

CHAPTER 11
PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

SECTION I GENERAL PROVISIONS

ARTICLE 11.1

Intellectual Property Rights

1. The Parties shall grant and ensure adequate, effective, transparent and non-discriminatory protection of intellectual property rights, and provide for measures for the enforcement of such rights against infringement thereof, counterfeiting and piracy, in accordance with the provisions of this Chapter and the international agreements acceded to by both Parties.
2. The Parties shall accord to each others' nationals treatment no less favourable than that accorded to their own nationals with regard to the protection of intellectual property. Exemptions from this obligation must be in accordance with the substantive provisions of Articles 3 and 5 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS Agreement").
3. The Parties shall grant to each others' nationals treatment no less favourable than that accorded to nationals of any other State with regard to protection of intellectual property. Exemptions from this obligation must be in accordance with the substantive provisions of the TRIPS Agreement, in particular Articles 4 and 5 thereof.
4. The Parties recognise the importance of protection and enforcement of intellectual property rights in order to incentivise research, development and creative activity which will promote economic and social development, as well as the dissemination of knowledge and technology. The Parties recognise that the protection and enforcement of intellectual property rights should strike a balance between the legitimate interest of the right owners and the public at large.
5. The Parties may take appropriate measures provided that they are consistent with the provisions of this Agreement and their international obligations to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect technology transfer.
6. The Parties agree, upon request of any Party and subject to their agreement in the Joint Committee, to review the provisions on the protection of intellectual property rights contained in this Chapter, with a view to keep provisions up to date with international intellectual property developments in a balanced manner and to ensure their good functioning under this Agreement in practice.

ARTICLE 11.2

Definition of Intellectual Property

For the purposes of this Agreement, “intellectual property” comprises in particular copyright, as well as related rights, trademarks for goods and services, geographical indications¹⁸, industrial designs, patents, plant varieties, layout-designs (topographies) of integrated circuits, as well as undisclosed information.¹⁹

ARTICLE 11.3

International Conventions

1. The Parties reaffirm their commitments established in existing international agreements in the field of intellectual property rights, to which both are Parties, including the following:

- (a) the TRIPS Agreement;
- (b) the Paris Convention of 20 March 1883 for the Protection of Industrial Property, as revised by the Stockholm Act of 1967 (hereinafter referred to as “the Paris Convention”);
- (c) the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works, as revised by the Paris Act of 1971 (hereinafter referred to as the “Berne Convention”);
- (d) the Patent Cooperation Treaty of 19 June 1970, as revised by the Washington Act of 2001;
- (e) the Budapest Treaty of 28 April 1977 on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure;
- (f) the Nice Agreement of 15 June 1957 Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks as revised by the Geneva Act of 1979;
- (g) the Protocol of 27 June 1989 relating to the Madrid Agreement concerning the International Registration of Marks;
- (h) the WIPO Performances and Phonogram Treaty of 20 December 1996 (hereinafter referred to as the “WPPT”);
- (i) the WIPO Copyright Treaty of 20 December 1996; and

¹⁸ For the sake of clarification, appellations of origin of Switzerland may be protected as geographical indications in China.

¹⁹ For Switzerland, indications of source are part of the definition of intellectual property.

- (j) the International Convention for the Protection of New Varieties of Plants 1978 (hereinafter referred to as the “1978 UPOV Convention”).
2. Each Party shall make all reasonable efforts to ratify or accede to the Beijing Treaty on Audiovisual Performances.

ARTICLE 11.4

Notification and Exchange of Information

Under the established structure of the bilateral dialogue on intellectual property rights and the annual Intellectual Property Working Group meeting between China and Switzerland, each Party shall, upon request of the other Party, and in addition to the already existing forms of cooperation:

- (a) exchange information relating to intellectual property policies in their respective administrations;
- (b) inform the other Party of changes to, and developments in the implementation of their national intellectual property systems;
- (c) exchange information relating to the conventions referred to in this Chapter or to future international conventions on harmonisation, administration and enforcement of intellectual property rights and on activities in international organisations, such as the WTO and WIPO, as well as on relations of the Parties with third countries on matters concerning intellectual property; and
- (d) consider intellectual property right issues and questions of interest to private stakeholders.

ARTICLE 11.5

Intellectual Property and Public Health

1. The Parties recognise the principles established in the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 by the Ministerial Conference of the WTO and confirm that the provisions of this Chapter are without prejudice to this Declaration.
2. The Parties reaffirm their commitment to contribute to the international efforts to the implementation of the Decision of the WTO General Council of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, as well as the Protocol Amending the TRIPS Agreement, done at Geneva on 6 December 2005.

