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**Islamic Republic of Afghanistan
Ministry of Finance**

(DRAFT)

**Order on Customs Control of
Intellectual Property Rights**

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Chapter-One General Provisions

Basis

Article 1

This Regulation has been put into effect based on Article 52 of the Customs Code in order to provide a basis for enforcement of intellectual property rights at Afghanistan's customs borders.

Objectives

Article 2

The main objectives of this Regulation are:

1. To provide mechanism for enforcement of Intellectual Property Rights upon importation, exportation and transit;
2. To maintain and safeguard the Intellectual Property Rights;
3. To determine the duties and obligations of right-holders and Customs authorities inside of Afghanistan with respect to enforcement of intellectual property rights.

Terms

Article 3

The terms used in this Regulation shall have the following meaning:

Intellectual Property Rights: Exclusive rights, whether moral or economic, arising under Afghanistan's laws on intellectual property.

Right Holder: A natural person or legal entity, which, under the laws of Afghanistan, is the owner of an intellectual property right, its successors in title or its duly authorized exclusive licensee.

Goods Infringing Intellectual Property Rights: Any goods whose production, reproduction, distribution, or other use violates the intellectual property laws of Afghanistan. If such production, reproduction, distribution or other use took place outside Afghanistan, the goods are deemed to be infringing if those acts would have constituted an infringement in Afghanistan had they been undertaken in Afghanistan. "Goods infringing intellectual property rights" shall be understood to include goods protected under copyright or related rights, whose rights management information has been removed, altered, or added without the right holders' authorization.

Customs Transit: The Customs procedure under which goods are transported under Customs control from one Customs office to another.

Technological Measure: Any technology, device or component that in the normal course of its operation, either controls access to a protected work or subject matter protected by related rights,

or protects any copyright or any related rights or facilitates the detection of counterfeit trademark goods or goods protected by a copyright or related right.

Protection-Defeating Devices: Devices, products, components or parts, such as unauthorized smart cards, set top decoders or circumvention software, which are primarily designed or adapted to circumvent any technological measure, including any illegitimate authentication.

Chapter-Two Application

Application Article 4

A right holder or his duly authorized representative may lodge an application to the Customs authorities, in accordance with the procedures and under the conditions set out in this Regulation, for suspension of customs clearance and/or detention of imported goods, goods destined for exportation, or goods in transit, where such goods are suspected goods infringing intellectual property rights or protection-defeating devices.

Content of Application Article 5

(1) An application under Article 4 of this Regulation shall be presented in writing and shall be accompanied, as applicable, by:

1. The applicant's name, address and contact information;
2. Where the applicant is a duly authorized representative of the right holder, authorization from the right holder in accordance with applicable law;
3. Adequate evidence of the existence and ownership of a valid intellectual property right by, or on behalf of, the right holder;
4. A statement of the grounds for the application for border measures related to shipments in general, or, in the case of a specific shipment of actual suspected goods infringing intellectual property rights or protection-defeating devices, a statement of the grounds for the application, including *prima facie* evidence showing that such intellectual property rights have been infringed or that rights are about to be infringed or that the shipment contains protection-defeating devices;
5. A sufficiently detailed description of the goods in respect of which the intellectual property right applies, together, where appropriate, with a sample of a genuine product;
6. Where the application concerns a right in a geographical indication, evidence that the use of the geographical indication in question is a violation of national law in the country of origin, and where the release of the goods is suspended upon exportation or transit,

that the use of the geographical indication is a violation of national law in the country of ultimate destination or sale; and

7. The prescribed application fee.

(2) In the event any of the particular information listed in paragraph 1 of this Article is not provided with the application, the Customs authorities shall, if it deems such information materially necessary, ask the applicant to supplement the application. The Customs authorities shall not deny an application without further examination on the basis that the applicant has not provided some of the information listed in paragraph 1, nor shall the Customs authorities impose an evidentiary burden on the applicant which is:

1. undue under the circumstances of the case, or
2. which would deter recourse to border enforcement measures.

Time Limit for Issuance of Decision

Article 6

(1) Where the application relates to shipments in general, the Customs authorities shall render a decision and notify the applicant in writing whether the application has been granted or rejected within a reasonable period of time, not to exceed thirty working days from the receipt of the application.

(2) Where the application relates to a specific shipment of actual suspected goods infringing intellectual property rights or protection-defeating devices, the Customs authorities shall render a decision and notify the applicant in writing whether the application has been granted or rejected as soon as possible, but no later than within three working days.

