

REVIEW OF LEGISLATION

TUNISIA¹

This document reproduces the introductory statement by the delegation of Tunisia, the questions addressed to it and the responses given in connection with the review of legislation undertaken at the Council meeting of 27 and 28 November 2001.²

I. INTRODUCTORY STATEMENT

It is a privilege and an honour for me to address the Council for TRIPS at this important meeting to review the legislation of several WTO Members, including Tunisia.

I first of all wish to assure you of the importance that my country attaches to this review. The presence today of a major Tunisian delegation bears witness to Tunisia's commitment to the multilateral trading system and to its rules.

My thanks go to all Member delegations whose attendance at this TRIPS Council meeting demonstrates their interest in my country's legislation in this area. I also thank those that have posed highly relevant questions, to which I trust that we have provided satisfactory replies.

We apologize to those delegations whose questions have not been answered in full and assure them that comprehensive responses will be given to them as rapidly as possible.

Tunisia has a rich history in the sphere of protection of intellectual property rights.

The protection of industrial property rights in Tunisia goes as far back as the Paris Convention of 20 March 1883, of which Tunisia is a founding member along with several other countries. This legislation lays down *inter alia* the general rules governing the protection of patents, trademarks, service marks and industrial designs.

As regards copyright, it should be recalled that Tunisia is among the 10 countries that established the Berne Convention of 1886 and that it signed the Universal Copyright Convention in 1969 and approved the Brazzaville Recommendation of 1963 on the Safeguarding of Folklore.

¹ For the relevant laws and regulations notified by Tunisia under Article 63.2 of the TRIPS Agreement, please refer to documents IP/N/1/TUN/1; IP/N/1/TUN/2 and Add.1; IP/N/1/TUN/D/1 to 3; IP/N/1/TUN/E/1 to 3; IP/N/1/TUN/G/1; IP/N/1/TUN/L/1 to 3; IP/N/1/TUN/P/1 to 6; IP/N/1/TUN/T/1 to 3.

² The record of the meeting was circulated in document IP/C/M/34.

A series of domestic laws has been enacted, forming a significant corpus of legislation for the protection of copyright. The latest law was passed on 24 February 1994 and constitutes a turning point in the history of copyright protection.

Indeed, in addition to the traditional areas covered by copyright, namely cinematographic, literary, musical and photographic works, the scope of protection has been extended to software.

This law also grants authors the exclusive right to make use of their works and provides for preventive and corrective measures, ranging from fines to imprisonment, in the event of infringement.

It already protects the various literary and artistic property rights covered by the TRIPS Agreement and guarantees respect for the fundamental principle of national treatment.

The law has also led to the establishment of a collective copyright management system. The first autonomous Tunisian institution representing the interests of Tunisian and foreign authors was created in 1968. Known as the Tunisian Society of Authors and Composers (SODACT), it replaced the African Copyright Office and was replaced in turn by the Tunisian Copyright Protection Agency (OTPDA) in February 1994.

The Agency immediately drew up a plan of action to ensure greater effectiveness and protection of copyright by developing cooperation programmes and concluding mutual representation agreements with a number of copyright agencies.

Intellectual property became more prominent in the business world and in international markets following the conclusion of the Agreement Establishing the World Trade Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights in particular.

In order to bring domestic legislation into line with the new Agreement, efforts have been made to meet Tunisia's commitments in this area.

A draft law is now before the Chamber of Deputies, following endorsement of the text by the Council of Ministers and the Constitutional Council. It will be adopted in the coming days.

The main objective of this instrument is on the one hand to bring the provisions of the above-mentioned Law No. 94-36 on copyright into line with the provisions of the TRIPS Agreement and the WIPO Treaty of December 1996 and, on the other, to incorporate in this special legislation provisions on related rights in accordance with the TRIPS Agreement, the Rome Convention and the WIPO Treaty of December 1996.

I should now like to give a brief review of new legislation adopted by Tunisia pursuant to its commitments under the TRIPS Agreement.

As regards patent protection, Law No. 2000-84 of 24 August 2000 has extended the patentability of inventions to all fields of technology, including medicines and agricultural chemicals. Inventions in such areas were previously excluded from patentability by most developing countries, including Tunisia.

This law has introduced innovations in terms of the patent granting procedure, by providing for a substantive as well as a formal examination of patent applications.

It has, moreover, established a system of contractual licences freely negotiated between the parties. Where necessary to protect public health, compulsory licensing has also been introduced in accordance with the criteria laid down in the TRIPS Agreement.

Concerning the protection of layout-designs of integrated circuits, Law No. 2001-20 of 6 February 2001 is the first legal instrument in Tunisia to protect creations and innovations in electronics and information technology, such as microchips and semi-conductor components.

As far as industrial designs are concerned, Law No. 2001-21 of 6 February 2001 contains new provisions regarding the form of protection afforded when the same subject-matter presents both new technical and new ornamental features.

If the elements that constitute the novelty of the industrial design are inseparable from those of the invention, the subject-matter is protected in accordance with the provisions applicable to patents.

Law No. 2001-36 of 17 April 2001 protecting trademarks and service marks distinguishes between the filing and the registration phases by introducing a system for opposing the registration of a mark.

This law further establishes the mandatory use of a trademark or service mark. All registered marks must henceforth be used for at least one of the products or services designated in the registration.

It also prohibits the reproduction of a protected mark in any form whatsoever.

Lastly, domestic legislation protects geographical indications, which are governed in Tunisia by the law of 28 June 1999.

I should add that all of the above texts have provided for border measures, in order to prevent the importation of counterfeit goods and to combat the circulation of such goods within the country.

These measures are designed as incentives to build a climate conducive to investment by foreign economic operators in Tunisia.

Likewise, to enforce intellectual property rights Tunisian legislation provides for judicial proceedings leading to civil and criminal penalties in the event of infringement.

Thus, any infringement of intellectual property rights gives rise to civil action for compensation of the injury incurred.

The courts may order the confiscation and destruction of counterfeit goods and of the instruments used for their production.

Deliberate infringement of property rights in a mark, patent, industrial design or topography is punishable by a fine of up to 50,000 dinars.

The fine may be doubled in the event of a repeat offence, in addition to the penalty of imprisonment.

I should like to conclude by citing the main activities carried out in Tunisia with a view to implementing the TRIPS Agreement.

A number of awareness-raising and extension activities have been undertaken among the different partners, namely the Judiciary, Customs, experts from the Ministry of Public Health and all economic actors concerned.

A graduate diploma in intellectual property was introduced in the 1999-2000 academic year. The aim is to train a pool of intellectual property specialists every year.

To facilitate the filing of applications for patents at the international level, and in view of its undertakings *vis-à-vis* foreign partners, Tunisia acceded to the Patent Cooperation Treaty on 10 September 2001.

It should be noted, moreover, that our country is now preparing for accession to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

I would also emphasize that Tunisia is fully aware of the crucial role of a modern and effective corpus of intellectual property legislation in the economic development process.

Tunisia has therefore done its utmost to develop a new legal framework in keeping with the provisions of the WTO TRIPS Agreement, and will make every effort to create all the conditions required to ensure full and effective implementation of this legislation in the regulatory and institutional spheres.

II. RESPONSES TO QUESTIONS POSED BY CANADA

1. Please describe how the enforcement obligations (Articles 41-46 of the TRIPS Agreement) have been implemented.

Literary and artistic intellectual property (copyright and related rights) is protected in Tunisia by the following:

- International treaties legally ratified pursuant to Article 32 of the Constitution, which take precedence over legislation (the Uruguay Round agreements (TRIPS), the Berne Convention, etc.);
- ordinary law: general civil and criminal legislation (Code of Obligations and Contracts, Commercial Code, Law on Competition and Prices, Code of Criminal Procedure, Customs Code, etc.);
- special (*sui generis*) legislation, specifically Law No. 94-36 of 24 February 1994 on Literary and Artistic Property (copyright) and the relevant implementing provisions, in particular Decree No. 96-2230 of 11 November 1996 on the administrative and financial organization of the Tunisian Copyright Protection Agency and its operating procedures.

It should be noted that a draft Law is currently before the Chamber of Deputies, following adoption of the text by the Council of Ministers and the Constitutional Council. The main objective of this legislation is on the one hand to bring the provisions of the above-mentioned Law No. 94-36, relating to copyright, into line with the provisions of the TRIPS Agreement and the WIPO Treaty of December 1996, and on the other hand to incorporate in this special legislation provisions on related rights in accordance with the TRIPS Agreement, the Rome Convention and the WIPO Treaty of December 1996.

As regards the enforcement obligations under Section 3 of the TRIPS Agreement, Tunisian legislation lays down procedures for the enforcement of copyright and related rights which allow effective action to be taken against any act in infringement of such rights.

Article 42

For example, in accordance with Article 42 of the TRIPS Agreement on fair and equitable procedures:

(1) The parties are authorized to arrange to be represented by independent legal counsel. Indeed, "representation by an attorney-at-law is mandatory in proceedings before a Court of First Instance. The chambers of the attorney-at-law shall be regarded as the elected domicile of its client for the level of jurisdiction for which the attorney is retained" (Article 68 of the Code of Civil and Commercial Procedure).

(2) Defendants must receive timely written notice setting out the basis for the allegations. Article 70 of the Code of Civil and Commercial Procedure states that "the writ of summons must specify the surnames, given names, occupations and addresses of the parties and the capacities in which they are acting, along with an account of the facts in the matter ... It must also include a statement calling on the party on whom the writ is served to enter its pleadings in reply".

(3) A procedure is specified in Tunisian legislation for the identification and protection of confidential information, as follows:

- Article 253 of the Criminal Code states that "Any person who discloses the contents of a letter, telegram or any document belonging to another party without authorization is liable to a prison sentence of three months".
- Article 254 of the Criminal Code states that "Any doctor, surgeon or other medical personnel, as well as any pharmacist, midwife or any other person in whom secrets are vested by virtue of their status or profession who reveals such secrets, except where required or permitted by law to report the matter, shall be liable to a prison sentence of six months and a fine ...".

The general regulations governing the conduct of public-sector personnel place civil servants under obligations of professional secrecy and discretion; these general regulations include the following:

- The General Regulations for State employees of local public authorities and administrative public bodies;
- the General Regulations for the employees of Boards, industrial and commercial public bodies, and companies whose capital is held directly or indirectly by the State or by public authorities;
- the General Regulations for magistrates;
- the General Regulations for customs staff;
- the General Regulations for the personnel of the internal security forces.

Furthermore, Article 168 of the Labour Code states that: "members of company consultative committees and staff representatives are bound by the obligation of professional secrecy with respect

to all information of a confidential nature coming into their possession while serving in that capacity, and to all matters relating to manufacturing processes. In the event of a breach of this obligation they shall be liable to the penalties set down in Articles 138 and 254 of the Criminal Code".

Article 138 of the Criminal Code states as follows: "in addition to a fine, any manager, clerk or worker of a factory who discloses or communicates a manufacturing secret shall be liable to a prison sentence of two years; attempts to do so are also punishable".

Article 43

Tunisian legislation, in accordance with Article 43 of the TRIPS Agreement on evidence, gives judicial authorities the power to order a party in proceedings, on a request to this effect from the opposing party, to produce the evidence lying in its control.

Articles 213 to 223 of the Code of Civil and Commercial Procedure allow the presiding judge of the Court to issue rulings on request from either of the parties in the case, to ensure the protection of rights and interests which must not be left unprotected. In cases of extreme urgency, judges may rule in their private homes on questions submitted to them.

Enforcement of rulings issued in this manner is not subject to the appending of the seal of the Court or "*ad hoc*" registration. These formalities are completed later.

Rulings issued on request are exempted from the registration procedure. Such rulings are enforced without delay by process-serving notaries.

A request for the withdrawal of a ruling does not suspend enforcement. Article 101 of the same Code states that "if it is necessary to obtain an expert's report and the parties fail to agree on the selection of the expert, the expert shall be appointed by the judge".

Article 44

As regards Article 44 of the TRIPS Agreement on injunctions, under Tunisian legislation the judicial authorities have authority to issue various kinds of rulings, i.e. interim injunctions, payment injunctions and final or other judgments.

According to Article 86 of the Code of Civil and Commercial Procedure, "if it sees this as necessary, the Court may ask the judge acting as rapporteur to carry out any investigative actions, such as an inquiry, visit to the scene, expert's report, taking of pleas of forgery, or any other action that will help to establish the truth".

The Court, during the hearing and in the presence of the parties, may set the date for the investigative action so ordered, specifying the date and time for the appearance of the parties in the chambers of the judge as rapporteur or at the location of the dispute or any other location.

Article 225 of that same Code states that "in any event, the Court may require ex officio the participation of a third party in the proceedings where it sees the presence of that party as essential for a correct appreciation of the matter at issue". If it is necessary to arrange an expert's report and the parties fail to agree on the selection of the expert, the expert is appointed by the judge.

Emergency interim proceedings:

Article 201 of the Code of Civil and Commercial Procedure (CCCP) states as follows: "In all situations of urgency, emergency interim rulings shall be issued, without prejudice to the main

action". "Emergency interim rulings may be made by the presiding judge of the Court of First Instance or a person with delegated authority from that judge, or a canton magistrate where that magistrate has jurisdiction under the law" (Art. 202 of the Code of Civil and Commercial Procedure).

"Provisional injunctions are enforceable 24 hours after service, unless the judge has granted a period of grace."

Enforcement is carried out without a security unless the judge has ordered that a security be provided (Art. 207 of the Code of Civil and Commercial Procedure).

- Payment injunctions

Article 59 of the Code of Civil and Criminal Procedure states that a payment injunction may be issued for any debt payment demand where the debt – irrespective of its nature – is for a fixed amount and is based on a contract.

- Judgment

A judgment is not final if the decision is subject to appeal. However, provisional enforcement of a judgment may always be ordered, with or without security, according to the circumstances of the case (Articles 126 and 286 of the Code of Civil and Commercial Procedure).

Regarding the enforcement of a judgment:

The process-serving notary may:

- Enter the premises where the enforcement of the judgment is to be carried out, place a guard at the door to prevent any misappropriation of property, require the immediate attendance of the officer in charge of the local police station or national guard, in whose presence the opening of the doors ... and furniture ... will take place ...;
- effect a distraint procedure on property of the party against which the ruling is given.

The Court may:

- Order the publication of the judgment, in part or in full, at the expense of the party against which the ruling is given.
- Final judgment

A final judgment ends the action by deciding the question at issue in the proceedings.

Article 45

With respect to the damages referred to in Article 45 of the TRIPS Agreement, the provisions of Articles 82 and 83 of the Code of Obligations and Contracts (COC) require a party which has knowingly or deliberately caused material or moral damage to another party to make good that damage, where it is established that this was the direct cause of the damage in question.

Along the same lines, Article 51 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property states that "any person who infringes copyright as set out in this Law shall be required to pay the owner of such right damages for material and moral damage caused to the owner,

for the amount determined by the competent Court". The draft Law amending and adding to the said Law No. 94-36 extends these rights to include related rights.

Article 46

With respect to the other remedies referred to in Article 46 of the TRIPS Agreement, the following points should be noted:

Regarding precautionary measures:

(1) The Code of Criminal Procedure gives the investigating magistrate, and in some cases criminal investigation police officers, the power to effect the following:

- Searches in all premises where objects may be located whose disclosure is deemed necessary in order to arrive at the truth.
- Confiscation of papers or chattels likely to contribute to establishing the truth of the matter ...
- Expert's reports where required by the circumstances, so that technical inspections can be carried out ... with experts to be given specific time limits for the submission of their reports ...
- The Code of Civil and Commercial Procedure allows any person able to demonstrate a legitimate interest to ask the Court to order the implementation of any measures to ensure the protection of rights and interests which must not be left unprotected ...

(2) Article 55 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property allows the competent Court to order ex officio or on request the confiscation or destruction of fraudulent copies and the temporary or definitive closure of the establishment in which the infringement has been ascertained.

The owner of the establishment where the infringement has been committed is regarded as jointly and severally liable with the principal offender committing the infringement for making good the damage.

Article 47

As regards the right of information referred to in Article 47 of the TRIPS Agreement, in a criminal case the judicial authority and its auxiliary entities are empowered to seek any information or clarification from the person charged regarding his or her accomplices, the beneficiaries of the offence with which the defendant is charged, and the channels of distribution of the objects involved in the criminal offence. The person charged does of course have the right to remain silent and may decline to answer any question, but the judge will take that silence into account when considering the penalty to be imposed.

The information obtained from the criminal investigation can be used as supporting evidence for a civil action, both in the case of civil actions brought separately and for actions conducted concomitantly with the criminal proceedings.

Article 48

Regarding the indemnification of the defendant referred to in Article 48 of the TRIPS Agreement, ordinary law (the Code of Obligations and Contracts) generally allows reparation for moral and material damage suffered, and a suit can be brought to seek reparation for the loss incurred following a wrongful and unjustified action.

Administration officials guilty of abuses and faults committed in the course of their duties are subject to administrative sanctions under the regulations governing their conduct, and may be prosecuted in civil and even criminal proceedings, according to the nature and level of the fault committed.

Article 50-4 of the draft Law amending and adding to Law 94-36 of 24 February 1994 states that "subject to completion of all customs formalities, the suspension of the release of the products shall be revoked automatically if the author, holder of related rights or his/her representative has failed to provide the customs authorities, within ten days from notification of the suspension of the release of the products, with proof of the following:

- Lodgement of a security sufficient to cover its liability to the persons concerned in the event of it being subsequently established that the products in question do not infringe the copyright or related rights. The amount of the said security shall be set by the competent Court".

Similarly, Article 54 (new) of the new draft Law states as follows in its last paragraph: "The records of the identification of the infringement and the confiscation measure shall be sent within seven days to the Public Prosecutor, who shall forward the documents to the competent Court for a ruling on the approval or revocation of the confiscation within a time limit of no more than one month from the date on which the confiscation measure was carried out.

If the Court does not rule on the confiscation within the time limit specified, the confiscation measure shall be revoked automatically".

Article 49

As regards the administrative procedures referred to in Article 49 of the TRIPS Agreement, Tunisian legislation does not provide for any administrative procedures on the merits of a case. Only the judicial authorities are authorized to deal with the matter.

Article 50

As regards the provisional measures referred to in Article 50 of the TRIPS Agreement (generic legislation), adequate provisional measures are provided for in Tunisian ordinary law through the mechanisms of provisional injunctions and rulings on request as described above.

The draft Law amending and adding to law No. 94-36 of 24 February 1994 on Literary and Artistic Property states in Article 54-1 that "the right holder or his/her representative may, as a preventive measure, on the basis of a ruling on request issued by the presiding judge of the competent Court, arrange for a process-serving notary, assisted by an expert, to carry out a detailed description, with or without physical confiscation, of the alleged counterfeit products constituting an infringement of copyright or related rights".

Such measures may be ordered "in all situations of urgency, on a provisional basis, without prejudice to the principal action" (Article 201 of the Code of Civil and Commercial Procedure).

Articles 51-60

As regards the special requirements related to border measures referred to in Articles 51 to 60 of the TRIPS Agreement, in addition to the Customs Code which protects the borders from any infringement of intellectual property and Article 50 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, which prohibits the importation of works breaching copyright, Articles 50-1 to 50-5 of the draft Law amending and adding to Law No. 94-36 1994 on Literary and Artistic Property contain provisions in accordance with the requirements of the TRIPS Agreement.