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

ARTICLE 11.6

Copyright and Related Rights

1. Without prejudice to the obligations set out in the international agreements to which both Parties are parties, each Party shall, in accordance with its laws and regulations, grant and ensure adequate and effective protection to the authors of works and to performers, producers of phonograms and videograms and broadcasting organisations for their works, performances, phonograms, videograms and broadcasts, respectively. It is understood that computer programmes fall under copyright protection.
2. In addition to the protection provided for in the international agreements to which the Parties are parties, each Party shall:
 - (a) grant and ensure protection as provided for in Articles 5, 6, 7, 8 and 10 of the WPPT, *mutatis mutandis*, to performers for their audio-visual performances; and
 - (b) grant and ensure protection as provided for in Articles 11, 12, 13 and 14 of the WPPT, *mutatis mutandis*, to producers of videograms.
3. A radio station or television station shall have the right to prohibit the following acts performed without its permission:
 - (a) rebroadcasting its programmes; and
 - (b) making a sound recording or video recording of its programmes and reproducing such recording.
4. Each Party may, in its national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers for their audio-visual performances to the protection of videograms producers, and to broadcasting organisations as it provides for in its national legislation, in connection with the protection of copyright in literary and artistic work.
5. Each Party shall ensure that the author has the right, independently of the author's economic rights, and even after the transfer of the said rights, to claim authorship of the work and to object to any modification, distortion, mutilation or other derogatory action in relation to the said work, which would be prejudicial to his or her honour or reputation.
6. The rights granted to the author in accordance with paragraph 5 shall, after his or her death, be maintained at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the Party in which protection is claimed.
7. The rights granted under paragraphs 5 and 6 shall be granted, *mutatis mutandis*, to performers as regards their live aural, visual or audiovisual performances, or performances fixed in phonograms or audiovisual fixations.

8. The term of protection to be granted to performers under this Agreement shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance took place.

9. The term of protection to be granted to producers of videograms under this Agreement shall last, at least, until the end of a period of 50 years computed from the end of the year in which the videogram was published, or failing such publication within 50 years from fixation of the videogram, 50 years from the end of the year in which the fixation was made.

10. The term of protection to be granted to broadcasting organisations under this Agreement shall last, at least, until the end of a period of 50 years computed from the end of the year in which the broadcast took place.

11. A Party may be exempted from its obligations under paragraphs 8, 9 and 10 where the exemptions as provided for in Articles 7 and 7*bis* of the Berne Convention may apply.

ARTICLE 11.7

Trademarks

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

2. The Parties reaffirm the importance of the principles contained in the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the WIPO in 1999, and the WIPO Joint Recommendation Concerning Provisions on the Protection of Marks and other Industrial Property Rights in Signs on the Internet, adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the WIPO in 2001.

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

4. The protection according to paragraph 3 shall not be limited to identical or similar goods or services where the registered trade mark is well known in the respective Party and provided that use of a trademark which is a reproduction, an imitation or a translation, of the

well-known trademark above in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

ARTICLE 11.8

Patents

1. The Parties shall, in their national laws, at least ensure adequate and effective patent protection for inventions in all fields of technology, including in the field of biotechnology and herbal medicine, provided that they are new, involve an inventive step and are capable of industrial application.
2. For the Parties, this means protection on a level corresponding to the one in paragraph 1 of Article 27 of the TRIPS Agreement. In addition to what is provided for in paragraph 2 of Article 27 of the TRIPS Agreement, the Parties may exclude from patentability:
 - (a) methods for treatment of the human or animal body by surgery or therapy or for diagnostic methods practised on the human or animal body; this provision shall not apply to products, in particular substances or compositions, for use in any of these methods; and
 - (b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof.

ARTICLE 11.9

Genetic Resources and Traditional Knowledge

1. The Parties recognise the contribution made by genetic resources and traditional knowledge to scientific, cultural and economic development.
2. The Parties acknowledge and reaffirm the principles established in the Convention on Biological Diversity adopted on 5 June 1992 and encourage the effort to enhance a mutually supportive relationship between the TRIPS Agreement and the Convention on Biological Diversity, regarding genetic resources and traditional knowledge.
3. Subject to each Party's international rights and obligations and domestic laws, the Parties may adopt or maintain measures to promote the conservation of biological diversity and the equitable sharing of benefits arising from the use of genetic resources and traditional knowledge.
4. The Parties may require that patent applicants should indicate the source of a genetic resource and, if so provided by the national law, traditional knowledge, to which the inventor or the patent applicant has had access, insofar as the invention is directly based on this resource or this knowledge in accordance with domestic laws and regulations;

5. If a patent application does not meet the requirements of paragraph 4, the Parties may set a time limit by which the applicant must correct the defect. The Parties may refuse the application or consider it withdrawn if the defect according to this paragraph has not been corrected within the set time limit.