Security

Article 7

The Customs authorities may require an applicant to provide a security or equivalent assurance or an undertaking, sufficient to protect interests of the importer, consignee, consignor, exporter or owner of the goods and the competent authorities. However, such security or equivalent assurance shall not be fixed at an amount, which would unreasonably deter recourse to these procedures.

Rejection of Application

Article 8

If the application is rejected, the Customs authorities' written notification under Article 6 shall clearly state the reasons for the rejection.

Chapter-Three Acceptance and Customs Action

Granting of Application

Article 9

If the application is granted, the Customs authorities' written notification under Article 6 shall specify the action that the Customs authorities will take, and the time period during which they will take such action.

Period of Action

Article 10

(1) Where the accepted application relates to shipments in general, the time period for the Customs' authorities' action pursuant to it shall in all cases be at least one year, unless the applicant requests a shorter period for assistance.

(2) Where the accepted application relates to a specific shipment, the time period for such action shall be such period as specified in the application, but no more than 6 months.

Forwarding

Article 11

Promptly upon grant of an application, the Customs official rendering that decision shall inform all potentially affected Customs offices of the details of the application, and of the goods referred to in the application.

Changes in Rights

Article 12

The right holder is required to inform the Customs authorities if, during the pendency of an application or period of action under Article 10, his intellectual property right ceases to be valid, or if he ceases to be the owner of the intellectual property right for any reason.

Execution

Article 13

(1) Where the Customs authorities are satisfied, after consulting with the applicant if necessary, that particular imported or exported goods or goods in transit are covered by an accepted application, they shall suspend the clearance of those goods. The suspension shall remain in force for the initial period, and any extension thereof, as specified by the Customs authorities or by the relevant Court as specified below.

(2) The Customs authorities shall immediately serve notice on the importer, exporter, consignee or the consignor and the applicant regarding the suspension of the clearance of the goods or of the detention of goods destined for export or goods in transit, and shall state the reasons for such suspension or detention.

Chapter - Four Proceedings on Merits

Initiation of Proceedings

Article 14

Upon being served notice of a suspension or detention, the applicant for suspension or other right holder shall be obliged to promptly initiate judicial proceedings leading to a decision on the merits of his claim of infringement.

Period of time for suspension

Article 15

(1) Subject to the procedure set out in Article 20(2), if, within a period of seven working days after the applicant has been served notice of the suspension or other action, the Customs authorities have not been informed that judicial proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that a Court has taken provisional measures prolonging the action, the goods shall be released, provided that all other conditions for importation or exportation have been complied with.

(2) This Article also applies in cases including the detention of goods in the course of any criminal investigation.

(3) The time limit set out in paragraph (1) of this Article may be extended by another ten working days in appropriate cases. In the case of perishable goods suspected of infringing an intellectual property right, the period shall be three working days and may not be extended.

(4) If judicial proceedings leading to a decision on the merits of the case have been initiated, a review, including a hearing if requested, shall take place, upon request of the defendant, with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed.

(5) Notwithstanding the above, where the suspension of the release of goods is continued in accordance with a provisional judicial measure, this period will be determined by the Court ordering the measure. In the absence of such a determination, the period shall not exceed twenty working days or thirty-one calendar days, whichever is longer.

Release of goods under security

Article 16

(1) Where, pursuant to an application, the Customs authorities have suspended the clearance of goods involving intellectual property rights other than trademarks, copyright and related rights, and the period provided for in Article 15 above has expired without the adjudicating Court having granted a provisional seizure order, and provided that all other conditions for importation have been complied with, the owner, exporter, importer, consignee or consignor of such goods shall be entitled to clearance on the posting of a security in an amount sufficient to protect the right holder in the event of any infringement.

(2) Payment of such security shall not prejudice any other remedy available to the right holder, and the security shall be released if the right holder fails to pursue his claim on the merits within a reasonable period of time.

Inspection and Protection of Confidential Information

Article 17

(1) Without prejudice to the protection of confidential information, the Customs authorities shall allow a right holder, importer or exporter to examine the goods, the clearance of which has been suspended in accordance with this procedure, and may provide samples for examination, testing and analysis to assist in the determination of whether the goods infringe an intellectual property right or comprise protection-defeating devices.

(2) Without prejudice to the protection of confidential information and personal data, and in accordance with applicable legislation and procedures, the Customs authorities shall notify the right holder, at the right holder's request, of the name and address of the declarant.

(3) At the right holder's request, the Customs authorities may also provide additional information relating to a consignment which has been suspended from clearance, where such information would assist the right holder in pursuing claims of infringement.