1. Thus, Article 50-1 of the draft Law states that "customs authorities may suspend customs clearance procedures for products in respect of which there is manifest evidence of infringements against copyright and related rights. The customs authorities may ask the author and holders of related rights or their representative to provide any information which may be of assistance in the exercise of their authority".

2. As regards procedures by which the customs authorities suspend the release into free circulation of the goods, paragraph 2 of Article 50-1 states that "the customs authorities shall promptly notify the author or holders of related rights or their representative of the suspension; they are required to lodge the application referred to in Article 50-2 within a time limit of seven days from the date of the notification".

Article 50-3 of the same draft Law states that "customs authorities shall immediately notify the author or holders of related rights or their representative, and the owner, importer or consignee, of the suspension of release, giving them the opportunity to examine the products whose release has been suspended in accordance with the provisions of the Customs Code. On the basis of a ruling on request, to enable the author and holders of related rights or their representative to bring legal actions, the customs authorities are required to inform them of the names and addresses of the owner, importer or consignee, if known".

Finally, Article 50-5 of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 states that "the owner, importer or consignee shall be entitled to ask the Court to revoke the suspension of the release of the products at issue, in return for the lodgement of a security sufficient to protect the interests of the author or holders of related rights, provided that:

- The customs authorities have been informed within the time limit specified in Article 50-4 of this Law of the referral of the matter to the competent Court for a ruling on the merits of the case;
- on the expiry of that time limit, the competent Court has not granted any precautionary measures; and
- all customs formalities have been completed.

3. As regards the actual duration of the customs procedures, Article 50-4 of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property states as follows:

"Subject to completion of all customs formalities, the measure of suspension of the release of the products shall be revoked automatically if the author, holders of related rights or their

representative has failed to provide the customs authorities, within ten days from notification of the suspension of the release of the products, with proof of the following:

- Adequate precautionary measures ordered by the competent Court; or
- the lodgement of a civil or criminal action; or
- lodgement of a security sufficient to cover its liability to the persons concerned in the event of it being subsequently established that the products in question do not infringe the copyright or related rights. The amount of the said security shall be set by the competent Court.

Where appropriate, the time limit set down in the first indent of this Article may be extended by a maximum of ten days by the competent Court.

The measure of suspension of release of the products pursuant to Article 50-1 is also revoked automatically if the author, holders of related rights or their representative fails to lodge the application referred to in this Article within a time limit of seven days from the date of notification by the customs authorities."

The customs authorities may act on their own initiative to suspend the customs clearance procedures for products in respect of which there is manifest evidence of infringements of copyright or related rights (Article 50-1 of the above-mentioned draft Law).

Article 61

As regards the criminal procedures referred to in Article 61 of the TRIPS Agreement, further to reparation for damage in civil proceedings, Article 52 of Law No. 94-36 of 24 February 1994 provides for a fine of 50 to 5,000 dinars, doubled in the event of a repeat offence, with the possibility of imprisonment for between one and six months.

Article 52 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property increases the fine to between 1,000 and 50,000 dinars.

The fine is doubled in the event of a repeat offence, and the possibility of imprisonment has been increased to between one and 12 months.

These penalties may be accompanied by confiscation of the infringing goods, their destruction and the temporary or definitive closure of the establishment where the infringement was committed.

As regards the public authorities charged with identifying infringements and initiating criminal proceedings, the first paragraph of Article 54 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property states that "the identification of breaches of this Law and the drawing up of records of evidence [is] entrusted to the criminal investigation police authorities and officials of the Ministry of Culture duly sworn and empowered for this purpose ...".

Article 54 (new) of the draft Law amending and adding to Law No. 94-36 extends these prerogatives to customs officials, officials responsible for monitoring economic activity and municipal regulatory officials.

Public authorities may act on their own initiative to institute criminal proceedings. Thus, paragraphs 2 and 3 of Article 54 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property state that "the above-mentioned officials may seize the necessary documents and take samples of the counterfeit products for the purposes of the investigation and to prove the infringement, against receipt. They may also seize, as a preventive measure, any products suspected to be counterfeit and not in accordance with current regulations".

2. What protection does your Copyright legislation afford to "foreign works"?

According to the provisions of the last paragraph of Article 56 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, "the provisions of this Law regarding copyright apply to works qualifying for protection under an international convention to which the Tunisian State is a party", noting that Article 32 of the Tunisian Constitution states that legally ratified conventions take precedence over national Laws in the hierarchy of legal norms, subject to their application by the other party (principal of reciprocity).

Tunisia ratified the Uruguay Round agreements by Law No. 95-6 of 23 January 1995. Thus, the provisions of that Law provide protection to the nationals of all member countries.

III. RESPONSES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

A. GENERAL

1. Please describe if your legislation includes measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to your socio-economic and technological development as mentioned under Article 8 of the TRIPS Agreement. If so, please explain how such measures are consistent with the provisions of the TRIPS Agreement.

Pursuant to Article 8 of the TRIPS Agreement, and with a view to protecting public health and nutrition and promoting the public interest, Chapter XI of Law No. 2000-84 of 24 August 2000 on Patents provides for ex officio licensing.

Article 78.4 of the Law accordingly stipulates that "if required in the interests of public health, patents issued for medicines, for products necessary for obtaining those medicines or for processes for making such products may, in the event of the said medicines being made available to the public only in insufficient quantity or quality or at abnormally high prices, be made subject to ex officio licensing at the request of the Minister of Public Health, by order of the Minister of Industry".

B. COPYRIGHT AND RELATED RIGHTS

2. Please state how your legislation provides for the protection of the exclusive rights of authors in relation to their literary and artistic works, as specified in Article 9 of the TRIPS Agreement, which requires Members to comply with Articles 1-21 of the Berne Convention (1971) and the Appendix to the Berne Convention.

Tunisian legislation protects the exclusive rights of authors in their literary and artistic works. Law No. 94-36 of 24 February 1994 on Literary and Artistic Property thus provides for economic and moral rights.

As regards economic rights, Article 2 of Law No. 94-36 of 24 February 1994 provides that copyright affords an exclusive right to carry out or authorize the carrying out of any of the following acts:

- (a) Reproduction of a work in any material form whatsoever, including phonograms, audiovisual recordings and the like;
- (b) communication of the work to the public by any means, in particular by public performance such as performance in hotels and restaurants, by means of:
 - a medium for the broadcast of recorded works;
 - broadcasting means;
 - modes of transmission by cable or satellite;
- (c) communication of a broadcast work to the public:
 - by wire, loudspeaker or any other device that transmits signs, sounds or images;
- (d) any translation or adaptation of a work.

This Article will be amended and supplemented in order to clarify certain concepts and adapt it to developments in the field of copyright, in particular the WIPO Copyright Treaty (WCT) of December 1996 and the TRIPS Agreement.

The draft law amending and supplementing Law No. 94-36 of 24 February 1994 provides, in its Article 9-1, that authors' economic rights are exclusive rights of the author to exploit his work or to authorize its exploitation by third parties, by way of any of the following acts:

- (a) Reproduction of the work by any process, including printing, drawing, sound or audiovisual recordings on magnetic tape, discs, compact discs or any computer system and the like;
- (b) communication of the work by any process, in particular by:
 - public performance such as performance in hotels, restaurants, land, sea or air means of transport, as in festivals and entertainment halls;
 - drama or public performance;
 - a medium for wire or wireless broadcast of recorded works;
 - means of broadcasting transmission or reception and the like; loudspeakers and any other device that transmits signs, sounds or images; satellites, cables, computer networks or other similar means;
- (c) any form of exploitation of the work in general on a physical medium, including rental of the original and copies thereof;
- (d) translation, adaptation, arrangement and other alterations of a work deemed under this Law to be derivative works.

As regards moral rights, Article 9 of Law No. 94-36 of 24 February 1994 stipulates that an author's moral rights include, in particular:

- (a) a right of authorship;
- (b) a right of non-authorship;
- (c) a right to assume a pseudonym;
- (d) a right to oppose any modification or distortion or mutilation of his work;
- (e) a right to present his work to the public by any means;
- (f) a right to withdraw his work from circulation.

This Article will be amended in the draft law amending and supplementing Law No. 94-36 of 24 February 1994, in order to clarify practical questions such as:

- Indication of the name of the author, in the manner that is customary, each time that a work is made available to the public and on each copy that reproduces the content of the work on a physical medium;
- requirement of written consent by the author for any modification, addition, alteration or mutilation of a work and any derogatory action in relation to the work which would be prejudicial to the author's honour or reputation;
- indemnification of the authorized user in the event of any injury incurred as a result of withdrawal of the work from circulation.

3. Please describe the protection accorded to authors of computer programs, databases or compilations of data.

As regards computer programs:

Article 1 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property includes "software" (i.e. computer programs, as established during the Law's preparatory stages) among the works covered by copyright.

All general provisions relating to copyright, the rights it confers and the obligations it entails, the procedures for identifying infringements and the ensuing penalties thus apply to computer programs to the extent that they are not contrary to the provisions of Chapter VII on Software.

Copyright covers computer programs in both source and object code. The presumed author of the computer program is the person under whose name the program has been released. Programs written by employees in the course of their duties belong to the employer.

The Law on Scientific Research (Law No. 96-6 of 31 January 1996, as amended by Law No. 2000-68 of 17 July 2000 and its implementing rules and regulations) provides that government employees are entitled to various advantages and incentives in respect of the exploitation of the results of their research.

Computer programs and related documentation are the property of the producer. The author of a computer program has an exclusive right to carry out, authorize or prohibit certain acts relating to his work (reproduction, communication to the public, broadcasting and adaptation) and enjoys the economic and moral rights deriving from copyright. Authorization granted by the author must be in the form of a written contract containing a number of mandatory clauses. Economic rights may be assigned in part or in full. Assignment of works not yet created is deemed null and void.

Computer programs may be adapted only within the limits of the rights assigned by the author.

Unless expressly so authorized, the user of a legitimately acquired program may not produce any copies thereof other than a backup copy.

The term of protection of computer programs under Law No. 94-36 of 24 February 1994 is 25 years. In accordance with the TRIPS Agreement, ratified by Law No. 95-6 of 23 January 1995, the draft law amending Law No. 94-36 has extended the term to 50 years.

Data compilations (or databases) are implicitly protected under Articles 1 and 6 of Law No. 94-36 of 24 February 1994. Amended Article 6.2 of the draft law expressly provides that authors of works such as encyclopaedias or anthologies, folklore collections or databases which, by reason of the selection or arrangement of their contents, constitute intellectual creations are protected without prejudice to the rights of the authors of the original works.

4. Please state whether your legislation provides for a rental right and, if so, the works to which it applies.

Article 9-1 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994, which applies to all authors of protected works, stipulates that authors' economic rights are exclusive rights of the author to exploit his work or to authorize its exploitation by third parties, by way of any of the following acts:

- (a) Reproduction of the work;
- (b) communication of the work to the public;
- (c) any form of exploitation of the work in general on a physical medium, including rental of the original and copies thereof.

5. Please describe the rights granted to performers, producers of phonograms (sound recordings) and broadcasting organisations under your legislation.

Law No. 94-36 of 24 February 1994 does not cover related rights. Tunisia recognized the protection of such rights in ratifying the TRIPS Agreement (Law No. 95-6 of 23 January 1995 ratifying the Uruguay Round Agreements). Chapter 7*bis* (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 on Literary and Artistic Property deals with related rights (rights of performers, producers of phonograms and broadcasting organizations), in accordance with the TRIPS Agreement.

Holders of related rights enjoy the following rights:

Performers (Article 47-3)

Moral rights

- (1) A right, in respect of their sound or audiovisual performances, whether live or fixed on phonograms, to be identified as performers, except where the manner of use of the performance precludes such identification;
- (2) a right to oppose any distortion, mutilation or other modification of such performances that might be prejudicial to their reputation.

These rights are inalienable and imprescriptible, and may not be renounced.

Economic rights

- (1) A right of broadcasting and communication to the public of unfixed performances, except where the performance is already a broadcast performance;
- (2) a right of fixation of an unfixed performance;
- (3) a right of direct or indirect reproduction of their performances, fixed on phonograms or videograms, in any manner or form whatsoever;
- (4) a right of distribution to the public of the original and copies of the fixation of their performances on phonograms or videograms, by means of sale or any other transfer of ownership;
- (5) a right of commercial rental to the public of the original or copies of the fixation of their performances on phonograms or videograms, even after these have been distributed by the performers themselves or with their authorization;
- (6) a right to make their performances fixed on phonograms or videograms available to the public by wire or wireless means, in such a way that members of the public may access the work from a place and at a time individually chosen by them.

These are exclusive rights of performers to authorize partial use of their performances.

Producers of phonograms or videograms (Article 47-5):

- A right of direct or indirect reproduction of their phonograms or videograms, in any manner or form whatsoever;
- a right of distribution to the public of the originals and copies of their phonograms or videograms, by means of sale or any other transfer of ownership;
- a right of commercial rental to the public of the originals and copies of their phonograms or videograms, even after these have been distributed by the producers themselves or with their authorization;
- a right to make their phonograms or videograms available to the public by wire or wireless means, in such a way that members of the public may access the work from a place and at a time individually chosen by them.

These are exclusive rights of producers of phonograms or videograms to authorize the use, in full or in part, of their phonograms or videograms.

Broadcasting organizations (Article 47-8):

- A right of fixation and recording on a physical medium of their broadcasts or reproduction of such recordings;
- a right to re-broadcast their broadcasts;
- a right of communication of their broadcasts to the public in places accessible to the public, subject to payment of an entrance fee.

These are exclusive rights of broadcasting organizations to authorize the use, in full or in part, of their broadcasts.

6. Please state whether your legislation provides for any limitation or exception in relation to each of the rights described above in accordance with the relevant provisions of the Berne and Rome Conventions and in light of Articles 13 and 14.6 of the TRIPS Agreement.

Article 47-10 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 on Literary and Artistic Property stipulates that performers, producers of phonograms or videograms and broadcasting organizations are subject to the limitations on and exceptions to copyright, meaning that a work may be used without the author's permission for:

- personal and private use,
- educational purposes, and
- information purposes,

provided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the right holder.

7. Please state the terms of protection of each right described above and the work or subject matter to which it applies.

Copyright

The draft law amending and supplementing Law No. 94-36 of 24 February 1994 on Literary and Artistic Property has unified the term of copyright protection, extending it to 50 years.

Article 18 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 provides that protection of authors' economic rights subsists for the lifetime of the author and for 50 years counted from 1 January of the year following the author's death or of the date determined in a finding of presumed death in the event of absence or disappearance.

In the case of works of joint authorship, protection subsists for 50 years counted from 1 January of the year following the death of the last surviving author or of the date determined in a finding of presumed death in the event of absence or disappearance.

In the case of anonymous or pseudonymous works, protection subsists for 50 years counted from the date on which the work was first published. Copyright is exercised by the publisher or distributor of the work

Where a pseudonym does not conceal the author's identity from the public, or where the author of an anonymous or pseudonymous work reveals his true identity, the term of protection is that provided for in paragraph 2 of this Article.

In the case of works published after the author's death, protection subsists for 50 years counted from 1 January of the year following that in which the work was first published. Copyright is exercised successively by the executor, heirs, spouse or any other heirs to whom the rights of the author accrue.

In the case of photographic works, Article 19 (new) stipulates that protection subsists for 50 years counted from the date on which the work was created. The same term is provided for software (new Article 47).

In the case of cinematographic or audiovisual works, the term of protection is also 50 years counted from the date of the first lawful public performance of the work.

Where performance has not taken place, the term of protection is 50 years counted from the date on which the first reference copy was made (Article 42-1 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994).

Related rights

The term of protection of performers' rights is 50 years counted from 1 January of the year following that in which the performance was fixed on a phonogram or videogram.

The term of protection of the rights of producers of phonograms or videograms is 50 years counted from the year following that in which the phonogram or videogram was released or, failing such release, 50 years counted from 1 January of the year following that in which the fixation of the phonogram or videogram took place.

Protection of the rights of broadcasting organizations subsists for 20 years counted from 1 January of the year following that in which:

- The fixation took place, in the case of phonograms or videograms and the performances fixed on them;
- the performance took place, in the case of performances not fixed on phonograms or videograms;
- the broadcast took place, in the case of broadcasts.

8. Please state how your legislation grants the retroactive protection provided pursuant to Article 18 of the Berne Convention (the obligation of which derives from Article 9 of the TRIPS Agreement) and Article 14.6 of the TRIPS Agreement.

Article 18.1 of the Berne Convention provides for retroactive effect in respect of works which existed at the moment of the Convention's coming into force. It stipulates that such works may be protected where the term of protection has not yet expired in the country of origin.

Article 18.2 stipulates, as an exception to the above principle, that "if [...] through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew".

Under Tunisian law, the principle of non-retroactivity of laws is deemed to be a general principle of law settling the problem of conflict of laws in time, meaning that a new law does not apply to acts and facts that were governed by a pre-existing law.

This principle is enshrined in the provisions of the Tunisian Constitution governing criminal matters. Article 13 of the Constitution thus stipulates that the penalty is *in personam* and cannot be pronounced except under a provision of pre-existing legislation.

Likewise, Article 1 of the Penal Code stipulates that "no one may be punished except under a provision of a pre-existing law. Where a law more favourable to the accused is enacted after the occurrence of the fact but prior to the final ruling, that law alone shall apply".

The principle of non-retroactivity of laws recognizes exceptions in civil matters. Among these exceptions is a text that expressly provides for retroactivity, i.e. that allows retroactive application. Article 18.1 of the Berne Convention, duly ratified by Tunisia (which is one of the 10 countries that established the Berne Convention), may be regarded as one of the exceptions where retroactivity (in civil matters) is recognized.

9. Please explain whether the *droit de suite* provided for in Article 14^{ter} of the Berne Convention is protected in your legislation.

Article 25 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property provides for authors' *droit de suite* in manuscripts and three-dimensional works.

This Article stipulates that "the authors of manuscripts and three-dimensional works shall have an inalienable right, despite any assignment of the original work, to participate in the proceeds of any sale of the work made at auctions or through a dealer.

After the death of the author, this resale royalty right shall subsist for the remainder of the current Gregorian year and for the following 50 years. Five per cent of the proceeds of the sale shall be levied for the benefit of the author or his heirs".

C. TRADEMARKS

10. Please give the definition of a sign under your national legislation and explain under what conditions it is protectable.

According to Article 2 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks, marks are visible signs that distinguish products offered for sale or services provided by a natural or legal person.

Article 2 further provides that marks consisting of appellations of any kind, figurative signs and sounds are eligible for protection.

Under the terms of Articles 3 and 5 of the Law, however, signs devoid of distinctiveness, signs infringing prior rights, well-known marks and marks contrary to *ordre publique* and morality are excluded from protection.

Moreover, Article 6 of the Law specifies that ownership in a mark is acquired by registration with the industrial property agency.

11. Please confirm whether or not services are a protectable subject-matter in your trademark law. Please confirm if signs, such as trade names, are protectable. Please describe if elements such as sound, perfumes and containers are protectable.

Service marks, like trademarks, are protected in Tunisia under Law No. 2001-36 of 17 April 2001. Article 1 states that "the object of this Law is to establish rules relating to the protection of trademarks and service marks".