6. If it is discovered after the granting of a patent that the application failed to disclose the source or that intentionally false information was submitted, or other relevant laws and regulations were violated, the Parties may provide for appropriate legal consequences.

ARTICLE 11.10

Plant Variety Protection

1. The Parties shall grant adequate and effective protection to breeders of new plant varieties at least on a level equivalent to the level provided for by the 1978 UPOV Convention.

2. At least the following acts in respect of the propagating material of the protected variety shall require the authorisation of the breeder:

- (a) production or reproduction (multiplication) for the purposes of commercial marketing;
- (b) conditioning for the purpose of commercial propagation;
- (c) offering for sale;
- (d) selling or other marketing; and
- (e) importing or exporting.

3. The breeder may make his or her authorisation subject to conditions and limitations.

4. Exceptions:

(a) The breeder's right shall not extend to:

- i. acts done for experimental purposes; and
- ii. acts done for the purpose of breeding other varieties and acts referred to in paragraph 2 in respect of such other varieties.

(b) Each Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety.

5. The Parties shall apply paragraphs 1 and 2 to at least the genera/species contained in List A of Annex IX. If a Party, at its national level, grants protection to any other genera/species not mentioned in the Annex, the possibility to protect the relevant species/genera shall automatically be granted to any plant breeder of the Parties in accordance with the principles of national treatment and most favourite nation treatment.

6. Upon a Party's request, every two years after the entry into force of this Agreement, the two Parties will:

(a) discuss the inclusion of additional genera/species, if the protection is limited to certain genera/species; and

(b) subject to their agreement, amend/expand Annex IX accordingly. Furthermore, the Parties agree to exchange the information on the protection given in their respective plant

variety protection systems to essentially derived varieties after a period of two years after the entry into force of this Agreement with a view to examine the possibility of a more comprehensive protection regime, also with regard to essentially derived varieties.

ARTICLE 11.11

Undisclosed Information

1. The Parties shall protect undisclosed information in accordance with Article 39 of the TRIPS Agreement.
2. The Parties shall prevent applicants for marketing approval for pharmaceuticals, including chemical entities and biologics, and agricultural chemical products from relying on, or referring to, undisclosed test data or other data submitted to the competent authority by the first applicant for a period, counted from the date of marketing approval, of at least six years for pharmaceuticals and for agrochemical products.
3. Reliance on or reference to such data may be permitted in order to avoid unnecessary duplication of tests of agrochemical products involving vertebrate animals, provided that the first applicant is adequately compensated.

ARTICLE 11.12

Industrial Designs

1. The Parties shall ensure in their national laws adequate and effective protection of industrial designs by providing a period of protection of at least ten years.
2. The Parties shall provide copyright protection for industrial designs if they may be considered as works of applied art and fulfil the general condition required for copyright protection by the respective domestic legislation. The term of protection shall be at least 25 years from the making of the work.

ARTICLE 11.13

Geographical Indications

1. The Parties shall ensure in their national laws adequate and effective means to protect geographical indications.²⁰
2. For the purposes of this Agreement, “geographical indications” are indications which identify a product as originating in the territory of a Party, or a region or a locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin.

²⁰ Parties may require an indication to be registered in accordance with respective legislation and regulation on geographical indication in order to enjoy legal protection as a geographical indication.

3. Without prejudice to Articles 22 and 23 of the TRIPS Agreement, the Parties shall take all necessary measures, in accordance with this Agreement, to ensure mutual protection of the geographical indications referred to in paragraph 2 that are used to refer to goods originating in the territory of the Parties. Each Party shall provide interested parties with the legal means to prevent the use of such geographical indications for identical or similar goods not originating in the place indicated by the geographical indication in question.

SECTION III

ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS

ARTICLE 11.14

Acquisition and Maintenance of Intellectual Property Rights

Where the acquisition of an intellectual property right is subject to the right being granted or registered, the Parties shall ensure that the procedures for grant or registration are of the same level as that provided in the TRIPS Agreement, in particular Article 62.

SECTION IV

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

ARTICLE 11.15

General

The Parties shall provide for enforcement provisions for rights covered by Article 11.2 in their respective national laws which shall be at least of the same level as those provided in the TRIPS Agreement, in particular Articles 41 to 61.

ARTICLE 11.16

Suspension of Release

1. The Parties shall adopt procedures to enable a right holder, who has valid grounds for suspecting that importation or exportation of goods infringing patents, industrial designs, trademarks or copyright may take place, to lodge according to domestic laws and regulations an application in writing with the competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.

