

CHAPTER 11 INTELLECTUAL PROPERTY

Section A: General Provisions

ARTICLE 11.1 Definitions

For the purposes of this Chapter:

“geographical indication” means an indication that identifies a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin;

“intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement; and

a **“national”** means, in respect of the relevant right, a person of a Party that would meet the criteria for eligibility for protection provided for in the TRIPS Agreement.

ARTICLE 11.2 Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

ARTICLE 11.3 Principles

1. A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Chapter.

2. The Parties recognise that appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

ARTICLE 11.4 Understandings in Respect of this Chapter

Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

- (a) promote innovation and creativity;
- (b) facilitate the diffusion of information, knowledge, technology, culture and the arts; and
- (c) foster competition

through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of right holders, users and the public.

ARTICLE 11.5 **Nature and Scope of Obligations**

Each Party shall give effect to the provisions of this Chapter. A Party may, but shall not be obliged to, provide more extensive protection for, or enforcement of, intellectual property rights under its law than is required by this Chapter, provided that such protection or enforcement does not contravene the provisions of this Chapter. Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice.

ARTICLE 11.6 **TRIPS and Public Health**

1. The Parties:

- (a) reaffirm, in general, their right to utilise the flexibilities provided in the TRIPS Agreement;
- (b) reaffirm, in particular, the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 by the Ministerial Conference of the WTO; and
- (c) affirm that this Chapter shall be interpreted and implemented in a manner supportive of each Party's right to protect public health and, in particular, to promote access to medicines for all sections of the public.

2. The Parties have reached the following understanding regarding the protection of intellectual property rights under this Agreement:

- (a) this Chapter does not, in any manner whatsoever, prevent the Parties from taking measures to protect public health;
- (b) this Chapter does not, in any manner whatsoever, prevent the effective utilisation of Article 31*bis* of the TRIPS Agreement and the Annex and Appendix to the Annex to the TRIPS Agreement;
- (c) the Parties recognise the need and importance of contributing towards international efforts to implement Article 31*bis* of the TRIPS Agreement and the Annex and Appendix to the Annex to the TRIPS Agreement.

ARTICLE 11.7

National Treatment

1. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection¹ of intellectual property rights.
2. With respect to secondary uses of phonograms by means of analogue communications and free over-the-air broadcasting, however, a Party may limit the rights of the performers and producers of the other Party to the rights its persons are accorded within the jurisdiction of that other Party.
3. A Party may derogate from paragraph 1 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:
 - (a) necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter; and
 - (b) not applied in a manner that would constitute a disguised restriction on trade.
4. Paragraph 1 does not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organisation (WIPO) relating to the acquisition or maintenance of intellectual property rights.

ARTICLE 11.8

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Party to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of the other Party, in accordance with the TRIPS Agreement.

ARTICLE 11.9

Transparency and Ease of Access

1. Each Party shall make available on the internet its laws, regulations, and final administrative rulings of general application concerning the protection and enforcement of intellectual property rights.

¹ For the purposes of this paragraph, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. For greater certainty, "matters affecting the use of intellectual property rights specifically covered by this Chapter" in respect of works, performances and phonograms, include any form of payment, in respect of uses that fall under the copyright and related rights in this Chapter. The preceding sentence is without prejudice to a Party's interpretation of "matters affecting the use of intellectual property rights" in footnote 3 of the TRIPS Agreement.

2. Each Party shall endeavour to, subject to its law, make available on the internet information that it makes public concerning applications for trademarks, geographical indications, patents, designs plant variety rights, and copyright.²

3. Each Party shall, subject to its law, make available on the internet information that it makes public concerning registered or granted trademarks, geographical indications, patents, designs, plant variety rights, and copyright sufficient to enable the public to become acquainted with those registered or granted rights.³

4. For the better efficiency of the process related to intellectual property (IP) filings and registrations, each Party shall endeavour that the communication between IP filers/holders and IP offices is also made in the English language as well as in the official language to the extent practicable.

5. Each Party shall endeavour to make available the information referred to in paragraphs 1 through 3 in the English language.

ARTICLE 11.10

Application of Chapter to Existing Subject Matter and Prior Acts

1. Unless otherwise provided in this Chapter, this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement for a Party and that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

2. Unless otherwise provided in this Chapter, a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement for that Party has fallen into the public domain in its territory.

3. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement for a Party.

ARTICLE 11.11

Exhaustion of Intellectual Property Rights

Nothing in this Agreement prevents a Party from determining whether or under what conditions the exhaustion of intellectual property rights applies under its legal system.⁴

² For greater certainty, under paragraph 2, a Party may make available on the internet the entire dossier for the relevant application.

³ For greater certainty, under paragraph 3, a Party may make available on the internet the entire dossier for the relevant registered or granted intellectual property right.

⁴ For greater certainty, this Article is without prejudice to any provisions addressing the exhaustion of intellectual property rights in international agreements to which a Party is a party.

Section B: Cooperation

ARTICLE 11.12 Cooperation Activities and Initiatives

The Parties shall endeavour to cooperate on the subject matter covered by this Chapter, such as through appropriate coordination, training and exchange of information between the respective intellectual property offices of the Parties, or other institutions, as determined mutually by the Parties. Cooperation may cover areas such as:

- (a) developments in domestic and international intellectual property policy;
- (b) intellectual property administration and registration systems;
- (c) education and awareness relating to intellectual property;
- (d) intellectual property issues relevant to:
 - (i) small and medium-sized enterprises;
 - (ii) science, technology and innovation activities; and
 - (iii) the generation, transfer and dissemination of technology;
- (e) policies involving the use of intellectual property for research, innovation and economic growth;
- (f) implementation of multilateral intellectual property agreements, such as those concluded or administered under the auspices of WIPO;
- (g) technical assistance for developing countries;
- (h) genetic resources, traditional knowledge, and traditional cultural expressions; and
- (i) geographical indications.

ARTICLE 11.13 Cooperation in the Field of Patents

1. The Parties recognise the importance of continuous improvement in the quality and efficiency of the procedures followed in their respective patent offices, including the simplification and streamlining of the procedures for the benefit of the public as a whole.

2. Further to paragraph 1, the Parties shall endeavour to cooperate so as to facilitate the sharing of search and examination work by their patent offices. This may include:

- (a) making search and examination results accessible for the public according to relevant law and regulations; and

- (b) exchanging information on quality assurance systems relating to patent examination.

ARTICLE 11.14
Cooperation on Request

Cooperation activities and initiatives undertaken under this Chapter shall be considered upon request, conducted on mutually agreed terms, and be subject to the availability of resources.

Section C: Trademarks

ARTICLE 11.15
Use of Identical or Similar Signs

Each Party shall provide that the owner of a registered trademark has the exclusive right to prevent third parties that do not have the owner's consent from using in the course of trade, identical or similar signs, for goods or services that are related to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

ARTICLE 11.16
Scope of Protection in Trademarks

Each Party shall ensure that any signs or any combination of signs capable of distinguishing the goods and services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements, three-dimensional shapes 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, Parties may make registrability depend on distinctiveness acquired through use. No Party shall deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound.⁵

ARTICLE 11.17
Well-Known Trademarks

1. No Party shall require as a condition for determining that a trademark is well-known that the trademark has been registered in the Party or in another jurisdiction.
2. Article 6bis of the Paris Convention shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known

⁵ A Party may require an adequate description, which can be represented graphically, of the trademark.

trademark,⁶ whether registered or not, provided that the use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the well-known trademark, and provided that the interests of the owner of the well-known trademark are likely to be damaged by such use.

3. Each Party recognises the importance of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks as adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO at the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO, 20 to 29 September 1999.

4. Each Party shall provide for appropriate measures to refuse the application or cancel the registration and prohibit the use of a trademark that is identical or similar to a well-known trademark,⁷ for identical or similar goods or services, if the use of that trademark is likely to cause confusion with the prior well-known trademark. A Party may also provide such measures including in cases in which the subsequent trademark is likely to deceive public or cause confusion.

ARTICLE 11.18

Procedural Aspects of Examination, Opposition and Cancellation

Each Party shall provide a system for the examination and registration of trademarks which includes, among other things:

- (a) communicating to the applicant in writing, which may be by electronic means, the reasons for any refusal to register a trademark;
- (b) providing the applicant with an opportunity to respond to communications from the competent authorities, to contest any initial refusal, and to make a judicial appeal of any final refusal to register a trademark;
- (c) providing an opportunity to oppose the registration of a trademark or to seek cancellation⁸ of a trademark; and
- (d) requiring administrative decisions in opposition and cancellation proceedings to be reasoned and in writing, which may be provided by electronic means.