In Tunisia, trade names are protected under the law on trade registration and may also be registered as trademarks if the owners use them as such.

Article 5(c) of the Law of 17 April 2001 on trademarks stipulates that a sign that infringes a trade name may not be adopted as a trademark, if there is a risk of confusion in the mind of the public.

Under the terms of the above Law, only sounds (Article 2(c) and shapes of products (Article 2(b)) are eligible for trademark protection.

12. Please explain what the requirements of use are, if any, as a condition for trademark registration. Please explain the definition of use and the conditions of maintenance of a registration in that respect.

Under the terms of Article 34 of Law No. 2001-36 of 17 April 2001, the owner of a mark who, without good cause, fails to make serious use of it, for at least one of the goods or services covered by the registration, during an uninterrupted period of five years will be liable to forfeit his rights.

However, use is not a prerequisite for trademark registration.

As regards the definition of use, Article 34.2 specifies that "serious use of a mark shall include:

- Affixing the mark to goods or their packaging for marketing purposes;
- use of the mark in a modified form that does not change its distinctive character;
- use made with the consent of the owner of the mark or by any person authorized to use a collective mark".

13. Please confirm whether or not your legislation permits that the registration of trademarks be indefinitely renewable.

Registration of trademarks is renewable indefinitely following expiry of the term of protection of 10 years counted from the date of filing the application for registration (Article 16 of the Law of 17 April 2001).

14. Please describe the special requirements, if any, prescribed by your legislation concerning the use of a trademark.

The special requirements concerning use of a trademark are as follows.

Under the terms of Article 34 of Law No. 2001-36 of 17 April 2001, action for forfeiture of the rights of the owner of a mark may not be brought where, in the interval between expiry of the five-year period and the filing of such action, serious use of the mark has either begun or been resumed.

However, serious use of the mark does not constitute an obstacle to forfeiture if undertaken within the three months preceding the action for forfeiture and after the owner became aware of the possibility of an action for forfeiture. It is the responsibility of the owner of the mark against whom the action for forfeiture is brought to prove that the mark has been used.

D. GEOGRAPHICAL INDICATIONS

15. Please explain whether or not your trademark registration authority refuses a trademark application if it contains a geographical indication.

Under Article 20 of Law No. 99-57 of 28 June 1999 on registered appellations of origin and indications of source of agricultural products, the industrial property agency may not grant any trademark for a registered appellation of origin or an indication of source if the trademark application is filed after the territory covered by the registered appellation of origin or the indication of source has been defined and made public.

If the trademark application was filed before the territory in question was defined and made public, the Ministry of Agriculture may oppose registration of the mark, pursuant to Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks.

16. Please give the definition of a geographical indication in your legislation.

Law No. 99-57 of 28 June 1999 on the protection of appellations of origin defines a registered appellation of origin as the name of the country, natural region or part of a region from which the product originates and as deriving its value and specific features from its geographical environment, which consists of natural and human factors.

The term "natural factors" generally refers to the geographical environment in which the product originates, including characteristics relating to land, water, plant cover and climate.

The term "human factors" encompasses in particular production, manufacturing or processing methods and the specific techniques acquired by the producers or manufacturers in the region concerned.

Production methods must derive from ancient, stable and well-known local traditions.

The term "indication of source" is defined in Article 3 of the Law as the name of the country, natural region or parts of regions from which the product derives its characteristics and reputation and where it is produced, processed or manufactured.

17. Please describe and explain the provisions of your legislation establishing a link, if any, between the characteristics of an indication and its geographical origin.

According to Article 2 of Law No. 99-57 of 28 June 1999 on registered appellations of origin and indications of source of agricultural products, the link between the characteristics of a geographical indication and its geographical origin is that a product originating in a given region derives its value and specific features from its geographical environment, which consists of natural and human factors.

18. Please describe how additional protection is granted by your legislation to wines and spirits. Please mention other types of products, if any, covered by this additional protection.

In Tunisia, wines and spirits are protected under Law No. 99-57 of 28 June 1999 on registered appellations of origin and indications of source of agricultural products. The Law does not provide for additional protection for wines and spirits.

19. Please explain how exceptions under Article 24 of the TRIPS Agreement are used in your jurisdiction. Please provide examples of the use of the exceptions by courts or lists of names considered as generic in your jurisdiction.

The exceptions under Article 24 of the TRIPS Agreement are provided for in Article 20 of Law No. 99-57 of 28 June 1999. This Article stipulates that the industrial property agency may not grant any trademark similar to an indication of source if the trademark application is filed after the territory covered by the registered appellation of origin or the indication of source has been defined and made public.

E. INDUSTRIAL DESIGNS

20. Please explain whether or not your legislation extends to the protection of designs dictated essentially by technical or functional considerations. Please explain how textile designs are protected.

Article 2 of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs specifies that the Law applies to "any new design, any new three-dimensional shape or any industrial product that differs from similar designs by having either a distinct and recognizable configuration conferring novelty or one or more outward effects giving it a new and characteristic appearance".

Article 2.2 provides that "if the same subject-matter may be regarded as both a new industrial design and a patentable invention and if the elements that constitute the novelty of the industrial design are inseparable from those of the invention, the said subject-matter may be protected only in accordance with the provisions applicable to patents".

Textile designs are protected on the same terms as all other products, but they also enjoy the following advantages:

- Article 15: possibility of delaying publication;
- Article 10: term of protection, at the applicant's choice, of five, 10 or 15 years;
- collective filing.

21. Please explain how your legislation protects right holders of a design against importing of articles bearing embodied or copied design.

Article 4 of Law No. 2000-21 of 6 February 2000 on the Protection of Industrial Designs provides that any creator of an industrial design or his successors in title has the exclusive right to exploit or sell the design, without prejudice to the rights conferred by other statutory provisions and in particular the legislation relating to the protection of literary and artistic works.

Third parties not having the consent of the owner of an industrial design or his successors in title are prohibited from making, selling or importing goods bearing a design which is a copy, or substantially a copy, of the protected design, where such acts are undertaken for commercial purposes.

To enforce the above rights, the Law contains an entire chapter (Chapter V) relating to border measures providing for suspension of the free circulation of counterfeit industrial designs.

22. Please state whether or not your legislation provides for the right to issue a compulsory licence for industrial designs.

Law No. 2000-21 of 6 February 2000 on the Protection of Industrial Designs does not provide for the right to issue compulsory licences for industrial designs.

23. Please indicate for what period of time your legislation grants protection for industrial designs.

Under the terms of Article 10 of the aforementioned Law, an industrial design is protected, at the applicant's choice, for a period of five, 10, or 15 years at most.

F. PATENTS

24. Please describe how your legislation defines the notions of: novelty, inventiveness and industrial application.

Article 4 of Law No. 2000-84 of 24 August 2000 on Patents stipulates that "an invention shall be considered new if it does not form part of the state of the art".

The state of the art comprises everything that has been made accessible to the public by written or oral description, use or any other means prior to the date of filing the patent application or the date of priority validly claimed for this application.

According to Article 5 of the Law on Patents, invention must also involve an inventive step, i.e. it must not obviously derive, to a person skilled in the relevant field, from the state of the art on the date of filing the patent application.

Article 6 of the Law states that an invention is susceptible of industrial application if its subject-matter can be produced or used in any type of industry or in agriculture.

25. Please explain whether or not in your legislation, patent or otherwise, patent rights are enjoyed without any exclusions. If exclusions are provided for, please describe in detail how these exclusions are applied in legal as well as practical terms.

Law No. 2000-84 of 24 August 2000, which deals with the protection of inventions, provides for exclusions from patent rights. These exclusions are listed in Articles 47, 48, 49 and 50 of the Law, which stipulate that the exclusive rights conferred by a patent do not extend to the following acts:

- Acts performed privately for non-commercial purposes;
- acts performed for experimental purposes relating to the subject-matter of the patented invention;
- the extemporaneous preparation for individual cases in a pharmacy of medicines on the basis of a medical prescription, or the acts relating to the medicines thus prepared;

- the offer, importation, stocking or use, on Tunisian territory, of the patented product or the product obtained by a patented process, after the product has been lawfully placed on the market of any country by the patent holder or with his explicit consent;
- acts required for the production of generic drugs; products resulting from such acts may not be exploited for commercial purposes until the term of protection of the patent has expired;
- the use of patented subject-matter on board aircraft, land vehicles or foreign ships which temporarily or accidentally enter the airspace, territory or territorial waters of the Tunisian Republic.

26. Please explain whether your legislation provides for the exclusion of inventions from patentability based on *ordre public* or morality. If so, please explain the relevant section of your legislation and explain its formulation. Please also explain if it has been applied in practice.

Article 3.2 of the Law of 24 August 2000 protecting inventions provides that "a patent may be not delivered for an invention the publication or working of which would be contrary to morality, *ordre public*, public health or environmental protection". The Article further specifies, however, that "working the patent may not be considered as such merely because it is restricted by a statutory or regulatory provision".

As an example, in practice anyone may not manufacture cigarettes or produce wine, but anyone may file patent applications in these fields.

27. Please explain whether or not diagnostic, therapeutic and surgical methods are excluded from patentability in your legislation. If so, please explain the relevant section of your legislation and explain its formulation.

Diagnostic, therapeutic and surgical methods practised on the human or animal body are excluded from patentability under Article 2(d) of the Law of 24 August 2000.

This does not, however, apply to preparations and in particular to products and compositions used to put such methods into practice.

28. Please explain whether or not plants, animals and essentially biological processes are excluded from patentability in your legislation. If so, please explain the relevant section of your legislation and explain its formulation.

Plants, animals and essentially biological processes for the breeding of animals and plants are excluded from patentability under Article 3 of the Law.

This does not, however, apply to medical biological processes or the products of such processes.

29. Please describe how micro-organisms, non-essentially biological processes, microbiological processes and plant varieties are protected in your legislation. Please explain, in this respect, the relevant sections of your legislation.

Medical biological processes, including micro-organisms and the products of such processes are patentable (Article 3 of Law No. 2000-84 of 24 August 2000 on Patents).

Plant varieties are protected in Tunisia under Law No. 99-42 of 10 May 1999 on Seeds, Seedlings and Plant Varieties.

30. Please explain how your legislation protects patent right holders against the importing and against the offering for sale of a patented invention.

Article 46 of Law No. 2000-84 of 24 August 2000 provides that a patent confers an exclusive right of exploitation on its holder or his successors in title, meaning that third parties are prohibited from performing the following acts without the consent of the patent holder or his successors in title:

- Making, offering, placing on the market or using a product which is the subject-matter of the patent, or importing or stocking a product for such purposes;
- using the manufacturing process that is the subject-matter of the patent;
- offering, placing on the market or using the product obtained directly by a process which is the subject-matter of the patent, or importing or stocking a product for such purposes.

For the purpose of enforcing the above rights, the Law contains an entire chapter (Chapter XIII) relating to border measures providing for suspension of the free circulation of counterfeit products.

31. Please state if your legislation provides for patent product protection of pharmaceutical and agricultural chemical products. In the affirmative, please indicate the legal reference.

Under the terms of Article 1 of the Law on Patents, patent protection is afforded for any invention of a product or manufacturing process. Pharmaceutical and agricultural chemical products are therefore patentable.

32. Please clarify if the patent protection of a process, as provided for in your legislation, covers the product obtained directly by that process.

Article 1 of the Law on Patents states that "any invention of a product or manufacturing process may be protected by a document referred to as a 'patent'".

Article 85.2 of the Law specifies, however, that "if the patent subject-matter is a product manufacturing process, the court is entitled to order the defendant to prove that the process used to obtain an identical product is different from the patented process. If the defendant fails to provide such proof, any identical product manufactured without the consent of the patent holder shall be presumed to be obtained by the patented process if the product is new".

33. Please explain the additional conditions, if any, in your legislation other than the sufficient disclosure of the invention in Article 29 of the TRIPS Agreement (e.g. submission of justification for access to genetic material or prior informed consent to its use). If such additional conditions exist, please point out the relevant legislation and describe the additional conditions in detail.

Tunisian legislation does not provide for any additional conditions other than that the invention must be disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art in the relevant field of technology (Article 21 of the Law on Patents).

34. Please describe if your legislation provides for limited exceptions to the exclusive rights conferred by a patent. If so, please make a reference to relevant legislation.

Tunisian legislation provides for exceptions to the exclusive rights conferred by a patent. These are set forth in Articles 47, 48, 49 and 50 of the Law on Patents.

The exclusive rights conferred by a patent do not extend to the following acts:

- Acts performed privately for non-commercial purposes;
- acts performed for experimental purposes relating to the subject-matter of the patented invention;
- the extemporaneous preparation for individual cases in a pharmacy of medicines on the basis of a medical prescription, or the acts relating to the medicines thus prepared;
- the offer, importation, stocking or use, on Tunisian territory, of the patented product or the product obtained by a patented process, after the product has been lawfully placed on the market of any country by the patent holder or with his explicit consent;
- acts required for the production of generic drugs; products resulting from such acts may not be exploited for commercial purposes until the term of protection of the patent has expired;
- the use of patented subject-matter on board aircraft, land vehicles or foreign ships which temporarily or accidentally enter the airspace, territory or territorial waters of the Tunisian Republic.

35. Please explain whether or not your legislation provides for compulsory licensing. If so, please explain in detail the conditions under which a compulsory licence may be granted. In particular, please explain how your national legislation considers individual merits in the authorization of such use.

Tunisian legislation provides for a compulsory patent licensing system. Under the terms of Article 69 of the Law on Patents, after the expiry of a period of four years counted from the date of filing the application or three years from the granting of the patent, whichever is later, if the patented invention is not worked, any interested party may seek a compulsory licence at any time, if industrial exploitation of the patented invention has not commenced or no effective and serious preparations for its exploitation in Tunisia have been made within the relevant time-limit.

Compulsory licences may also be granted if the subject-matter of the invention has not been commercialized in sufficient quantities to meet the needs of the Tunisian market and the industrial or commercial exploitation of the patented invention has been discontinued in Tunisia for longer than three years.

To obtain a compulsory licence, an application must be filed with the competent court, along with proof that the applicant has approached the patent holder to seek a contractual licence but has not been able to obtain such a licence on reasonable terms and conditions and within a reasonable period of time.

The applicant must also provide evidence that he is in a position to work the invention in an effective and serious manner (Article 70).

Pursuant to Articles 74, 75 and 76 of the above Law, the court examines the merits on which use may be authorized.

36. Please explain how your legislation explicitly ensures that a proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. In this context, how do you define "reasonable period of time"? Please also explain how your legislation ensures that the use of a compulsory licence shall be authorized predominantly for the supply to the domestic market of the Member authorizing such use.

According to Article 70 of Law No. 2000-84 on Patents, a person applying for a compulsory licence must provide proof that he has previously approached the patent holder by registered letter, with acknowledgement of receipt, to seek a contractual licence but has been unable to obtain such a licence on reasonable terms and conditions and within a reasonable period of time.

All forms of evidence are admissible for the purpose, and the court weighing the merits of the case has sole power to assess the evidence produced in support of an application for a compulsory licence.

Article 69 of the Law states that after the expiry of a period of four years counted from the date of filing the application or three years from the granting of the patent, whichever is later, if the patented invention is not worked, any interested party may seek a compulsory licence at any time in any of the following cases:

- Where industrial exploitation of the patented invention has not commenced or no effective and serious preparations for such exploitation in Tunisia have been made within the time-limit established in Article 51;
- where the subject-matter of the invention has not been commercialized in sufficient quantities to meet the needs of the Tunisian market;
- where the industrial or commercial exploitation of the patented invention has been discontinued in Tunisia for longer than three years;
- the court rules on an application for compulsory licensing after hearing the parties (Article 73 of the Law on Patents) and sets the licensing conditions, in particular the term of the licence, its scope and the amount to be paid to the patent holder, which must be commensurate with the scope of exploitation of the invention (Article 74 of the Law on Patents).

Licences designed solely for the supply of the domestic market are governed by Chapter XI on Ex Officio Licences. Article 78 of the Law on Patents stipulates that "the Minister of Industry may give patent holders formal notice to work the patents in such a way as to meet the needs of the national economy or the need for environmental conservation".

37. Please state if your legislation grants additional protection for innovations after the 20 years of patent protection have lapsed.

Tunisian legislation does not afford additional protection for innovations after the 20 years of patent protection have lapsed.

38. Please explain how your legislation provides for the reversal of the burden of proof in relation to process patents.

Under the terms of Article 85 of the Law protecting inventions, if the patent subject-matter is a product manufacturing process, the court is entitled to order the defendant to prove that the process used to obtain an identical product is different from the patented process.

If the defendant fails to provide such proof, however, any identical product manufactured without the consent of the patent holder will be presumed to be obtained by the patented process if the product is new.

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

39. Please describe how your legislation protects topographies.

Layout-designs of integrated circuits are protected under Law No. 2001-20 of 6 February 2001, to the extent that they are the result of their creators' own intellectual efforts and are not commonplace, at the time of their creation, in the integrated circuits sector (Article 3 of the Law).

Applications for layout-designs of integrated circuits must be filed with the industrial property agency (Article 8).

40. Please explain what protection your national legislation grants to right holders against the unlawful importation, sale or distribution for commercial purposes of topographies including integrated circuits or other articles in which a topography is incorporated in accordance with Article 36 of the TRIPS Agreement.

In accordance with Article 36 of the TRIPS Agreement, Article 17 of Law No. 2001-20 on the Protection of Layout-Designs of Integrated Circuits prohibits third parties "from exploiting the reproduction of a layout-design of integrated circuits for commercial purposes or from importing to such ends a reproduction of any product incorporating such a layout-design".

The Law also contains an entire chapter (Chapter VII) relating to border measures providing for suspension of the free circulation of products incorporating copied layout-designs of integrated circuits.

41. Please explain how your legislation provides for the derogation from Article 36, as specified in Article 37 of the TRIPS Agreement, where a person has no knowledge or reasonable grounds to know when acquiring an integrated circuit or an article incorporating such an integrated circuit that it contains an unlawful topography.

Pursuant to Article 37 of the TRIPS Agreement, which provides for derogation from Article 36 of the Agreement, the prohibition in Article 17 of Law No. 2001-20 on the Protection of Layout-Designs of Integrated Circuits is not effective against a person who acquired an integrated circuit *bona fide*. That person will nevertheless be liable for appropriate indemnification if he intends to pursue the commercial exploitation of the circuit in question.

42. Please state the term of protection granted by your legislation to topographies.

The protection of layout-designs of integrated circuits commences on the date of filing the application or on that of the first commercial exploitation, provided that such exploitation does not exceed two years if it pre-dates the filing of the application.

The protection of layout-designs lapses at the end of the 10th calendar year following the date on which it commenced (Article 18).

H. PROTECTION OF UNDISCLOSED INFORMATION

43. Please explain whether your legislation grants a defined period of time for the protection of undisclosed information. If so, please give the time span.

Tunisian legislation establishes a procedure for the identification and protection of confidential information.

44. Please explain how your legislation defines "undisclosed information".

With reference to Article 168 of the Labour Code, undisclosed information includes information of a confidential nature and matters relating to manufacturing processes that come to a person's knowledge in the course of his duties.

Likewise, Article 61 of the Penal Code specifies that such information may concern either an invention of interest for national defence or information, research or manufacturing processes relating to an invention of interest for defence.

