement of their rights and also compensation for the damages, without prejudice to any corresponding criminal proceedings.

(d) Furthermore, in criminal terms, the offences relating to the protection of intellectual property and industrial property are classified as offences that are actionable publicly at the request of a private person, requiring the intervention of the holder of the infringed right. It is the holder of the infringed right that must lodge the complaint with the Office of the Attorney-General of the Republic (Article 193(4) of the Constitution) and when that institution brings the case before the criminal court, the interested party must appear as the complainant before that court (Article 26(9) and (10) of the Code of Criminal Procedure). Without the authorization of the offended party the corresponding criminal action cannot proceed.

Category of Offence and Penalty

<u>Article of the Penal Code/Offence</u>	<u>Penalty</u>
226/infringement of copyright and related rights	1-3 years' imprisonment
227/aggravated infringement of copyright and related rights	3-5 years' imprisonment
228/infringement of the privileges of an invention	1-3 years' imprisonment
229/infringement of distinctive commercial signs	1-3 years' imprisonment
230/breach of commercial confidence	6 months to 2 years' imprisonment
231/revealing or disclosing industrial secrets	6 months to 2 years' imprisonment
238/unfair competition	6 months to 2 years' imprisonment

Copies of the relevant articles are attached.

QUESTIONS POSED BY SWITZERLAND TO EL SALVADOR WITH REGARD TO INTELLECTUAL PROPERTY

A. ARTICLES 27 AND 33 OF THE TRIPS AGREEMENT (PATENTS AND TERM OF PROTECTION)

1. **The Law on the Promotion and Protection of Intellectual Property of El Salvador provides in Article 109 that the term of protection for patents for inventions in the field of pharmaceuticals shall be 15 years only, contrary to a 20-year term of protection for patents for all other inventions. Please explain how this provision complies with Article 27.1 of the TRIPS Agreement providing for patent rights to be enjoyable without discrimination as to the field of technology and with Article 33 of the TRIPS Agreement requiring a minimal term of protection of 20 years?**

2. With the entry into force of the TRIPS Agreement in January of this year the provision contained in Article 9.2 of the Law on the Promotion and Protection of Intellectual Property has ceased to be operative and thus the term of protection for patents for inventions in general will be a non-renewable period of 20 years beginning from the date of filing of the application with the Commercial Registry.

3. In view of the above and to ensure that the provision no longer gives rise to confusion it will be abrogated through an amendment of the Law on the Promotion and Protection of Intellectual Property.

B. ARTICLE 39 OF THE TRIPS AGREEMENT (PROTECTION OF UNDISCLOSED INFORMATION)

1. **Does your legislation ensure that undisclosed and confidential test data or other data submitted by an applicant to the responsible state agency in the procedure for market authorization of a pharmaceutical product is protected against disclosure and against unfair commercial use by a competitor, for example by prohibiting a second applicant from relying on or from referring to the original data of the first applicant, when applying subsequently for market authorization for his own product? Does your legislation provide for exceptions to this? If yes, under what conditions would such exceptions apply?**

Article 177.2 of the Law on the Promotion and Protection of Intellectual Property ensures protection for data submitted to the authorities as confidential under the following conditions: information that is within the public domain is not regarded as an industrial or commercial secret, but information supplied to any authority by a person holding it as an industrial or trade secret is not considered as coming under the public domain or disclosed by operation of the law when it is supplied for the purpose of obtaining licences, permits, or authorizations, registration or any other official documents, and it would therefore enjoy legal protection under Article 178 of that Law.