2. The Parties shall enable their competent authorities to act upon their own initiative and suspend the release of goods according to domestic laws and regulations when they have valid

grounds for suspecting that the importation or exportation of those goods would infringe patents, industrial designs, trademarks or copyright.

3. The Parties shall authorise their customs authorities to inform the right holder in order to enable the lodging of an application according to paragraph 1.

4. It is understood that there shall be no obligation to apply procedures set forth in paragraphs 1 or 2 to the suspension of the release into free circulation of goods put on the market in another country by or with the consent of the right holder.

5. In the case of the suspension pursuant to paragraphs 1 or 2, the competent authorities of the Party suspending the release of the products shall notify according to domestic laws and regulations the right holder of the suspension including necessary information available to enforce his or her rights, such as the name and addresses of the consignor or consignee, importer or exporter, as applicable, and of the quantity of the products in question.

6. Each Party shall ensure that the competent authorities, administrative or judicial, on request from the right holder, have the authority to decide that the products, the release of which has been suspended pursuant to paragraphs 1 or 2, shall be held seized until a final decision is reached in the infringement dispute.

7. Each Party shall provide that if the competent authorities have made a determination that the suspected goods infringe an intellectual property right, procedures are made available to enable the right holder to seek recovery of, and indemnify against, costs and expenses that the right holder may have incurred in connection with the exercise of rights and remedies provided in this provision.

ARTICLE 11.17

Right of Inspection

1. The competent authorities shall give the applicant for the suspension of goods and other persons involved in the suspension the opportunity to inspect goods whose release has been suspended or which have been detained.

2. When examining goods, the competent authorities may take samples and, according to the rules in force in the Party concerned, hand them over or send them to the right holder, at his or her request, strictly for the purposes of analysis and of facilitating the subsequent procedure. Where circumstances allow, samples must be returned on completion of the technical analysis and, where applicable, before goods are released or their detention is lifted. Any analysis of these samples shall be carried out under the sole responsibility of the right holder.

3. The declarant, holder or owner of the suspected infringing goods may be present at the inspection.

ARTICLE 11.18

Liability Declaration, Security or Equivalent Assurance

The competent authorities shall have the authority to require an applicant to declare to accept liability where applicable towards the persons involved or, in justified cases, to provide a security or equivalent assurance, sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

ARTICLE 11.19

Enforcement – Civil Remedies

Each Party shall provide that:

- (a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer who knowingly or with reasonable grounds to know, engaged in infringing activity of intellectual property rights to pay the right holder damages adequate to compensate for the actual injury the right holder has suffered as a result of the infringement;
- (b) in determining the amount of damages for intellectual property rights infringement, its judicial authorities shall consider, *inter alia*, the actual damage, or establishing a fair licence fee; and
- (c) the competent judicial authorities in an infringement dispute may order, at the request of the right holder, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements predominantly used in the creation or manufacture of those goods. Such measures shall include definitive removal from the channels of commerce or destruction. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

ARTICLE 11.20

Provisional Measures and Injunctions

1. Each Party shall ensure that its judicial authorities have the authority to order prompt and effective provisional measures:
 - (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; and
 - (b) to preserve relevant evidence in regard to the alleged infringement.
2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable

harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. On request for provisional measures, the judicial authorities shall act expeditiously and make a decision without undue delay.

3. Each Party shall ensure that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order a party to desist from an infringement, *inter alia*, to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods.

ARTICLE 11.21

Enforcement – Criminal Remedies

Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.

SECTION V

INDICATIONS OF SOURCE AND COUNTRY NAMES

ARTICLE 11.22

Indications of Source and Country Names

1. The Parties shall ensure in their national laws adequate and effective means to protect indications of source, country names and flags, with regard to all goods and services.
2. For the purposes of this Agreement, “indications of source” are direct or indirect references to the geographical origin of goods or services.
3. With regard to the use of indications of source for goods or services, the Parties shall provide in their national laws for adequate and effective means to prevent the use of such indications for goods or services not originating in the place indicated by the designation in question.
4. The Parties shall provide the legal means for interested parties to prevent any incorrect or misleading use or registration of country names of a Party as trademarks, company names or names of associations.
5. The Parties shall provide the legal means for interested parties to prevent that armorial bearings, flags and other State emblems of a Party are used or registered as trademarks, or as company names or names of associations, in non-compliance with the conditions laid down in the laws and regulations of that Party. This protection shall also apply to signs that may be confused with armorial bearings, flags and other State emblems of the Parties.