45. Please explain how your legislation defines data submitted to governments or governmental agencies.

Pharmaceuticals are governed by Laws Nos. 73-55 of 3 August 1973 and 85-91 of 22 November 1985. Implementing rules and regulations have been enacted, including:

- Decree No. 90-1400 of 3 September 1990, laying down rules of good manufacturing practice for medicines for human use and regulating quality control, packaging, labelling, denomination and advertising;
- Decree No. 90-1401 of 3 September 1990 laying down procedures for medical or scientific testing of medicines for human use;
- Order of the Minister of Public Health of 10 September 1996 establishing the procedures for authorization to market medicines for human use and renewal and assignment of such authorization.

The above texts, pursuant to the laws that gave rise to them, provide that infringement will be subject to disciplinary sanctions and civil and criminal penalties.

The processing of applications relating to medicines is governed by procedures and provisions that guarantee the security of information. They are detailed as follows.

Reception of applications

This is handled by a pharmaceutical inspector dealing directly with the person delegated by the laboratory filing the application. The application, countersigned by the inspector, is then returned to the person with an official filing date.

Assessment of applications

Applications are kept under the inspector's responsibility. Pharmaceutical files are sent to the National Drug Control Laboratory, which determines whether the product is in conformity with what is stated in its files, in the light of current pharmaceutical knowledge. Clinical files are submitted to an expert appointed by Ministerial order for a detailed report to an expert committee.

Assessment of products similar to registered products

Data confidentiality is crucial at this stage, in order to prevent the use of data recorded in another file.

In Tunisia, as in most countries with a reliable registration system, the procedure is based on the following:

- Clinical data pertaining to a molecule that is the subject-matter of a second application is not required because the molecule has already been analysed;
- regulations require the product to be approved for marketing in its country of origin (*Autorisation de mise sur le marché* - AMM); where this is a country having signed the WTO Agreements, responsibility for observance of the provisions governing patents lies with the country of origin, if no application for a patent specific to another country has been filed; where the country has not adhered to the WTO Agreements, it is for Tunisia to ensure observance of intellectual property provisions;
- application for marketing approval requires submission of a pharmaceutical file, including analysis methods which must satisfy either of the following conditions:
 - (a) where the product is described in an international pharmacopoeia, reference to the latter is sufficient to validate the methods used;
 - (b) if such is not the case, the supplier is required to present a method that he himself has validated without referring to the data furnished by the first holder of the marketing authorization.

Scientific publications may be used, however, for the relevant authority regards the results they contain as having become public knowledge at the initiative of the patent holder or of the international scientific community.

The procedure applied by Tunisia has been in force for more than 20 years, making it possible to avoid conflicts of interest and ensuring data confidentiality. It has enabled the relevant authority to acquire the status of WHO Collaborating Centre for drug registration and pharmaceutical regulation.

Article 103 of Law No. 2000-84 of 24 August 2000, which covers pharmaceutical products, makes provision for delaying implementation of the Law according to the extension period set in the relevant WTO Agreement.

Tunisia nevertheless assures the admissibility of patent applications pursuant to that same international Agreement.

All the aforementioned information and references to regulation are public and can be accessed at: www.dpm.tn.

I. ENFORCEMENT

46. Please describe how your legislation provides for effective action against infringement of intellectual property rights.

Under Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, copyright infringements are punishable by a fine of 500 to 5,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of one to six months.

Article 52 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 increases the fine to an amount ranging between 1,000 and 50,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of up to 12 months.

These penalties may be accompanied by forfeiture of the infringing goods, their destruction and the temporary or definitive closure of the establishment where the infringement was committed.

As regards the authorities responsible for identifying infringements and instituting criminal proceedings, Article 54, paragraph 1, of Law No. 94-36 of 24 February 1994 states that "the identification of breaches of this Law and the drawing up of records of evidence are entrusted to the criminal investigation police authorities and officials of the Ministry of Culture duly sworn and empowered for this purpose".

Article 54 (new) of the draft law amending and supplementing Law No. 94-36 extends these prerogatives to customs officials, officials responsible for monitoring economic activity and municipal regulatory officials.

The authorities may institute criminal proceedings on their own initiative. Thus, paragraphs 2 and 3 of Article 54 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 stipulate that "the above-mentioned officials may seize the necessary documents and take samples of the counterfeit products for the purposes of the investigation and to establish proof of the infringement, against receipt. They may also seize, as a preventive measure, any products suspected to be counterfeit and not in accordance with current regulations".

Tunisian industrial property legislation provides for effective enforcement of industrial property rights. Infringement of such rights is an offence giving rise to civil and criminal liability.

There are also additional enforcement measures in that the court may order, at the unsuccessful party's expense, the ruling to be posted up in places of its own choosing and to be published, in full or in part, in newspapers of its choice, along with the destruction and forfeiture of the counterfeit goods.

47. Please explain whether or not your legislation provides for a mechanism to appeal to judicial bodies of final administrative decisions.

Tunisian industrial property legislation establishes a mechanism to appeal to the relevant courts of final administrative decisions. The appeal process is initiated by written application addressed or handed to the court registrar within the time-limit set by the law.

Leave to appeal to judicial bodies of final administrative decisions is provided for in Articles 27 to 33 of the Law on the Protection of Layout-Designs of Integrated Circuits, Articles 37 to 43 of the Law on the Protection of Trademarks, Articles 17 to 23 of the Law on the Protection of Industrial Designs and in Articles 39 to 45 of the Law on Patents.

48. Please describe how your legislation authorizes judges to order production of evidence by the opposing party. Please give precise information on what measures are taken to ensure the protection of confidential information.

Tunisian legislation empowers the judicial authorities to order a party in proceedings, on application by the opposing party, to produce the evidence lying in its control.

Articles 213 to 223 of the Code of Civil and Commercial Procedure give the presiding judge authority to serve an order on either party in a case following an *ex parte* application, so as to ensure the protection of rights and interests that must not be left unprotected.

In cases of extreme urgency, judges may rule in their private homes on questions submitted to them. Enforcement of rulings issued in this manner is not subject to the appending of the seal of the court or "*ad hoc*" registration. These formalities are completed later.

Article 101 of the same Code states that "if it is necessary to obtain an expert's report and the parties fail to agree on the selection of the expert, the expert shall be appointed by the judge".

Tunisian legislation establishes the following procedure for the protection of confidential information:

Article 253 of the Penal Code states that "any person who discloses the contents of a letter, telegram or any document belonging to another party without authorization shall be liable to a prison sentence of three months".

Article 254 of the Penal Code states that "any doctor, surgeon or other medical personnel, as well as any pharmacist, midwife or any other person in whom secrets are vested by virtue of their status or profession who reveals such secrets, except where required or permitted by law to report the matter, shall be liable to a prison sentence of six months and a fine of 500 francs".

The general regulations governing the conduct of public-sector personnel place civil servants under obligations of professional secrecy and discretion; these general regulations include the following:

- The General Regulations for State employees, including employees of local public authorities and administrative public bodies;
- the General Regulations for the employees of Boards, industrial and commercial public bodies, and companies whose capital is held directly or indirectly by the State or by public authorities;
- the General Regulations for magistrates;
- the General Regulations for customs staff;
- the General Regulations for the personnel of the internal security forces.

Furthermore, Article 168 of the Labour Code provides that "members of company advisory committees and staff representatives are bound by the obligation of professional secrecy with respect to all information of a confidential nature coming into their possession while serving in that capacity, and to all matters relating to manufacturing processes.

Any breach of this obligation shall entail the penalties laid down in Articles 138 and 254 of the Penal Code".

Article 138 of the Penal Code states that "in addition to a fine, any manager, clerk or worker of a factory who discloses or communicates a manufacturing secret shall be liable to a prison sentence of two years. Attempts to do so are also punishable".

Under Article 254, as cited above, persons in possession of documents belonging to a third party that fail to observe secrecy are liable to six months' imprisonment and a fine.

Article 85 of Law No. 2000-84 of 24 August 2000 protecting inventions stipulates that the courts are empowered to order the production of evidence by the opposing party, where the patent subject-matter is the product manufacturing process.

In this case, the court has authority to order the defendant to prove that the process used to obtain an identical product is different from the patented process.

Thus, in the adduction of proof to the contrary, Article 85.3 of the Law stipulates that "the legitimate interests of the defendant in protecting his manufacturing and trade secrets shall be taken into account".

49. Please quote provisions of your legislation that authorize judges to order a defendant to desist from an infringement.

Under Tunisian legislation, the judicial authorities are empowered to order a defendant to desist from an infringement, by issuing interim orders, payment orders and final judgments.

According to Article 86 of the Code of Civil and Commercial Procedure, "if it sees this as necessary, the court may ask the reporting judge to carry out any investigative action, such as an inquiry, visit to the scene, expert's report, taking of pleas of forgery and any other action that will help to establish the truth".

The court may, during the hearing and in the presence of the parties, set the date for the investigative action so ordered, specifying the date and time for the appearance of the parties in the chambers of the reporting judge or at the location of the dispute or any other location.

Article 225 of that same Code states that "in any event, the court may require ex officio the participation of a third party in the proceedings where it sees the presence of that party as essential for a correct appreciation of the matter at issue".

If it is necessary to obtain an expert's report and the parties fail to agree on the selection of the expert, the expert is appointed by the judge.

Interim orders

Article 201 of the Code of Civil and Commercial Procedure (CCCP) states as follows:

"Interim orders may be made on urgent applications without prejudice to the main proceedings."

"Interim orders on urgent applications may be made by the president of the court of first instance or his deputy, or by the district judge, where so authorized by law" (Article 202 of the CCCP).

"Interim orders made on urgent applications are enforceable 24 hours after being served, except where the court has granted an extension.

The order will be enforced without security, unless the judge has ordered that security be provided" (Article 207 of the CCCP).

Payment orders

Under the terms of Article 59 of the CCCP, any claim for the payment of a debt, where the latter, whatever its nature, is for a specific amount and has a contractual origin, may be submitted under the payment order procedure.

Judgments

(The Code establishes three judicial levels, i.e. first instance, appeal and cassation.)

The judgment will not be final if the decision can be appealed. However, it may still be made immediately enforceable, with or without security, depending on the circumstances of the case (Articles 126 and 286 of the CCCP).

Final judgments

The final judgment (after appeals have been exhausted or the time-limits for lodging appeals have expired) brings the case to a close by deciding the question forming the subject-matter of the proceedings.

The court may issue an interim order ordering a defendant to desist from an infringement.

Thus, measures dictated by urgency or difficulties relating to the enforcement of a judgment delivered or a writ of execution may be taken by the president of the competent court or his deputy sitting in chambers, in accordance with Articles 201 and 210 of the CCCP.

Law No. 2000-84 on Patents (and Article 87 in particular) accordingly provides that "where an action for infringement of a patented invention is brought before the court, the presiding judge may issue an interim order prohibiting, provisionally and on pain of a fine, the continuation of the allegedly infringing acts or make the continuation of such acts subject to the provision of security intended to ensure the indemnification of the patent holder". This is also provided for in the Law on the Protection of Trademarks (in particular Article 49).

50. Please quote what provisions of your legislation authorize judges to order the payment to the right holder of adequate damages to compensate the injury he suffered.

Under Articles 82 and 83 of the Code of Obligations and Contracts (COC), anyone who knowingly or deliberately causes material or moral damage to others must make good the damage, where it is established that his action was the direct cause.

Article 82 of the Law on Patents, Article 34 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 24 of the Law on the Protection of Industrial Designs and Article 44 of the Law on the Protection of Trademarks likewise provide for the civil liability of the infringer.

51. Please quote what provisions of your legislation authorize judges to order the payment of the right holder's expenses by the infringer.

As a general rule, ordinary law (i.e. the Code of Obligations and Contracts) provides for compensation for injury suffered, including lawyers' fees, for example.

Moreover, according to Article 191 of the Code of Penal Procedure, "the costs of the proceedings shall be ordered against the person convicted".

52. Please explain if and how judges have the authority to order that infringing goods are placed outside channels of commerce or destroyed.

Article 55 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property empowers the competent court to order, ex officio or on request, the confiscation or destruction of fraudulent copies and the temporary or definitive closure of the establishment in which the infringement has been ascertained.

As regards industrial property, in addition to seizing the infringing goods the court may order that they be placed outside the channels of commerce, destroyed or confiscated. This is provided for in Article 26 of the Law of 6 February 2001 on the Protection of Industrial Designs, Article 36 of the Law of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits, and Article 55 of the Law of 17 April 2001 on the Protection of Trademarks.

53. Please quote what provisions of your legislation authorize judges to indemnify a defendant in the event of abuse by the plaintiff.

It is for the defendant to bring action for compensation for injury suffered as a result of unreasonable and unjustified claims, and ordinary law provides for such action in the courts.

Article 50-4 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 states that "subject to completion of all customs formalities, the suspension of the release of the products shall be revoked automatically if the author, holder of related rights or his representative has failed to provide the customs services, within 10 days from notification of the suspension of the release of the products, with proof of the following: [...] Lodgement of a security [...] the amount of said security shall be set by the competent court". The posting of security sufficient to cover his liability to the persons concerned in the event of it being subsequently established that the products in question do not infringe copyright or related rights would serve at least partly to guarantee any indemnification of the defendant decided by the courts under ordinary law and a priori discourage unreasonable and unjustified claims.

As regards industrial property, Articles 86 and 87 of the Law on Patents, Article 38 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 28 of the Law on the

Protection of Industrial Designs and Article 50 of the Law on the Protection of Trademarks give the courts authority to indemnify the defendant in the event of the plaintiff abusing enforcement procedures.

The above Articles specify that where an action for infringement is brought before a court, the judge may, provisionally and on pain of a fine, prohibit the continuation of the allegedly infringing acts or make the continuation of such acts subject to the provision of security designed to ensure the indemnification of any damage suffered by the defendant if the action for infringement is subsequently deemed to be unfounded.

54. Please explain how your legislation implements Article 50 of the TRIPS Agreement.

In conformity with the TRIPS Agreement (in particular Article 50), which empowers the judicial authorities to order prompt and effective provisional measures, generic legislation (ordinary law) provides, as mentioned above, that interim orders and orders on *ex parte* applications may be made for the adoption of appropriate provisional measures.

In order to prevent infringements of intellectual property, Articles 213 to 223 of the Code of Civil and Commercial Procedure give the presiding judge authority to serve an order on either party in a case following an *ex parte* application, so as to ensure the protection of rights and interests that must not be left unprotected.

In cases of extreme urgency, judges may rule in their private homes on questions submitted to them. Enforcement of rulings issued in this manner is not subject to the appending of the seal of the court or "*ad hoc*" registration. These formalities are completed later.

Orders on *ex parte* applications are exempted from the registration procedure and are enforced without delay by bailiffs. A request for the withdrawal of such an order does not suspend enforcement.

To preserve relevant evidence, Article 86 of the Code of Civil and Commercial Procedure provides that "if it sees this as necessary, the court may ask the reporting judge to carry out any investigative action, such as an inquiry, visit to the scene, expert's report, taking of pleas of forgery and any other action that will help to establish the truth". The judicial authorities may adopt provisional measures *inaudita altera parte* if need be. Article 207 of the Code thus specifies that "in cases of extreme urgency the court may order immediate enforcement before registration. It may also order enforcement without prior service". The judicial authorities may require the plaintiff to provide any reasonably available evidence.

Article 12 of the Code further stipulates that "the court is under no obligation to gather, supplement or produce evidence in support of the parties' claims". It is for the plaintiff to produce the evidence.

The judicial authorities may order prior posting of security to protect the defendant from any abuse. Paragraph 5 of Article 54-1 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 on Literary and Artistic Property thus provides that "under an order on an *ex parte* application, the president of the competent court may require prior posting of security by the applicant".

Where provisional measures are adopted *inaudita altera parte*, the affected parties will be duly informed. Such measures may be revoked if a decision on the merits of the case is not handed down within a reasonable period of time. Article 54 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 stipulates that "the record shall include the date

and place of the identification or confiscation measure and of the notice given to the infringer or his representative in person of the identified subject-matter of the infringement or of the confiscation measure, or, in the event of his absence, a copy of the record shall be sent to him by registered mail.

The records of the identification of the infringement and the confiscation measure shall be sent within seven days to the Public Prosecutor, who shall forward the documents to the competent court for a ruling on the approval or revocation of the confiscation measure within a maximum period of one month from the date on which the confiscation measure was carried out. If the court does not rule on the confiscation within the time-limit specified, the confiscation measure shall be revoked automatically".

Where it is subsequently found that there has been no infringement or threat of infringement, ordinary law generally provides for compensation for any material and moral damage suffered and proceedings may be instituted to seek reparation for injury resulting from unreasonable and unjustified action.

In an action for infringement of a patented invention, the court may, provisionally and on pain of a fine, prohibit the continuation of the allegedly infringing acts or make the continuation of such acts subject to the provision of security designed to ensure the indemnification of the patent holder (Article 87 of the Law on Patents). This is also provided for in the Law on the Protection of Trademarks (Article 49).

Application for prohibition or the posting of security, as mentioned above, is admissible only if the action on the merits appears to be serious and is brought within a maximum of 30 days of the industrial property right holder becoming aware of the facts on which it is based.

The court may also make the prohibition subject to the posting by the applicant of security designed to ensure the indemnification of any damage suffered by the defendant if the action for infringement is subsequently deemed to be unfounded.

55. Please identify the competent authorities in your jurisdiction who receive requests from right holders for an application to suspend the release of counterfeit goods by the customs authorities.

Under Tunisian industrial property legislation governing border measures, right holders may apply to the customs authorities for suspension of the release of counterfeit goods (Article 39 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 91 of the Law on Patents, Article 56 of the Law on the Protection of Trademarks and Article 31 of the Law on the Protection of Industrial Designs).

The Order of the Ministry of Finance of 3 December 2001 establishing the form in which to apply in writing for the suspension of import clearance for products bearing a counterfeit trademark and the procedures for lodging the application with the customs services specifies that the application must be lodged with the Directorate-General of Customs in Tunis.

The measure suspending the release of the products is revoked *ipso jure*, however, where the applicant fails to provide the customs services, within 10 working days of being notified of the suspension, with proof that he has initiated civil or criminal proceedings; that precautionary measures have been ordered by the president of the competent court; and that security sufficient to cover the applicant's liability in respect of the persons concerned has been posted.

56. Please indicate whether or not procedures are available to suspend the exporting of counterfeit goods.

None of the Tunisian industrial property provisions relating to border measures contains procedures for suspending the export of counterfeit goods.

57. Please indicate whether or not your legislation provides for a *de minimis* imports exception.

Tunisian industrial property legislation, in particular Article 99 of the Law on Patents, Article 47 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 39 of the Law on the Protection of Industrial Designs and Article 64 of the Law on the Protection of Trademarks, expressly specifies that the provisions relating to border measures do not apply to goods of a non-commercial nature in travellers' personal luggage, within the quantitative limits set by the laws and regulations in force.

58. Please explain how your legislation implements Article 61 of the TRIPS Agreement.

In addition to the payment of civil damages, Article 52 of Law No. 94-36 of 24 February 1994 on Artistic and Literary Property provides that copyright infringements are punishable by a fine of 500 to 5,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of one to six months.