(4) Where a positive determination has been made by the adjudicating Court that goods infringe an intellectual property right, or that the goods comprise protection-defeating devices, the Customs authorities shall, at the right holder's request, inform the right holder of the names and addresses of the exporter, the importer, the consignee, and the consignor and of the estimated quantity of the goods in question.

(5) Right holders are permitted to use the data obtained under this Article solely for the purpose of investigating and bringing legal actions concerning alleged infringements of their intellectual property rights.

Chapter – Five Ex-officio Action

Action taken on the initiative of Customs

Article 18

(1) The Customs authorities shall, on their own initiative, suspend the clearance of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right has been infringed or is about to be infringed or that the goods are protection-defeating devices.

(2) The Customs authorities may, on their own initiative, also suspend the clearance of goods whenever there are reasonable grounds to suspect that the goods are infringing goods or protection-defeating devices.

Procedures on Action taken on the initiative of Customs

Article 19

(1) Where the clearance of goods has been suspended in accordance with Article 18, the Customs authorities may seek from the right holder the provision of any information or assistance, including technical expertise and facilities for the purpose of determining whether suspect goods infringe an intellectual property right.

(2) Where the Customs authorities act under Article 18 of this Regulation, the provisions of Articles 13 to 17 of this Regulation shall apply.

(3) The Customs authorities shall immediately inform the right holder or his representative and the declarant, importer or exporter of the place and the date of the suspension of customs clearance.

Chapter – Six Completion of the Procedures

Disposal or Destruction of Infringing Goods

Article 20

(1) Where it is determined by the adjudicating Court that goods detained under these proceedings infringe intellectual property rights under applicable law, or that the goods comprise protection-defeating devices, the Customs authorities may, upon application by the right holder, destroy those goods under official supervision, or dispose of them in such other manner as may be within the competence of the Customs authorities, provided that:

1. Disposal is outside the normal channels of commerce and in such a manner so as to minimize the risks of further infringements;
2. Such manner of disposal is without detriment to the right holder;
3. The right holder has the opportunity to suggest an appropriate manner of disposal of the goods; and
4. The Customs authorities do not allow the re-exportation of the infringing goods in an unaltered state, or subject them to a different customs procedure.

(2) The Customs authorities may, at the request of the right holder, forfeit and subsequently destroy the detained goods or place them outside the channels of commerce, or have them destroyed by the right holder under the Customs authorities' supervision, *ex officio* and without a court order, if:

1. The right holder has provided adequate evidence to prove that the goods are infringing goods, and

2. The importer, the exporter, the consignee, the consignor, the owner of the goods, or the declarant has been served by Customs with the notice of suspension, has been informed about the possibility of confiscation and destruction or disposal outside the channels of commerce by default of the allegedly infringing goods and he does not oppose the measure within twenty working days after having been served the notice, or alternatively if after reasonable efforts by Customs the importer, exporter, consignee, consignor, the owner of the goods, or the declarant has not been identified.

(3) In the event the applicant is granted an extension of the time limit for taking legal actions, such extension is automatically applied to the opposition procedure referred to in this Article.

(4) Right holders may, prior to the destruction or the disposal of the suspended goods, apply for a retention of samples, to the extent that such samples are needed as evidence in pending or future legal actions regarding infringements of intellectual property rights.

Exception for Minimal Quantities

Article 21

A single copy of a non-commercial nature of a work made by a person using his own means, and intended strictly for his own personal use and contained in personal luggage or sent in a small consignment is not subject to the suspension procedure provided by this Regulation.

Liability

Article 22

Public authorities and officials acting in good faith and following the procedures set out in this Regulation and in applicable implementing regulations shall be exempt from civil and criminal liability for any failure to detect goods infringing intellectual property rights or protection-defeating devices, the inadvertent release of such goods or devices, or any other action in respect of such goods or devices.

Costs

Article 23

(1) An importer, exporter, consignee, consignor or the owner of the goods may seek appropriate monetary compensation for injury caused through wrongful detention of goods or devices.

(2) The owner, importer, exporter, consignee or consignor, as applicable, shall be liable to pay the costs of storage and destruction of any goods suspended and finally determined to be goods infringing intellectual property rights or protection-defeating devices.

Conflicts

Article 24

Where the suspension or other procedures set out in this Regulation conflict with corresponding procedures in the Customs Code, the present Regulation shall apply to the processing of suspected goods infringing intellectual property rights or protection-defeating devices.

Date of Enforcement
Article 25

This Regulation shall enter into force as from the date of its Publication in the Official Gazette. Starting from its enforcement, provisions in other regulations inconsistent with this Regulation shall be repealed.