Article 52 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 raises the fine to an amount ranging between 1,000 and 50,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of one to 12 months. These penalties may be accompanied by forfeiture of the infringing goods, their destruction and the temporary or definitive closure of the establishment where the infringement was committed.

As regards the authorities responsible for identifying infringements and instituting criminal proceedings, Article 54, paragraph 1, of Law No. 94-36 of 24 February 1994 specifies that "the identification of breaches of this Law and the drawing up of records of evidence are entrusted to the criminal investigation police authorities and officials of the Ministry of Culture duly sworn and empowered for this purpose".

Article 54 (new) of the draft law amending and supplementing Law No. 94-36 extends these prerogatives to customs officials, officials responsible for monitoring economic activity and municipal regulatory officials.

The authorities may institute criminal proceedings on their own initiative. Thus, paragraphs 2 and 3 of Article 54 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 stipulate that "the above-mentioned officials may seize the necessary documents and take samples of the counterfeit products for the purposes of the investigation and to establish proof of the infringement, against receipt. They may also seize, as a preventive measure, any products suspected to be counterfeit and not in accordance with current regulations".

Tunisian legislation provides for civil and criminal proceedings and penalties in the event of infringement of industrial property rights.

Counterfeiting is punishable by a fine of 5,000 to 50,000 dinars (Article 51 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks, Article 24 of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs and Article 83 of Law No. 2000-84 of

24 August 2000 on Patents); or by a fine of 1,000 to 50,000 dinars for infringements relating to layout-designs of integrated circuits (Article 34 of Law No. 2001-20 of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits), in addition to the fine of 500 to 2,000 dinars payable by anyone who causes to appear on his business documents, advertising or products words that give reason to believe that a layout-design has been registered

It should also be noted that in all these cases of infringement repeat offenders will be liable to imprisonment for one to six months and the doubling of the fine.

In the event of conviction, the court may order the infringing products to be destroyed or placed outside the channels of commerce and confiscated (Article 36 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 26 of the Law on the Protection of Industrial Designs and Article 55 of the Law on the Protection of Trademarks).

The seizure of counterfeit products is also provided for in Article 86 of the Law on Patents, Article 38 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 28 of the Law on the Protection of Industrial Designs and Article 50 of the Law on the Protection of Trademarks.

IV. RESPONSES TO QUESTIONS POSED BY THE UNITED STATES

A. GENERAL

1. Please describe, in relation to each form of intellectual property covered by the TRIPS Agreement, including plant variety protection, the manner in which national treatment and most favoured nation treatment are provided to nationals of other WTO Members.

Article 101 of the Law on Patents, Articles 17 and 18 of the Law on the Protection of Trademarks, Article 5 of the Law on the Protection of Industrial Designs and Article 6 the Law on the Protection of Layout-Designs of Integrated Circuits stipulate that foreigners as well as Tunisian nationals may request protection for all aspects of industrial property, provided that the principle of reciprocity applies.

This is also stipulated in Article 15, paragraph 2, of Law No. 99-42 of 10 May 1999 on Seeds, Seedlings and Plant Varieties.

Article 57 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property specifies that foreign works "may enjoy protection on condition that the country concerned affords equivalent protection to works of Tunisian nationals".

The last paragraph of Article 56 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 further provides that "the provisions of this Law relating to copyright shall apply to works eligible for protection under an international convention to which Tunisia is party".

Likewise, the last paragraph of Article 57 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 stipulates that "the provisions of this Law shall also apply to performances, phonograms or videograms and broadcasts protected under an international convention to which Tunisia is party".

B. COPYRIGHT AND RELATED RIGHTS

2. Please explain whether and how the copyright law of Tunisia complies with Article 9 of the TRIPS Agreement requiring that Members comply with all Articles 1 through 21 of the Berne Convention (1971), except Article 6^{bis}, since Members do not have rights or obligations relating to the latter Article under the TRIPS Agreement.

Tunisia is one of the 10 countries that established the Berne Convention of 1886 and is also a Member of the WTO. Article 9 of the TRIPS Agreement provides that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.

However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6^{bis} of that Convention or of the rights derived therefrom."

Article 6^{bis} of the Berne Convention deals with authors' moral rights (right to claim authorship of a work; right to object to certain modifications of, and other derogatory action in relation to, the work; term of protection; and means of redress for safeguarding these rights). Article 2.2 of the TRIPS Agreement provides that "[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits".

Thus, a WTO Member that is not party to the Berne Convention is not required to comply with the provisions of the Berne Convention relating to moral rights, whereas a WTO Member that is also party to the Berne Convention (which is the case of Tunisia) is under the obligation to apply those provisions.

3. Please explain how the copyright law of Tunisia protects computer programs as literary works and complications of data as required by Article 10 of the TRIPS Agreement.

Protection of computer programs

Article 1 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property includes "software" (i.e. computer programs, as established during the Law's preparatory stages) among the works covered by copyright. All general provisions relating to copyright, the rights it confers and the obligations it entails, the procedures for identifying infringements and the ensuing penalties thus apply to computer programs to the extent that they are not contrary to the provisions of Chapter VII on Software. The following provisions are cited as examples:

- (1) Copyright covers computer programs in both source and object code.

The presumed author of the computer program is the person under whose name the program has been released.

- (2) Programs written by employees in the course of their duties belong to the employer. The Law on Scientific Research (Law No. 96-6 of 31 January 1996, as amended by Law No. 2000-68 of 17 July 2000 and its implementing rules and regulations) provides that government employees are entitled to various advantages and incentives in respect of the exploitation of the results of their research.
- (3) Commissioned computer programs and related documentation are the property of the producer.

- (4) The author of a computer program has an exclusive right to carry out, authorize or prohibit certain acts relating to his work (reproduction, communication to the public, broadcasting and adaptation).
- (5) The author of a computer program enjoys the economic and moral rights deriving from copyright.
- (6) Authorization granted by the author must be in the form of a written contract containing a number of mandatory clauses.
- (7) Economic rights may be assigned in part or in full. Assignment of works not yet created is deemed null and void.
- (8) Computer programs may be adapted only within the limits of the rights assigned by the author.
- (9) Unless expressly so authorized, the user of a legitimately acquired program may not produce any copies thereof other than a backup copy.
- (10) The term of protection of computer programs under Law No. 94-36 of 24 February 1994 is 25 years. In accordance with the TRIPS Agreement, ratified by Law No. 95-6 of 23 January 1995, the draft law amending Law No. 94-36 has extended the term to 50 years.

Protection of data compilations (or databases)

Data compilations (or databases) are implicitly protected under Articles 1 and 6 of Law No. 94-36 of 24 February 1994. Article 6.2 of the draft law amending this Law expressly provides that authors of works such as encyclopaedias or anthologies, folklore collections or databases which, by reason of the selection or arrangement of their contents, constitute intellectual creations are protected without prejudice to the rights of the authors of the original works.

4. Article 11 of the TRIPS Agreement requires that rental rights for computer programs and cinematographic works be available. Please cite to the corresponding provision of the copyright law of Tunisia.

This matter is governed by Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, which does not expressly refer to rental rights but does not exclude them.

Under Tunisian general legislation, "rental rights form part of the rights of the holder of a title of property ownership conferring an exclusive right to use, enjoy and dispose of that property" (Article 17 of the Code of Property Rights). Consequently, the "owner" of a computer program or a cinematographic work is entitled to rent it. Such a provision has been expressly included in the special law on copyright and related rights. Thus, Article 9-1 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994, which applies to all protected works, grants the author an exclusive right to exploit his work or to authorize its exploitation by third parties, by way of any of the following acts:

- (a) Reproduction of the work;
- (b) communication of the work to the public;

- (c) any form of exploitation of the work in general on a physical medium, including rental of the original and copies thereof.

5. Please state the length and terms of protection the copyright law of Tunisia provides for a work other than a photographic work or a work of applied art and cite to the relevant provision of law.

Article 18 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property protects copyright for the author's lifetime and for 50 years counted from 1 January of the year following the author's death or of the date determined in a finding of presumed death or disappearance.

In the case of anonymous works, the term of protection is counted from the date on which the work was made available to the public. In the case of photographic works and computer programs, protection subsists for 25 years counted from the year in which the work was created.

The draft law amending and supplementing Law No. 94-36 of 24 February 1994 has unified the term of copyright protection, extending it to 50 years. Article 18 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 provides that "protection of authors' economic rights shall subsist for the lifetime of the author and for 50 years counted from 1 January of the year following the author's death or of the date determined in a finding of presumed death in the event of absence or disappearance".

In the case of works of joint authorship, protection subsists for 50 years counted from 1 January of the year following the death of the last surviving author or of the date determined in a finding of presumed death in the event of absence or disappearance.

In the case of anonymous or pseudonymous works, protection subsists for 50 years counted from 1 January of the year following that in which the work was first published. Copyright is exercised by the publisher or distributor of the work. Where a pseudonym does not conceal the author's identity from the public or where the author of an anonymous or pseudonymous work reveals his true identity, the term of protection is that provided for in paragraph 2 of this Article.

In the case of works published after the author's death, protection subsists for 50 years counted from 1 January of the year following that in which the work was first published. Copyright is exercised successively by the executor, heirs, spouse or any other heirs to whom the rights of the author accrue.

In the case of photographic works, Article 19 (new) stipulates that protection subsists for 50 years counted from the date on which the work was created. The same term is provided for software or computer programs (new Article 47). In the case of cinematographic or audiovisual works, the term of protection is also 50 years counted from the date of the first lawful public performance of the work. Where performance has not taken place, the term of protection is 50 years counted from the date on which the first reference copy was made (Article 42-1 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994).

6. Please describe the protection the copyright law of Tunisia provides for performers, and the term of the protection.

Performers are protected under Tunisian general legislation and the Uruguay Round Agreements, ratified by Law No. 95-6 of 23 January 1995.

The draft law amending and supplementing Law No. 94-36 of 24 February 1994 on Literary and Artistic Property contains specific provisions for the protection of performers. Under Article 47-3 of the draft law, performers thus enjoy the following moral and economic rights:

Moral rights

- A right, in respect of their sound or audiovisual performances, whether live or fixed on phonograms or videograms, to be identified as performers, except where the manner of use of the performance precludes such identification;
- a right to oppose any distortion, mutilation or other modification of such performances that might be prejudicial to their reputation.

These rights are inalienable and imprescriptible, and may not be renounced.

Economic rights

- A right of broadcasting or communication to the public of unfixed performances, except where the performances is already a broadcast performance;
- a right of fixation of an unfixed performance;
- a right of direct or indirect reproduction of their performances, fixed on phonograms or videograms, in any manner or form whatsoever;
- a right of distribution to the public of the original and copies of the fixation of their performances on phonograms or videograms, by means of sale or any other transfer of ownership;
- a right of commercial rental to the public of the original and copies of the fixation of their performances on phonograms or videograms, even after these have been distributed by the performers themselves or with their authorization;
- a right to make their performances fixed on phonograms or videograms available to the public by wire or wireless means, in such a way that members of the public may access the work from a place and at a time individually chosen by them.

These are exclusive rights of performers to authorize the use, in full or in part, of their performances.

The term of protection of performers' economic rights is 50 years counted from 1 January of the year following that in which the performance was fixed on a phonogram or videogram.

7. Article 14.2 of the TRIPS Agreement provides that producers of phonograms are to enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Article 14.2 requires that producers of phonograms are to have the right to authorize or prohibit the commercial rental to the public of originals or copies of their phonograms. Please describe how the copyright law of Tunisia implements these obligations and indicate the term of protection.

In addition to the rental rights which are provided under general legislation for computer programs, as mentioned above, and which also apply to producers of phonograms, Article 47-5 of the

draft law amending and supplementing Law No. 94-36 of 24 February 1994 confers the following rights on producers of phonograms or videograms:

- A right of direct or indirect reproduction of their phonograms or videograms, in any manner or form whatsoever;
- a right of distribution to the public of the originals and copies of their phonograms or videograms, by means of sale or any other transfer of ownership;
- a right of commercial rental to the public of the originals and copies of their phonograms or videograms, even after these have been distributed by the producers themselves or with their authorization;
- a right to make their phonograms or videograms available to the public by wire or wireless means, in such a way that members of the public may access the work from a place and at a time individually chosen by them.

These are exclusive rights of producers of phonograms or videograms to authorize the use, in full or in part, of their phonograms or videograms.

The term of protection of the rights of producers of phonograms or videograms is 50 years counted from the year following that in which the phonogram or videogram was released or, failing such release, 50 years counted from 1 January of the year following that in which the fixation of the phonogram or videogram took place.

C. TRADEMARKS

8. Please describe the subject matter that can comprise a trademark under the trademark law of Tunisia.

According to Article 2 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks, the following may be registered as trademarks:

- Denominations of all kinds such as words; combinations of words; family and geographical names; pseudonyms; letters; numbers; and acronyms;
- figurative signs such as drawings; reliefs; shapes, in particular that of the product or its packaging or those characterizing services; arrangements; and combinations of colours or hues;
- audio signals such as sounds and musical phrases.

9. Please describe the procedure that must be followed to register a trademark in Tunisia, citing the relevant provisions of the law, and describe the rights that the owner of a registered mark can exercise.

Article 7 of the Law on the Protection of Trademarks stipulates that applications for trademark registration must be filed with the industrial property agency. Every application must be accompanied by a file containing a number of documents and relevant data (Article 1 of Decree No. 2001-1603 of 11 July 2001).

Once all the requisite items have been delivered, the application is approved, validated and published in the agency's official bulletin within a maximum period of 12 months counted from the date of filing (Article 9 of the Law).

Any interested party may challenge an application for trademark registration within two months of the date of its publication, whereupon a reconciliation procedure is initiated.

If no objection is raised, the mark will be registered and published within a maximum period of 12 months following the registration date (Article 13).

Pursuant to Articles 6, 21, 22 and 23 of the Law, trademark registration confers on its holder a right of ownership in that trademark. Third parties may thus be prohibited from accomplishing the following acts:

- Reproducing, using or affixing a protected mark;
- removing or modifying a protected mark;
- imitating a mark or using an imitated mark, for products or services identical or similar to those covered in the registration.

10. Please provide the length and terms of protection that the trademark law of Tunisia provides for a trademark.

According to Article 6 of the Law on the Protection of Trademarks, trademark registration takes effect from the date of filing the application and is valid for a period of 10 years, renewable indefinitely.

D. GEOGRAPHICAL INDICATIONS

11. Please describe in detail how the laws of Tunisia provide for the recognition and protection of geographical indications required by Article 22.2 of the TRIPS Agreement, citing to the relevant provisions of law or regulation, and provide examples of geographical indications so protected.

Pursuant to Article 22.2 of the TRIPS Agreement, Article 4 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks stipulates that any sign liable to mislead the public as to the quality or geographical origin of a product or service may not be adopted as a mark or an element of a mark.

Article 5 of the Law also provides that any sign that infringes prior rights and in particular a protected appellation of origin may not be adopted as a mark.

Article 20 of Law No. 99-57 of 28 June 1999 on registered appellations of origin thus establishes that the industrial property authorities may not grant any trademark for a registered appellation of origin or an indication of source if the trademark application is filed after the territory covered by the registered appellation of origin or the indication of source has been defined and made public.

12. Please describe in detail the manner in which the higher level of protection required for wines and spirits under Article 23.2 of the TRIPS Agreement is implemented, citing to the relevant provisions of law or regulation, and provide examples of geographical indications for such products.

Law No. 99-57 of 17 April 1999 on registered appellations of origin and indications of source of agricultural products and Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks do not expressly provide for additional protection for wines and spirits.

Article 5 of the Law on the Protection of Trademarks does specify, however, that "any sign that infringes prior rights and in particular a protected appellation of origin may not be adopted as a mark".

E. INDUSTRIAL DESIGNS

13. Please describe the procedure that must be followed to obtain protection for industrial designs, citing to the provisions of the law of Tunisia, and describe the nature of the protection provided.

Under Article 9 of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs, applications for industrial designs must be filed with the industrial property agency.

All duly filed industrial designs are entered in the national register of industrial designs and published in the official bulletin of the industrial property agency within a period not exceeding nine months from the date of filing.

Article 15 of the Law provides that applicants may request the publication of their industrial designs to be postponed for a period of 12 months from the date of filing.

Pursuant to Article 8 of the Law, ownership in an industrial design ultimately belongs to the person who created the design. In other words, filing is no more than a presumption of ownership which may be disproved.

14. Please describe the procedure that must be followed to obtain protection for textile designs and cite to the relevant provisions of law or regulation.

There are no specific provisions for the protection of textile designs. On the other hand, Tunisian legislation provides for postponement of the publication of industrial designs filed, including those of the textile industry, for a period of 12 months from the date of filing. It also provides for collective filing, which applies to textile designs.

F. PATENTS

15. Please describe in detail the way in which the patent law of Tunisia implements Article 27 of the TRIPS Agreement, indicating any exceptions provided for, and including details regarding the protection for micro-organisms and non-biological and microbiological processes and plant varieties. Please cite to the relevant provisions of the law.

Articles 1, 2 and 3 of Law No. 2000-84 of 24 August 2000 on Patents are in conformity with Article 27 of the TRIPS Agreement.

Article 1 states that any invention of a product or manufacturing process may be protected by a document referred to as a "patent", which is delivered by the industrial property agency.

According to Article 2, methods for therapeutic or surgical treatment of the human or animal body and diagnostic methods practised on the human or animal body are not considered inventions.

Under the terms of Article 3, patents may be not delivered for plant varieties, animal breeds or essentially biological processes for the breeding of plants or animals, with the exception of medical biological processes, including micro-organisms and the products of such processes, which are patentable.

Inventions the publication or application of which would be contrary to morality, *ordre public*, public health or environmental protection are likewise excluded from patentability.

16. Please describe in detail the rights provided patent holders under the patent law of Tunisia and cite to the relevant provisions of law.

Article 46 of Law No. 2000-84 of 24 August 2000 on Patents provides that a patent confers an exclusive right of exploitation on its holder or his successors in title, meaning that the patent holder may prohibit third parties from performing the following acts:

- Making, offering, placing on the market or using a product which is the subject-matter of the patent, or importing or stocking a product for such purposes;
- using the manufacturing process that is the subject-matter of the patent;
- offering, placing on the market or using the product obtained directly by a process which is the subject-matter of the patent, or importing or stocking a product for such purposes.

17. Please describe in detail any provisions in the laws of Tunisia permitting unauthorized use of a patent, citing to the relevant provisions of law, and describe in detail the conditions under which such use can occur.

Article 47 of the Law on Patents stipulates that the rights conferred by a patent do not extend to the following acts:

- Acts performed privately for non-commercial purposes;
- acts performed for experimental purposes relating to the subject-matter of the patented invention;
- the extemporaneous preparation for individual cases in a pharmacy of medicines on the basis of a medical prescription, or the acts relating to the medicines thus prepared;
- the offer, importation, stocking or use, on Tunisian territory, of the patented product or the product obtained by a patented process, after the product has been lawfully placed on the market of any country by the patent holder or with his explicit consent;
- acts required for the production of generic drugs; products resulting from such acts may not be exploited for commercial purposes until the term of protection of the patent has expired;
- the use of patented subject-matter on board aircraft, land vehicles or foreign ships which temporarily or accidentally enter the airspace, territory or territorial waters of the Tunisian Republic.

18. What term of protection does the patent law of Tunisia provide for patents? Please describe any provisions for extension of the term of protection and cite to the relevant provisions of the law.

Article 36 of the Law on Patents specifies that patent protection subsists for 20 years from the date of filing the application.

Tunisian legislation does not provide for any extension of the term of patent protection.

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

19. Please describe in detail the protection for layout-designs of integrated circuits provided under the laws of Tunisia, including the term of protection, and cite to the relevant provisions of law.

Law No. 2001-20 of 6 February 2001 provides for the filing of layout-designs of integrated circuits with the industrial property agency.

Protection is afforded if a layout-design is the result of its creator's own intellectual effort and is not commonplace, at the time of its creation, in the integrated circuits sector (Article 3 of the Law).

The filing of a layout-design confers an exclusive right of exploitation on the owner, who may prohibit third parties from reproducing, exploiting or importing the layout-design without due authorization (Article 17 of the Law).

The protection of a layout-design of integrated circuits commences on the date of filing or on the date of the first commercial exploitation, where exploitation precedes the date of filing.

Under Article 18 of the Law, the term of protection of a layout-design is 10 years from the date of filing or that of the first commercial exploitation, where exploitation precedes the date of filing.

H. PROTECTION OF UNDISCLOSED INFORMATION

20. Please describe in detail how the laws of Tunisia provide for the protection of undisclosed information as required by Article 39.2 of the TRIPS Agreement and provide citations to the relevant provisions of law.

Protection is afforded under Article 168 of the Labour Code, which states that members of company advisory committees and staff representatives are bound by the obligation of professional secrecy with respect to all information of a confidential nature coming into their possession while serving in that capacity, and to all matters relating to manufacturing processes. Any breach of this obligation entails the penalties laid down in Articles 138 and 254 of the Penal Code.

Article 138 of the Penal Code states that, in addition to a fine, any manager, clerk or worker of a factory who discloses or communicates a manufacturing secret is liable to a prison sentence of two years. Attempts to do so are also punishable.

Article 61^{ter} of the Penal Code stipulates that "any Tunisian or any foreigner who, without prior authorization from the competent authority, discloses or communicates to a party acting on behalf of a foreign power or enterprise either an invention of interest for national defence or information, research or manufacturing processes relating to an invention of interest for defence shall be guilty of a breach of State security".

21. Please describe in detail the manner in which protection is provided test data regarding pharmaceutical and agricultural chemical products submitted to the government in order to obtain marketing approval in Tunisia and cite to the relevant provisions of law.

Pharmaceuticals are governed by Laws Nos. 73-55 of 3 August 1973 and 85-91 of 22 November 1985. Implementing rules and regulations have been enacted, including:

- Decree No. 90-1400 of 3 September 1990, laying down rules of good manufacturing practice for medicines for human use and regulating quality control, packaging, labelling, denomination and advertising;
- Decree No. 90-1401 of 3 September 1990 laying down procedures for medical or scientific testing of medicines for human use;
- Order of the Minister of Public Health of 10 September 1996 establishing the procedures for authorization to market medicines for human use and renewal and assignment of such authorization.

The above texts, pursuant to the laws that gave rise to them, provide that infringement will be subject to disciplinary sanctions and civil and criminal penalties.

The processing of applications relating to medicines is governed by procedures and provisions that guarantee the security of information. They are detailed as follows.

Reception of applications

This is handled by a pharmaceutical inspector dealing directly with the person delegated by the laboratory filing the application. The application, countersigned by the inspector, is then returned to the person with an official filing date.

Assessment of applications

Applications are kept under the inspector's responsibility. Pharmaceutical files are sent to the National Drug Control Laboratory, which determines whether the product is in conformity with what is stated in its file, in the light of current pharmaceutical knowledge. Clinical files are submitted to an expert appointed by Ministerial order for a detailed report to an expert committee.

Assessment of products similar to registered products

Data confidentiality is crucial at this stage, in order to prevent the use of data recorded in another file.

In Tunisia, as in most countries with a reliable registration system, the procedure is based on the following:

- Clinical data pertaining to a molecule that is the subject-matter of a second application is not required because the molecule has already been analysed;

- regulations require the product to be approved for marketing in its country of origin (*Autorisation de mise sur le marché* - AMM); where this is a country having signed the WTO Agreements, responsibility for observance of the provisions governing patents lies with the country of origin, if no application for a patent specific to another country has been filed; where the country has not adhered to the WTO Agreements, it is for Tunisia to ensure observance of intellectual property provisions;
- application for marketing approval requires submission of a pharmaceutical file, including analysis methods which must satisfy either of the following conditions:
 - (a) where the product is described in an international pharmacopoeia, reference to the latter is sufficient to validate the methods used;
 - (b) if such is not the case, the supplier is required to present a method that he himself has validated without referring to the data furnished by the first holder of the marketing authorization.

Scientific publications may be used, however, for the relevant authority regards the results they contain as having become public knowledge at the initiative of the patent holder or of the international scientific community.

The procedure applied by Tunisia has been in force for more than 20 years, making it possible to avoid conflicts of interest and ensuring data confidentiality. It has enabled the relevant authority to acquire the status of WHO Collaborating Centre for drug registration and pharmaceutical regulation.

All the aforementioned information and references relating to regulations are public and can be accessed at: www.dpm.tn.

22. Are other applicants for marketing approval for their own versions of a previously approved pharmaceutical or agricultural chemical products permitted to rely on data submitted by the earlier applicant? If so, how long a period of exclusivity is given the earlier applicant before such reliance becomes possible?

Application files differ according to whether the product is a first product or a generic product. The entire body of clinical data specified by law is required only in the case of a first product.

The data is evaluated by experts who are subject to a legal obligation of professional secrecy. The authorities themselves are also bound by secrecy, and no application file may be communicated or used on the submission of a second application.

Generic products may be exempted from the requirement to submit clinical and pharmacological-toxicological files if the authorities deem that a sufficient period has passed, and the patent has expired. If the authorities deem such files to be necessary, the laboratory is required to recompile all the data without referring to the documentation for the first product.

It should be noted, however, that scientific data published in periodicals can generally be used for filing first or second product applications, since the data has become public knowledge at the initiative of the owner of the first product.

I. ENFORCEMENT

23. Please describe in detail the manner in which the laws of Tunisia provide for effective action against infringement of intellectual property rights as required by Article 41.1 of the TRIPS Agreement.

Provision is made for civil and criminal proceedings and penalties in the event of infringement of industrial property rights.

Counterfeiting is punishable by a fine of 5,000 to 50,000 dinars (Article 51 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks, Article 24 of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs and Article 83 of Law No. 2000-84 of 24 August 2000 on Patents); or by a fine of 1,000 to 50,000 dinars for infringements relating to layout-designs of integrated circuits (Article 34 of Law No. 2001-20 of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits), in addition to the fine of 500 to 2,000 dinars payable by anyone who causes to appear on his business documents, advertising or products words that give reason to believe that a layout-design has been registered.

It should also be noted that in all these cases of infringement repeat offenders are liable to imprisonment for one to six months and the doubling of the fine.

Moreover, in the event of conviction the court may order the infringing products to be destroyed or placed outside the channels of commerce and confiscated (Article 36 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 26 of the Law on the Protection of Industrial Designs and Article 55 of the Law on the Protection of Trademarks).

The seizure of counterfeit products is also provided for in Article 86 of the Law on Patents, Article 38 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 28 of the Law on the Protection of Industrial Designs and Article 50 of the Law on the Protection of Trademarks.

Literary and artistic intellectual property (copyright and related rights) is protected in Tunisia by the following:

- Ordinary law, i.e. general civil and criminal legislation (Code of Obligations and Contracts, Commercial Code, Law on Competition and Prices, Code of Civil and Commercial Procedure, Penal Code, Code of Penal Procedure, Customs Code);
- special (*sui generis*) legislation, specifically Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, which provides, *inter alia* for the following: There is a presumption of infringement where the user of a work fails to produce the requisite authorization. Any person who infringes copyright is liable to the payment of damages, as determined by the competent court, in addition to criminal penalties (fines and imprisonment for repeat offenders).

The competent court may order, ex officio or at the request of the author, the confiscation or destruction of fraudulent copies and the temporary or definitive closure of the establishment in which the infringement has been ascertained.

The owner of an establishment open to the public in which an infringement has been committed (public showing, sale or rental of copies) who acted with full knowledge of the facts will be regarded as jointly and severally liable for making good the moral and material damage resulting from the use of fraudulent works.

The identification of infringements is entrusted to the criminal investigation police authorities and officials of the Ministry of Culture duly sworn and empowered for this purpose by the Minister.

The purpose of the draft law is to establish more effective measures and procedures for combating infringements of copyright and related rights, in conformity with the letter and spirit of the TRIPS Agreement and the two WIPO Treaties (WCT and WPPT) of December 1996. The draft law accordingly makes provision for:

- Adopting specific border measures and establishing procedures to guarantee the rights of the parties involved;
- extending authority to report infringements to other government bodies;
- strengthening criminal penalties.

As regards enforcement, Tunisian general legislation contains provisions to ensure effective action against any infringement of the above rights, while guaranteeing the right of the defence.

The judicial authorities are thus empowered to take various types of decision in the form of interim orders, payment orders and final or other judgments.

According to Article 86 of the Code of Civil and Commercial Procedure, "if it sees this as necessary, the court may ask the reporting judge to carry out any investigative action, such as an inquiry, visit to the scene, expert's report, taking of pleas of forgery and any other action that will help to establish the truth. The court may, during the hearing and in the presence of the parties, set the date for the investigative action so ordered, specifying the date and time for the appearance of the parties in the chambers of the reporting judge or at the location of the dispute or any other location".

Article 225 of the Code states that "in any event, the court may require ex officio the participation of a third party in the proceedings where it sees the presence of that party as essential for a correct appreciation of the matter at issue".

If it is necessary to obtain an expert's report and the parties fail to agree on the selection of the expert, the expert is appointed by the judge.

Interim orders

Article 201 of the Code of Civil and Commercial Procedure (CCCP) states as follows:

"Interim orders may be made on urgent applications without prejudice to the main proceedings."

"Interim orders on urgent applications may be made by the president of the court of first instance or his deputy, or by the district judge, where so authorized by law" (Article 202 of the CCCP).

"Interim orders made on urgent applications are enforceable 24 hours after being served, except where the court has granted an extension.

The order shall be enforced without security, unless the judge has ordered that security be provided" (Article 207 of the CCCP).

Payment orders

Under the terms of Article 59 of the CCCP, any claim for the payment of a debt, where the latter, whatever its nature, is for a specific amount and has a contractual origin, may be submitted under the payment order procedure.

Judgments

The CCCP establishes three judicial levels, i.e. first instance, appeal and cassation. The judgment will not be final if the decision can be appealed. However, it may still be made immediately enforceable, with or without security, depending on the circumstances of the case (Articles 126 and 286 of the CCCP).

Final judgments

The final judgment (after appeals have been exhausted or the time-limits for lodging appeals have expired) brings the case to a close by deciding the question forming the subject-matter of the proceedings.

24. Article 43.1 of the TRIPS Agreement requires that judges be authorized to order production of evidence necessary to substantiate a party's claims where that party has been unable to obtain such evidence from the opposing party. Please describe how the laws or regulations of Tunisia provide this authorization, citing to the relevant provisions of law or regulation.

Pursuant to Article 43 of the TRIPS Agreement, Tunisian legislation empowers the judicial authorities to order a party in proceedings, on application by the opposing party, to produce the evidence lying in its control.

Articles 213 to 223 of the Code of Civil and Commercial Procedure give the presiding judge authority to serve an order on either party in a case following an *ex parte* application, so as to ensure the protection of rights and interests that must not be left unprotected.

In cases of extreme urgency, judges may rule in their private homes on questions submitted to them. Enforcement of rulings issued in this manner is not subject to the appending of the seal of the court or "*ad hoc*" registration. These formalities are completed later.

Orders on *ex parte* applications are exempted from the registration procedure and are enforced without delay by bailiffs. A request for the withdrawal of such an order does not suspend enforcement.

Article 101 of the Code stipulates that "if it is necessary to obtain an expert's report and the parties fail to agree on the selection of the expert, the expert is appointed by the judge".

25. Please describe in detail all of the civil remedies that are available to right holders under the laws of Tunisia, citing to the relevant provisions of law or regulation.

Under Articles 82 and 83 of the Code of Obligations and Contracts (COC), anyone who knowingly or deliberately causes material or moral damage to others must make good the damage, where it is established that his action was the direct cause.

Along these same lines, Article 51 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property stipulates that anyone who infringes copyright as set forth in this Law will be

required to pay the copyright owner damages for material and moral injury caused, in the amount determined by the competent court. The draft law amending and supplementing Law No. 94-36 extends these provisions to include related rights.

The following civil remedies are available to right holders under Tunisian law:

- Injunctions;
- damages, including recovery of profits, and expenses, including lawyer's fees;
- destruction or other disposal of infringing goods and materials/implements for their production;
- any other remedies.

Injunctions

The judicial authorities are empowered to take various types of decision in the form of interim orders, payment orders and judgments.

Interim orders

Article 201 of the Code of Civil and Commercial Procedure (CCCP) states as follows:

"Interim orders may be made on urgent applications without prejudice to the main proceedings."

"Interim orders on urgent applications may be made by the president of the court of first instance or his deputy, or by the district judge, where so authorized by law" (Article 202 of the CCCP).

"Interim orders made on urgent applications are enforceable 24 hours after being served, except where the court has granted an extension.

The order will be enforced without security, unless the judge has ordered that security be provided" (Article 207 of the CCCP).

Payment orders

Under the terms of Article 59 of the CCCP, any claim for the payment of a debt, where the latter, whatever its nature, is for a specific amount and has a contractual origin, may be submitted under the payment order procedure.

Judgments

The judgment will not be final if the decision can be appealed. However, it may still be made immediately enforceable, with or without security, depending on the circumstances of the case (Articles 126 and 286 of the CCCP).

Final judgments

The final judgment brings the case to a close by deciding the question forming the subject-matter of the proceedings.

Damages, including recovery of profits, and expenses, including lawyer's fees

Under Articles 82 and 83 of the Code of Obligations and Contracts (COC), anyone who knowingly or deliberately causes material or moral damage to others must make good the damage, where it is established that his action was the direct cause.

Article 82 of the Law on Patents, Article 34 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 24 of the Law on the Protection of Industrial Designs and Article 44 of the Law on the Protection of Trademarks likewise provide for the civil liability of the infringer.

Destruction or other disposal of infringing goods and materials/implements for their production

According to Article 55 of the Law on the Protection of Trademarks, Article 36 of the Law on the Protection of Layout-Designs of Integrated Circuits and Article 26 of the Law on the Protection of Industrial Designs, if the court finds against the defendant it may order the destruction or disposal outside the channels of commerce of the products or goods found to be infringing and the forfeiture of the implements used to make them.

Any other remedies

Under Article 34 of the Law on the Protection of Layout-Designs of Integrated Circuits, Article 24 of the Law on the Protection of Industrial Designs and Article 54 of the Law on the Protection of Trademarks, in every case the court may order, at the expense of the unsuccessful party, the ruling to be published, in full or in part, in newspapers of its own choosing and to be posted up in places of its choice, in particular at the main gates of factories or workshops of that party or in the party's shop windows.

26. Please describe in detail the provisional procedures and remedies available to right holders under the laws of Tunisia, citing to the relevant provisions of law and regulation, and indicate any condition under which a right holder may avail itself of those procedures and remedies.

As regards copyright, ordinary law provides for interim orders and orders on *ex parte* applications, as explained above (see reply to the question on enforcement of intellectual property rights) to ensure the adoption of appropriate provisional measures.

Article 55 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property empowers the competent court to order, *ex officio* or at the request of the author, the confiscation or destruction of copies and the temporary or definitive closure of the establishment in which the infringement has been ascertained.

Article 54-1 of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 provides that "the right holder or his representative may, as a preventive measure and under an order made by the president of the court on an *ex parte* application, have a bailiff assisted by an expert undertake a detailed description, with or without attachment, of allegedly counterfeit goods that infringe copyright or related rights".

As stipulated in Article 201 of the Code of Civil and Commercial Procedure, "interim orders may be made on urgent applications without prejudice to the main proceedings".

As regards industrial property rights, Law No. 2000-84 of 24 August 2000 on Patents provides for a detailed description, with or without attachment, of the allegedly infringing products or processes by a bailiff assisted by an expert, under an order made by the president of the court on an *ex parte* application. In the event of attachment, the order may require the applicant to furnish security, which must be posted before the goods are attached.

Similar measures are provided for in:

- Law No. 2001-20 of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits (Article 38);
- Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs (Article 28); and
- Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks (Article 50).

Such measures may also be ordered because of urgency or difficulties relating to the enforcement of a judgment delivered or a writ of execution. They are made by the president of the competent court or his deputy sitting in chambers, in accordance with Articles 201 and 210 of the Code of Civil and Commercial Procedure.

As regards procedures, an action is initiated under the interim procedure by *ex parte* application to the president of the competent court, who may prohibit, provisionally and on pain of a fine, the continuation of the allegedly infringing acts or make such continuation subject to the provision of security designed to ensure the indemnification of the owner of the mark or the holder of an exclusive right (Article 49 of the Law on the Protection of Trademarks).

This procedure is also provided for in the laws on patents (Article 87), layout-designs of integrated circuits (Article 38) and industrial designs (Article 28).

J. SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES

27. Please describe in detail the procedures under the laws of Tunisia that provide for border enforcement at least for trademark counterfeiting and copyright piracy, identifying the competent authority and citing to the relevant provisions of law or regulation.

Types of intellectual property covered by border measures

In addition to covering counterfeit trademark and pirated copyright goods (draft law in preparation), the scope of applications for suspension by customs of the release into free circulation of goods infringing intellectual property rights has been extended to include:

- Goods that infringe a patent;
- goods incorporating a counterfeit industrial design;
- goods incorporating a copied layout-design of an integrated circuit.

Competent authorities

Patent holders, creators of layout-designs of integrated circuits and owners of protected industrial designs or registered trademarks or their successors in title who have good grounds for suspecting that goods that infringe their rights are being imported may apply in writing to the customs services for the suspension of import clearance for these goods.

Application requirements

Under the provisions in force, the application must include:

- The full name/business name and address of the applicant;
- evidence that the applicant is the holder of a right in the goods at issue;
- a description of the goods detailed enough to enable customs to recognize the goods.

In addition, the applicant should provide any other useful information that might enable the customs services to reach an informed decision, although the provision of such information is not a prerequisite for the admissibility of the application.

In particular, such information should relate to:

- The location of the goods or their intended destination;
- the identification of the consignment or packages;
- the estimated date of arrival or warehousing of the goods;
- the means of transport used;
- the identity of the importer, exporter or holder of the goods.

The application must also include an undertaking by the applicant to assume liability in respect of the importer if it is formally established that the goods detained by customs do not infringe the protected industrial property right.

The applicant must inform the customs services if his right is no longer validly registered or has expired.

An order issued by the Ministry of Finance on 3 December 2001 (regulation) specifies where (General-Directorate of Customs) and when (prior to the arrival of the goods at, or their removal from, the customs office) the application must be filed and the persons authorized to lodge the application (right holder or his successors in title). Applicants residing abroad are required to appoint an agent established in Tunisia.

The order also specifies the form in which applications must be lodged. Applications are valid for a period of 12 months from the date on which the customs services notified their acceptance.

If possible, the above information should also include a detailed description of the goods at issue, together with a photographic or any other graphic reproduction as well as a sample of the goods.

The order stipulates that where the goods at issue are detained by customs, the applicant is to be informed by mail, fax or any other means of telecommunication.

Various requirements relating to the duration of suspension

Where the customs services find, if necessary after consulting the applicant, that the goods correspond to those described in the application, they will proceed to detain those goods.

The customs services will immediately inform the applicant and the importer of the action taken and give them the opportunity to inspect the goods detained and take samples for the purpose of carrying out any tests or analyses needed to establish the existence of an infringement, in accordance with the provisions of the Customs Code and without prejudice to the principle of confidentiality of information.

Provided that all the customs formalities have been satisfied, the measure suspending the release of the goods is revoked *ipso jure*, unless within 10 working days of being notified of the detention of the goods the applicant can show to the satisfaction of the customs services that he has initiated civil or criminal proceedings before the competent court; that precautionary measures have been ordered by the president of the court; and that security sufficient to cover his liability in respect of the persons concerned has been posted. The amount of the security is fixed by the court.

Where appropriate, the above-mentioned initial period may be extended by a maximum of 10 working days.

Moreover, the owner of the goods, the importer or the consignee may obtain the release of the goods by posting security in an amount fixed by the court and sufficient to protect the interests of the applicant, provided that all the customs formalities are satisfied.

If the detention measure is discharged, the customs services will promptly inform the owner, the importer, the consignee and the applicant.

Security or equivalent assurance and indemnification of the importer and of the owner of the goods

The measure suspending the release of the goods is revoked *ipso jure*, unless within 10 working days of being notified of the detention of the goods the applicant can show to the satisfaction of the customs services that he has initiated civil or criminal proceedings before the competent court; that precautionary measures have been ordered by the president of the court; and that security sufficient to cover his liability in respect of the persons concerned has been posted. The amount of the security is fixed by the court.

The owner of the goods, the importer or the consignee may obtain the release of the goods by posting security in an amount fixed by the court and sufficient to protect the interests of the applicant, provided that all the customs formalities are satisfied.

Moreover, where the application has been accepted or where detention measures have been taken, the customs services may require the applicant to post security sufficient to ensure payment of the costs incurred as a result of keeping the goods under customs control.

Right of inspection and information

Upon receipt of an application drawn up in accordance with the provisions governing the lodging of applications, the customs services will examine the application and immediately inform the applicant of their decision in writing. The reasons for the decision must be duly given.

Where the customs services find, if necessary after consulting the applicant, that the goods correspond to those described in the application, they will proceed to detain those goods.

The customs services will immediately inform the applicant and the importer of the action taken and give them the opportunity to inspect the goods detained and take samples for the purpose of carrying out any tests or analyses needed to establish the existence of an infringement, in accordance with the provisions of the Customs Code and without prejudice to the principle of confidentiality of information.

Upon production of an order made by the president of the court on an *ex parte* application and in order to facilitate the initiation of legal proceedings, the customs services will inform the applicant of the full names and addresses of the exporter, the importer and the consignee of the goods, if they are known to them, as well as of the quantity of the goods forming the subject of the application.

28. Please indicate if border enforcement is available to owners of other forms of intellectual property and, if so, please describe the procedures and remedies available in relation to each form of intellectual property, citing the relevant provisions of law.

In addition to covering counterfeit trademark and pirated copyright goods (draft law in the process of being adopted in Parliament), the scope of applications for suspension by customs of the release into free circulation of goods infringing intellectual property rights has been extended to include:

- Goods that infringe a patent;
- goods incorporating a counterfeit industrial design;
- goods incorporating a copied layout-design of an integrated circuit.

The procedures relating to border measures, as described in the reply to question 27 above, fully apply to these various forms of intellectual property.

The statutory provisions covering border measures are set forth in:

- Chapter VII of Law No. 2001-20 of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits (Articles 39 to 48);
- Chapter V of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs (Articles 31 to 40);
- Chapter XIII of Law No. 2000-84 of 24 August 2000 on Patents (Articles 91 to 99);
- Chapter VII of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks (Articles 56 to 65).

29. Article 58 of the TRIPS Agreement specifies procedures to be followed where the competent authorities can act ex officio. Please explain whether the competent authorities in Tunisia are empowered to act ex officio and, if so, please identify the intellectual property areas subject to ex officio action.

The customs services may on their own initiative suspend customs clearance of goods that infringe a protected industrial property right. In this case:

- The customs services will immediately inform the right holder or his successors in title, who must lodge an application in accordance with the above-mentioned application procedure within three days of being notified by the customs services, whereupon the provisions concerning suspension will apply *ipso jure*;
- a detention measure applied in the context of ex officio action taken by the customs services will automatically be discharged if the holder of the protected industrial property right or his successor in title fails to lodge an application in accordance with the application procedure within three days of being notified by customs.

Ex officio action may be taken in respect of allegedly infringing goods in the following fields of intellectual property:

- Patents (Article 97 of Law No. 2000-84 of 24 August 2000 on Patents);
- trademarks (Article 62 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks);
- layout-designs of integrated circuits (Article 45 of Law No. 2001-20 of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits);
- industrial designs (Article 37 of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs).

K. CRIMINAL PROCEDURES

30. Please describe in detail how the laws of Tunisia implement Article 61 of the TRIPS Agreement that requires Members to have criminal procedures and penalties, including imprisonment and/or monetary fines sufficient to act as a deterrent, at least for cases of wilful trademark counterfeiting and copyright infringement on a commercial scale. Please cite to the relevant provisions of law and regulation.

In addition to reparation for damage in civil proceedings, Article 52 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property provides that copyright infringements are punishable by a fine of 500 to 5,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of one to six months.

Article 52 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 increases the fine to an amount ranging between 1,000 and 50,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of up to 12 months.

As regards the authorities responsible for identifying infringements and instituting criminal proceedings, Article 54, paragraph 1, of Law No. 94-36 of 24 February 1994 states that "the identification of breaches of this Law and the drawing up of records of evidence are entrusted to the criminal investigation police authorities and officials of the Ministry of Culture duly sworn and empowered for this purpose". Article 54 (new) of the draft law amending and supplementing Law No. 94-36 extends these prerogatives to customs officials, officials responsible for monitoring economic activity and municipal regulatory officials.

The authorities may institute criminal proceedings on their own initiative. Thus, paragraphs 2 and 3 of Article 54 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 stipulate that "the above-mentioned officials may seize the necessary documents and take samples of the counterfeit products for the purposes of the investigation and to establish proof of the infringement, against receipt. They may also seize, as a preventive measure, any products suspected to be counterfeit and not in accordance with current regulations".

Anyone who infringes the rights of the owner of a duly registered mark is subject to criminal proceedings and penalties.

Moreover, Article 51 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks provides for a fine of 5,000 to 50,000 dinars. The fine is doubled in the event of a repeat offence, with the possibility of a term of imprisonment of one to six months (Article 53 of the Law).

31. Article 61 also requires that remedies in appropriate cases include the seizure, forfeiture and destruction of infringing goods and any materials and implements the predominant use of which has been the commission of the offence. Please describe the provisions in the laws of Tunisia that provide for such remedies, and describe the circumstances in which those remedies would be imposed, citing to the relevant provisions of law or regulation.

Copyright

Article 55 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property provides that the competent court may order, ex officio or at the request of the author, the confiscation or destruction of fraudulent copies and the temporary or definitive closure of the establishment in which the infringement has been ascertained. The owner of the establishment where the infringement has been committed will be regarded as jointly and severally liable with the principal offender for making good the damage.

Criminal penalties for infringement of industrial property rights also include seizure, forfeiture or destruction of the infringing goods and of the materials and implements used for making them.

Layout-designs of integrated circuits

Pursuant to Article 36 of the Law of 6 February 2001, if the court finds against the defendant it may order the destruction of the infringing goods or their disposal outside the channels of commerce, together with the forfeiture of the implements used for making them. The injured party may, even before publication of the registration, cause a detailed description, with or without attachment, of the infringing articles or implements to be undertaken, under an order made by the president of the competent court on an *ex parte* application and production of the registration certificate (Article 38).

Industrial designs

According to Article 26 of the Law of 6 February 2001, if the court finds against the defendant it may order the forfeiture of the implements used for making the infringing articles.

The injured party may have a bailiff undertake a detailed description, with or without attachment, of the infringing articles or implements under an order made by the president of the competent court on an *ex parte* application and production of proof of registration (Article 28).

Trademarks

Anyone who brings an infringement action under Article 48 of the Law of 17 April 2001 may, in any place and under an order made by the president of the competent court on an *ex parte* application, have a bailiff assisted by an expert attach goods or services allegedly marked, offered for sale, delivered or supplied to his detriment or in violation of his rights.

Where attachment is authorized, it will be confined to the seizure of samples necessary to prove the infringement. The president of the court may make attachment subject to the provision by the applicant of security sufficient to compensate for any injury suffered by the defendant if the infringement action subsequently proves to be unfounded (Article 50).

The court may order the forfeiture of the goods and of the implements used for committing the offence. It may also order the destruction of the goods (Article 55).

Indications of source and appellations of origin

The officers responsible for monitoring appellations of origin and indications of source may seize products put on sale under registered appellations of origin or indications of source and suspected of not coming from the geographical area designated by the appellation or indication.

They may also seize products coming from the geographical area designated by the appellation or indication but not meeting the specified technical production requirements (Article 30 of Law No. 99-57 of 28 June 1999).

Patents

Anyone entitled to bring an infringement action may, under an order made by the president of the court on an *ex parte* application, have a bailiff assisted by an expert undertake a detailed description, with or without attachment, of the allegedly infringing goods or processes.

Where attachment is authorized, it will be confined to the seizure of any samples necessary to prove the infringement. The order may require the applicant to provide security, which must be posted before any goods are seized (Article 86 of Law No. 2000-84 of 24 August 2000).

32. Article 61 also indicates that Members may provide for criminal procedures and penalties in cases of wilful infringement of other forms of intellectual property. Please describe any provisions of the laws of Tunisia that provide for such procedures and remedies, citing to the relevant provisions of law or regulation.

The procedures and penalties for infringement of copyright and related rights are the same as those described in the reply to question 30 above (K. Criminal Procedures).

Tunisian legislation provides that in all fields of industrial property, i.e. patents, trademarks, industrial designs and layout-designs of integrated circuits, the court may order, at the expense of the unsuccessful party, the ruling to be posted up in places of its own choosing and to be published, in full or in part, in newspapers of its choice. The relevant provisions are as follows:

- Article 34 of Law No. 2001-20 of 6 February 2001 on the Protection of Layout-Designs of Integrated Circuits;

- Article 24 of Law No. 2001-21 of 6 February 2001 on the Protection of Industrial Designs;
- Article 54 of Law No. 2001-36 of 17 April 2001 on the Protection of Trademarks.

L. STATISTICAL QUESTIONS

33. Please provide statistical information related to civil copyright, trademark, geographical indication, industrial design, patent, integrated circuit layout-design, and trade secret enforcement for 2000, including the number of cases filed; injunctions issued; infringing products seized; infringing equipment seized; cases resolved (including settlement); and the amount of damages awarded.

A commission made up of the various authorities concerned with copyright (Ministries of the Interior, Justice, Trade and Culture) was established in order to coordinate activities to be conducted in this field. Model contracts for the use of works protected by copyright were drawn up.

An awareness-raising campaign was conducted among users and in the press.

Several disputes were resolved through friendly settlement. Various copyright proceedings were instituted, but no figures are yet available.

There are no statistics available on civil enforcement in 2000.

34. Please provide statistical information related to criminal enforcement in the area of copyright piracy and trademark infringement for 2000, including the number of raids, prosecutions, convictions, and the amount of fines and/or jail terms (including whether the fines were paid and whether the jail term was actually served or was suspended) and any other information establishing that the criminal system operates effectively to deter copyright piracy and trademark counterfeiting.

There are no statistics available on criminal enforcement in 2000.

V. RESPONSE TO THE QUESTION POSED BY JAPAN

COPYRIGHT AND RELATED RIGHTS

1. 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.

The above principles apply in Tunisia, which abides by its international commitments and monitors compliance with these principles, while taking into account the principle of reciprocity enshrined in Article 32 of the Tunisian Constitution, which provides that lawfully ratified conventions have primacy over national laws, provided that they are applied by the other party. That same principle is confirmed in Article 57 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, which states that foreign works "are eligible for protection on condition that the country concerned affords equivalent protection to works of Tunisian nationals".

The last paragraph of Article 56 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 further provides that "the provisions of this Law relating to copyright shall apply to works eligible for protection under an international convention to which Tunisia is party".

Likewise, the last paragraph of Article 57 (new) of the draft law amending and supplementing Law No. 94-36 of 24 February 1994 stipulates that "the provisions of this Law shall also apply to performances, phonograms or videograms and broadcasts protected under an international convention to which the Tunisian State is party".

VI. RESPONSES TO QUESTIONS POSED BY SWITZERLAND

A. PATENTS

1. Does your legislation grant patent protection for inventions relating to products and processes in all fields of technology? Are there any exceptions? If so, please explain what these exceptions are and how they comply with Article 27 of the TRIPS Agreement. In particular, is patent protection granted to all pharmaceutical products?

The legislation on the protection of inventions, in particular the first Article of Law No. 84-2000 of 24 August 2000, states that "any invention of a product or manufacturing process may be protected by a document referred to as a 'patent'".

According to Article 2, all that is required is that the invention meets a number of conditions, i.e. novelty, inventiveness and industrial applicability.

In other words, a patent may be issued for any invention of a product or manufacturing process in all fields of technology, including pharmaceutical products and agricultural chemical products.

However, there are a number of exceptions which are compatible with Article 27:1. Article 3 of the above-mentioned Law states that patents may not be granted for plant varieties, animal breeds or essentially biological processes for the production of plants or animals. This provision does not, however, apply to medical biological processes or the products obtained through such products.

Ad reply to question 1:

You mention that according to your Law, plant varieties shall be excluded from patent protection. Please explain how your legislation provides for protection of plant varieties. Is it by a *sui generis* protection as referred to in Article 27.3(b) of the TRIPS Agreement?

For the purposes of plant protection, Tunisia has enacted Law No. 99-42 of 10 May 1999 on Seeds, Seedlings and Plant Varieties.

This Law establishes a *sui generis* protection system for plant varieties, which is consistent with the UPOV model law.

2. Does your legislation, in accordance with Article 27:1 in combination with Article 31 of the TRIPS Agreement, consider importation as "working" a patent (and therefore preclude compulsory licensing, if a product is being imported)?

The legislation recognizes, in accordance with Article 27:1 in combination with Article 31 of the TRIPS Agreement, that importation is equivalent to "working" a patent.

Article 69 of Law No. 2000-84 on Patents includes the following situations where patents are subject to compulsory licensing:

- "where the patented product has not been sold in sufficient quantities to meet the needs of the Tunisian market";
- "where industrial or commercial exploitation of the patented invention has been discontinued for longer than three years in Tunisia".

These two indents show that the working of a patent has not been interpreted in a restrictive manner, and is understood as referring to industrial or commercial exploitation.

The essential requirement is that the patented product is commercialized, whether by industrial exploitation or importation, in such a way as to meet the needs of the domestic market.

3. Does your legislation make the granting of a compulsory licence subject to all the conditions enumerated in Article 31 of the TRIPS Agreement? Please cite the relevant provisions of law.

Law No. 2000-84 of 24 August 2000 makes the granting of compulsory licences subject to the conditions enumerated in Article 31 of the TRIPS Agreement.

Article 69 of the Law states that after expiry of the period specified (four years from filing of the applications, or three years from the issuing of the patent), any person interested in doing so may seek a compulsory licence at any time:

- Where industrial exploitation of the patented invention has not commenced or no genuine preparations for such exploitation have been made in Tunisia;
- where the product to which the invention refers has not been commercialized in sufficient quantities to meet the needs of the Tunisian market;
- where the industrial or commercial exploitation of the patented invention has been discontinued for longer than three years in Tunisia.

Article 70 of the same Law states that any application for a compulsory licence must be made to the competent Court. The applicant for a compulsory licence must provide proof that the applicant has approached the patent holder to seek a contractual licence but has not been able to obtain such a licence on reasonable commercial terms and conditions, and within a reasonable period of time.

A compulsory licence on the basis of non-exploitation or insufficient exploitation may never be granted if the patent holder demonstrates the existence of a legitimate excuse.

Compulsory licences are non-exclusive.

According to Article 74, the Court sets the conditions for a compulsory licence, and in particular the term of the licence, its scope and the amount to be paid to the patent holder, which is to be commensurate with the extent of exploitation.

4. Does your legislation provide for the principle of the reversal of burden of proof in a process patent litigation? Please cite the relevant provisions of law.

Article 85 of the Law on Patents includes provisions on the reversal of the burden of proof in a dispute relating to a process patent. According to the Article in question, "if the patent subject matter is a product manufacturing process, the Court is entitled to order the defendant to prove that the process used to obtain an identical product is different from the patented process. If the defendant fails

to provide such proof, any identical product manufactured without the consent of the patent holder shall be presumed to be obtained through the patented process if the product is new".

B. PROTECTION OF UNDISCLOSED INFORMATION

5. Please explain in detail if your legislation ensures that undisclosed test or other data submitted by an applicant to the responsible State agency in the procedure for market authorisation of a pharmaceutical or an agricultural chemical 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 authorisation for a similar product. Does your legislation provide for exceptions to this? If yes, under what conditions would such exceptions apply? Does your legislation set a specific term of protection for undisclosed test or other data of the first applicant?

The application dossiers submitted differ according to whether the product is a first product or a generic one. It is only in the case of a first product that all the clinical data specified by law are required.

These data are evaluated by experts who are subject to a legal obligation of professional secrecy. The administration itself is also subject to this secrecy requirement, and no dossier submitted may be communicated or used on the submission of a second application.

Generic products may be exempted from the requirement for clinical and pharmacological-toxicological dossiers if the administration deems that a sufficient period has passed, and the patent has expired. If the administration deems these dossiers to be necessary, the laboratory in question is required personally to recompile all the data required, without the possibility of referring to the documentation for the first product.

It should however be noted that traditionally it has been possible to use research which has been published in periodicals in any first or second product dossier, since this information has been placed in the public domain at the initiative of the owner of the first product.

Ad reply to question 5:

Referring to the issue of unfair commercial use of data submitted by an applicant to the responsible State Agency in the procedure for market authorization of a pharmaceutical or of an agricultural chemical product, please specify whether your legislation sets a specific term of protection for undisclosed test or other data of the first applicant.

Pharmaceuticals are governed by Laws Nos. 73-55 of 3 August 1973 and 85-91 of 22 November 1985. Implementing rules and regulations have been enacted, including:

- Decree No. 90-1400 of 3 September 1990, laying down rules of good manufacturing practice for medicines for human use and regulating quality control, packaging, labelling, denomination and advertising;
- Decree No. 90-1401 of 3 September 1990 laying down procedures for medical or scientific testing of medicines for human use;

- Order of the Minister of Public Health of 10 September 1996 establishing the procedures for authorization to market medicines for human use and renewal and assignment of such authorization.

The above texts, pursuant to the laws that gave rise to them, provide for disciplinary sanctions and civil and criminal penalties for infringement.

The processing of applications relating to medicines is governed by procedures and provisions that guarantee the security of information. They are detailed as follows.

Reception of applications

This is handled by a pharmaceutical inspector dealing directly with the person delegated by the laboratory filing the application. The application, countersigned by the inspector, is then returned to the person with an official filing date.

Assessment of applications

Applications are kept under the inspector's responsibility. Pharmaceutical files are sent to the National Drug Control Laboratory, which determines whether the product is in conformity with what is stated in its file, in the light of current pharmaceutical knowledge. Clinical files are submitted to an expert appointed by Ministerial order for a detailed report to an expert committee.

Assessment of products similar to registered products

Data confidentiality is crucial at this stage, in order to prevent the use of data recorded in another file.

In Tunisia, as in most countries with a reliable registration system, the procedure is based on the following:

- Clinical data pertaining to a molecule that is the subject-matter of a second application is not required because the molecule has already been analysed;
- regulations require the product to be approved for marketing in its country of origin (*Autorisation de mise sur le marché* - AMM); where this is a country having signed the WTO Agreements, responsibility for observance of the provisions governing patents lies with the country of origin, if no application for a patent specific to another country has been filed; where the country has not adhered to the WTO Agreements, it is for Tunisia to ensure observance of intellectual property provisions;
- application for marketing approval requires submission of a pharmaceutical file, including analysis methods which must satisfy either of the following conditions:
 - (a) where the product is described in an international pharmacopoeia, reference to the latter is sufficient to validate the methods used;
 - (b) if such is not the case, the supplier is required to present a method that he himself has validated without referring to the data furnished by the first holder of the marketing authorization.

Scientific publications may be used, however, for the relevant authority regards the results they contain as having become public knowledge at the initiative of the patent holder or of the international scientific community.

The procedure applied by Tunisia has been in force for more than 20 years, making it possible to avoid conflicts of interest and ensuring data confidentiality. It has enabled the relevant authority to acquire the status of WHO Collaborating Centre for drug registration and pharmaceutical regulation.

Article 103 of Law No. 2000-84 of 24 August 2000, which covers pharmaceutical products, makes provision for delaying implementation of the Law according to the extension period set in the relevant WTO Agreement.

Tunisia nevertheless assures the admissibility of patent applications pursuant to that same international Agreement.

All the aforementioned information and references to regulation are public and can be accessed at: www.dpm.tn.

C. ENFORCEMENT

6. Please indicate remedies provided by your legislation which constitute effective deterrents to infringements of intellectual property rights.

Further to the reply to this question provided in the replies of Tunisia to the Checklist of issues on enforcement (document IP/N/6/TUN/1) and in particular the replies to questions 15, 16, 17, 18, 19, 21, 22 and 24, the following should be noted:

Literary and artistic intellectual property (copyright and related rights) is protected in Tunisia by the following:

- International treaties legally ratified pursuant to Article 32 of the Constitution, which take precedence over legislation (the Uruguay Round agreements (TRIPS), the Berne Convention, etc.);
- ordinary law: general civil and criminal legislation (Code of Obligations and Contracts, Commercial Code, Law on Competition and Prices, Code of Criminal Procedure, Customs Code, etc.);
- special (*sui generis*) legislation, specifically Law No. 94-36 of 24 February 1994 on Literary and Artistic Property (copyright) and the relevant implementing provisions, in particular Decree No. 96-2230 of 11 November 1996 on the administrative and financial organization of the Tunisian Copyright Protection Agency and its operating procedures.

It should be noted that a draft Law is currently before the Chamber of Deputies, following adoption of the text by the Council of Ministers and the Constitutional Council. The main objective of this legislation is on the one hand to bring the provisions of the above-mentioned Law No. 94-36, relating to copyright, into line with the provisions of the TRIPS Agreement and the WIPO Treaty of December 1996, and on the other hand to incorporate in this special legislation provisions on related rights in accordance with the TRIPS Agreement, the Rome Convention and the WIPO Treaty of December 1996.

As regards the enforcement obligations under Section 3 of the TRIPS Agreement, Tunisian legislation lays down procedures for the enforcement of copyright and related rights which allow effective action to be taken against any act in infringement of such rights.

Article 42

For example, in accordance with Article 42 of the TRIPS Agreement on fair and equitable procedures:

(1) The parties are authorized to arrange to be represented by independent legal counsel. Indeed, "representation by an attorney-at-law is mandatory in proceedings before a Court of First Instance.

The chambers of the attorney-at-law shall be regarded as the elected domicile of its client for the level of jurisdiction for which the attorney is retained" (Article 68 of the Code of Civil and Commercial Procedure).

(2) Defendants must receive timely written notice setting out the basis for the allegations. Article 70 of the Code of Civil and Commercial Procedure states that "the writ of summons must specify the surnames, given names, occupations and addresses of the parties and the capacities in which they are acting, along with an account of the facts in the matter ... It must also include a statement calling on the party on whom the writ is served to enter its pleadings in reply".

(3) A procedure is specified in Tunisian legislation for the identification and protection of confidential information, as follows:

- Article 253 of the Criminal Code states that "Any person who discloses the contents of a letter, telegram or any document belonging to another party without authorisation is liable to a prison sentence of three months".
- Article 254 of the Criminal Code states that "Any doctors, surgeon or other medical personnel, as well as any pharmacist, midwife or any other person in whom secrets are vested by virtue of their status or profession who reveals such secrets, except where required or permitted by law to report the matter, shall be liable to a prison sentence of six months and a fine of 500 francs ...".

The general regulations governing the conduct of public-sector personnel place civil servants under obligations of professional secrecy and discretion; these general regulations include the following:

- The General Regulations for State employees of local public authorities and administrative public bodies;
- the General Regulations for the employees of Boards, industrial and commercial public bodies, and companies whose capital is held directly or indirectly by the State or by public authorities;
- the General Regulations for magistrates;
- the General Regulations for customs staff;
- the General Regulations for the personnel of the internal security forces.

Furthermore, Article 168 of the Labour Code states that "members of company consultative committees and staff representatives are bound by the obligation of professional secrecy with respect to all information of a confidential nature coming into their possession while serving in that capacity, and to all matters relating to manufacturing processes. In the event of a breach of this obligation they shall be liable to the penalties set down in Articles 138 and 254 of the Criminal Code".

Article 138 of the Criminal Code states that "in addition to a fine, any manager, clerk or worker of a factory who discloses or communicates a manufacturing secret shall be liable to a prison sentence of two years; attempts to do so are also punishable".

Article 43

Tunisian legislation, in accordance with Article 43 of the TRIPS Agreement on evidence, gives judicial authorities the power to order a party in proceedings, on a request to this effect from the opposing party, to produce the evidence lying in its control.

Articles 213 to 223 of the Code of Civil and Commercial Procedure allow the presiding judge of the Court to issue rulings on request from either of the parties in the case, to ensure the protection of rights and interests which must not be left unprotected. In cases of extreme urgency, judges may rule in their private homes on questions submitted to them.

Enforcement of rulings issued in this manner is not subject to the appending of the seal of the Court or "*ad hoc*" registration. These formalities are completed later.

Rulings issued on request are exempted from the registration procedure. Such rulings are enforced without delay by process-serving notaries.

A request for the withdrawal of a ruling does not suspend enforcement. Article 101 of the same Code states that "if it is necessary to obtain an expert's report and the parties fail to agree on the selection of the expert, the expert shall be appointed by the judge".

Article 44

As regards Article 44 of the TRIPS Agreement on injunctions, under Tunisian legislation the judicial authorities have authority to issue various kinds of rulings, i.e. interim injunctions, payment injunctions and final judgments or other judgments.

According to Article 86 of the Code of Civil and Commercial Procedure, "if it sees this as necessary, the Court may ask the judge acting as rapporteur to carry out any investigative actions, such as an inquiry, visit to the scene, expert's report, taking of pleas of forgery, or any other action that will help to establish the truth".

The Court, during the hearing and in the presence of the parties, may set the date for the investigative action so ordered, specifying the date and time for the appearance of the parties in the chambers of the judge as rapporteur or at the location of the dispute or any other location.

Article 225 of that same Code states that "in any event, the Court may require ex officio the participation of a third party in the proceedings where it sees the presence of that party as essential for a correct appreciation of the matter at issue". If it is necessary to arrange an expert's report and the parties fail to agree on the selection of the expert, the expert is appointed by the judge.

Furthermore, according to Article 86 of the Code of Civil and Commercial Procedure, "if it sees this as necessary, the Court may ask the judge acting as rapporteur to carry out any investigative

actions, such as an inquiry, visit to the scene, expert's report, taking of pleas of forgery, or any other action that will help to establish the truth".

Emergency interim proceedings:

Article 201 of the Code of Civil and Commercial Procedure (CCCP) states as follows: "In all situations of urgency, emergency interim rulings shall be issued, without prejudice to the main action".

"Emergency interim rulings may be made by the presiding judge of the Court of First Instance or a person with delegated authority from that judge, or a canton magistrate where that magistrate has jurisdiction under the law" (Art. 202 of the Code of Civil and Commercial Procedure).

"Provisional injunctions are enforceable 24 hours after service, unless the judge has granted a period of grace."

Enforcement is carried out without a security unless the judge has ordered that a security be provided (Art. 207 of the Code of Civil and Commercial Procedure).

Payment injunctions

Article 59 of the Code of Civil and Criminal Procedure states that a payment injunction may be issued for any debt payment demand where the debt – irrespective of its nature – is for a fixed amount and is based on a contract.

Judgment

A judgment is not final if the decision is subject to appeal. However, provisional enforcement of a judgment may always be ordered, with or without security, according to the circumstances of the case (Articles 126 and 286 of the Code of Civil and Commercial Procedure).

Final judgment

A final judgment ends the action by deciding the question at issue in the proceedings.

Article 45

With respect to the damages referred to in Article 45 of the TRIPS Agreement, the provisions of Articles 82 and 83 of the Code of Obligations and Contracts (COC) require a party which has knowingly or deliberately caused material or moral damage to another party to make good that damage, where it is established that this was the direct cause of the damage in question.

Along the same lines, Article 51 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property states that "any person who infringes copyright as set out in this Law shall be required to pay the owner of such right damages for material and moral damage caused to the owner, for the amount determined by the competent Court".

The draft Law amending and adding to the said Law No. 94-36 extends these rights to include related rights.

Article 46

With respect to the other remedies referred to in Article 46 of the TRIPS Agreement, the following points should be noted:

Regarding precautionary measures

(1) The Code of Criminal Procedure gives the investigating magistrate, and in some cases criminal investigation police officers, the power to effect the following:

- Searches in all premises where objects may be located whose disclosure is deemed necessary in order to arrive at the truth;
- confiscation of papers or chattels likely to contribute to establishing the truth of the matter ...;
- expert's reports where required by the circumstances, so that technical inspections can be carried out ... with experts to be given specific time limits for the submission of their reports ...;
- the Code of Civil and Commercial Procedure allows any person able to demonstrate a legitimate interest to ask the Court to order the implementation of any measures to ensure the protection of rights and interests which must not be left unprotected

(2) Article 55 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property allows the competent Court to order ex officio or on request the confiscation or destruction of fraudulent copies and the temporary or definitive closure of the establishment in which the infringement has been ascertained.

The owner of the establishment where the infringement has been committed is regarded as jointly and severally liable with the principal offender committing the infringement for making good the damage.

(3) Regarding the enforcement of a judgment:

The process-serving notary may:

- Enter the premises where the enforcement of the judgment is to be carried out, place a guard at the door to prevent any misappropriation of property, require the immediate attendance of the officer in charge of the local police station or national guard, in whose presence the opening of the doors ... and furniture ... will take place ...;
- effect a distraint procedure on property of the party against which the ruling is given.

The Court may:

- order the publication of the judgment, in part or in full, at the expense of the party against which the ruling is given.

Article 47

As regards the right of information referred to in Article 47 of the TRIPS Agreement, in a criminal case the judicial authority and its auxiliary entities are empowered to seek any information or clarification from the person charged regarding his or her accomplices, the beneficiaries of the offence with which the defendant is charged, and the channels of distribution of the objects involved in the criminal offence. The person charged does of course have the right to remain silent and may decline to answer any question, but the judge will take that silence into account when considering the penalty to be imposed.

The information obtained from the criminal investigation can be used as supporting evidence for a civil action, both in the case of civil actions brought separately and for actions conducted concomitantly with the criminal proceedings.

Article 48

Regarding the indemnification of the defendant referred to in Article 48 of the TRIPS Agreement, ordinary law (the Code of Obligations and Contracts) generally allows reparation for moral and material damage suffered, and a suit can be brought to seek reparation for the loss incurred following a wrongful and unjustified action.

Administration officials guilty of abuses and faults committed in the course of their duties are subject to administrative sanctions under the regulations governing their conduct, and may be prosecuted in civil and even criminal proceedings, according to the nature and level of the fault committed.

Article 50-4 of the draft Law amending and adding to Law 94-36 of 24 February 1994 states that "subject to completion of all customs formalities, the suspension of the release of the products shall be revoked automatically if the author, holder of related rights or his/her representative has failed to provide the customs authorities, within ten days from notification of the suspension of the release of the products, with proof of the following:

Lodgement of a security sufficient to cover its liability to the persons concerned in the event of it being subsequently established that the products in question do not infringe the copyright or related rights. The amount of the said security shall be set by the competent Court".

Similarly, Article 54 (new) of the new draft Law states as follows in its last paragraph: "The records of the identification of the infringement and the confiscation measure shall be sent within seven days to the Public Prosecutor, who shall forward the documents to the competent Court for a ruling on the approval or revocation of the confiscation within a time limit of no more than one month from the date on which the confiscation measure was carried out. If the Court does not rule on the confiscation within the time limit specified, the confiscation measure shall be revoked automatically".

Article 49

As regards the administrative procedures referred to in Article 49 of the TRIPS Agreement, Tunisian legislation does not provide for any administrative procedures on the merits of a case. Only the judicial authorities are authorized to deal with the matter.

Article 50

As regards the provisional measures referred to in Article 50 of the TRIPS Agreement (generic legislation), adequate provisional measures are provided for in Tunisian ordinary law through the mechanisms of provisional injunctions and rulings on request as described above.

The draft Law amending and adding to law No. 94-36 of 24 February 1994 on Literary and Artistic Property states in Article 54-1 that "the right holder or his/her representative may, as a preventive measure, on the basis of a ruling on request issued by the presiding judge of the competent Court, arrange for a process-serving notary, assisted by an expert, to carry out a detailed description, with or without physical confiscation, of the alleged counterfeit products constituting an infringement of copyright or related rights".

Such measures may be ordered "in all situations of urgency, on a provisional basis, without prejudice to the principal action" (Article 201 of the Code of Civil and Commercial Procedure).

Articles 51-60

As regards the special requirements related to border measures referred to in Articles 51 to 60 of the TRIPS Agreement, in addition to the Customs Code which protects the borders from any infringement of intellectual property and Article 50 of Law No. 94-36 of 24 February 1994 on Literary and Artistic Property, which prohibits the importation of works breaching copyright, Articles 50-1 to 50-5 of the draft Law amending and adding to Law No. 94-36 on Literary and Artistic Property contain provisions in accordance with the requirements of the TRIPS Agreement.

1. Thus, Article 50-1 of the draft Law states that "customs authorities may suspend customs clearance procedures for products in respect of which there is manifest evidence of infringements against copyright and related rights. The customs authorities may ask the author and holders of related rights or their representative to provide any information which may be of assistance in the exercise of their authority".

2. As regards procedures by which the customs authorities suspend the release into free circulation of the goods, paragraph 2 of Article 50-1 states that "the customs authorities shall promptly notify the author or holders of related rights or their representative of the suspension; they are required to lodge the application referred to in Article 50-2 within a time limit of seven days from the date of the notification.

Article 50-3 of the same draft Law states that "customs authorities shall immediately notify the author or holders of related rights or their representative, and the owner, importer or consignee, of the suspension of release, giving them the opportunity to examine the products whose release has been suspended in accordance with the provisions of the Customs Code. On the basis of a ruling on request, to enable the author and holders of related rights or their representative to bring legal actions, the customs authorities are required to inform them of the names and addresses of the owner, importer or consignee, if known".

Finally, Article 50-5 of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 states that "the owner, importer or consignee shall be entitled to ask the Court to revoke the suspension of the release of the products at issue, in return for the lodgement of a security sufficient to protect the interests of the author or holders of related rights, provided that:

- The customs authorities have been informed within the time limit specified in Article 50-4 of this Law of the referral of the matter to the competent Court for a ruling on the merits of the case;

- on the expiry of that time limit, the competent Court has not granted any precautionary measures; and
- all customs formalities have been completed.

3. As regards the actual duration of the customs procedures, Article 50-4 of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property states as follows:

"Subject to completion of all customs formalities, the measure of suspension of the release of the products shall be revoked automatically if the author, holders of related rights or their representative has failed to provide the customs authorities, within ten days from notification of the suspension of the release of the products, with proof of the following:

- Adequate precautionary measures ordered by the competent Court; or
- the lodgement of a civil or criminal action; or
- lodgement of a security sufficient to cover its liability to the persons concerned in the event of it being subsequently established that the products in question do not infringe the copyright or related rights. The amount of the said security shall be set by the competent Court.

Where appropriate, the time limit set down in the first indent of this Article may be extended by a maximum of ten days by the competent Court.

The measure of suspension of release of the products pursuant to Article 50-1 is also revoked automatically if the author, holders of related rights or their representative fails to lodge the application referred to in this Article within a time limit of seven days from the date of notification by the customs authorities."

The customs authorities may act on their own initiative to suspend the customs clearance procedures for products in respect of which there is manifest evidence of infringements of copyright or related rights (Article 50-1 of the above-mentioned draft Law).

Article 61

As regards the criminal procedures referred to in Article 61 of the TRIPS Agreement, further to reparation for damage in civil proceedings, Article 52 of Law No. 94-36 of 24 February 1994 provides for a fine of 50 to 5 000 dinars, doubled in the event of a repeat offence, with the possibility of imprisonment for between one and six months.

Article 52 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property increases the fine to between 1,000 and 50,000 dinars.

The fine is doubled in the event of a repeat offence, and the possibility of imprisonment has been increased to between one and 12 months.

These penalties may be accompanied by confiscation of the infringing goods, their destruction and the temporary or definitive closure of the establishment where the infringement was committed.

As regards the public authorities charged with identifying infringements and initiating criminal proceedings, the first paragraph of Article 54 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property states that "the identification of breaches of this Law and the drawing up of records of evidence [is] entrusted to the criminal investigation police authorities and officials of the Ministry of Culture duly sworn and empowered for this purpose ...".

Article 54 (new) of the draft Law amending and adding to Law No. 94-36 extends these prerogatives to customs officials, officials responsible for monitoring economic activity and municipal regulatory officials.

Public authorities may act on their own initiative to institute criminal proceedings. Thus, paragraphs 2 and 3 of Article 54 (new) of the draft Law amending and adding to Law No. 94-36 of 24 February 1994 on Literary and Artistic Property state that "the above-mentioned officials may seize the necessary documents and take samples of the counterfeit products for the purposes of the investigation and to prove the infringement, against receipt. They may also seize, as a preventive measure, any products suspected to be counterfeit and not in accordance with current regulations".