⁶ In determining whether a trademark is well-known in a Party, that Party need not require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

⁷ The Parties understand that a well-known trademark is one that was already well-known before, as determined by a Party, the application for, registration of, or use of the first-mentioned trademark.

⁸ For greater certainty, cancellation for the purposes of this Section may be implemented through nullification or revocation proceedings.

ARTICLE 11.19
Classification of Goods and Services

Each Party shall adopt or maintain a trademark classification system that is consistent with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, done at Nice, 15 June 1957, as revised and amended (Nice Classification). Each Party shall provide that:

- (a) registrations and the publications of applications indicate the goods and services by their names, grouped according to the classes established by the Nice Classification;⁹ and
- (b) goods or services may not be considered as being similar to each other on the ground that, in any registration or publication, they are classified in the same class of the Nice Classification. Conversely, each Party shall provide that goods or services may not be considered as being dissimilar from each other on the ground that, in any registration or publication, they are classified in different classes of the Nice Classification.

ARTICLE 11.20
Multiclass Application

Each Party shall provide that single application may be made for registration of trademarks for different classes of goods and/or services of the Nice Classification.

ARTICLE 11.21
Term of Protection for Trademarks

Each Party shall provide that initial registration and each renewal of registration of a trademark is for a term of no less than ten (10) years.

ARTICLE 11.22
Exceptions

A Party may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that those exceptions take account of the legitimate interest of the owner of the trademark and of third parties.

⁹ A Party that relies on translations of the Nice Classification shall follow updated versions of the Nice Classification to the extent that official translations have been issued and published.

Section D: Country Names

ARTICLE 11.23 Country Names

Each Party shall provide the legal means for interested persons to prevent commercial use of the country name of a Party in relation to a good in a manner that misleads consumers as to the origin of that good.

Section E: Geographical Indications

ARTICLE 11.24 Recognition of Geographical Indications

1. The Parties shall ensure in their domestic laws, adequate and effective means to protect geographical indications. Each Party recognises that such protection may be provided through a trademark system, or a sui generis system or other legal means, provided that all requirements under the TRIPS Agreement are fulfilled.
2. Each Party recognises that such goods may include, agricultural goods, natural goods, and manufactured goods, including goods of industry, handicrafts, and foodstuffs.

ARTICLE 11.25 Opposition Procedures

With respect to the opposition procedures, each Party in accordance with its laws shall provide procedures that allow at least interested persons to oppose the protection of a geographical indication.

Section F: Patents and Undisclosed Test or Other Data

Subsection A: General Patents

ARTICLE 11.26 Grace Period

Each Party shall disregard at least information contained in public disclosures used to determine if an invention is novel or has an inventive step, if the public disclosure of any form:^{10, 11}

¹⁰ No Party shall be required to disregard information contained in applications for, or registrations of, intellectual property rights made available to the public or published by a patent office, unless erroneously published or unless the application was filed without the consent of the inventor or their successor in title, by a third person who obtained the information directly or indirectly from the inventor.

- (a) was made by the patent applicant or by a person that obtained the information directly or indirectly from the patent applicant; and
- (b) occurred within twelve (12) months prior to the date of the filing of the application.

ARTICLE 11.27

Exceptions

A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

ARTICLE 11.28

Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions

1. Subject to each Party's international obligations, each Party shall establish appropriate measures to protect genetic resources, traditional knowledge, and traditional cultural expressions.
2. Where a Party has disclosure requirements relating to the source or origin of genetic resources as part of a Party's patent system, that Party shall endeavour to make available its laws, regulations, and procedures with respect to such requirements, including on the internet where feasible, in such a manner as to enable interested persons and other Parties to become acquainted with them.
3. The Parties shall endeavour to pursue quality patent examination, which may include, wherever applicable and appropriate, the use of databases or digital libraries which contain relevant information on traditional knowledge associated with genetic resources, and, when determining prior art, relevant publicly-available documented information related to traditional knowledge associated with genetic resources may be taken into account.

Subsection B: Protection of Undisclosed Test or Other Data

ARTICLE 11.29

Protection of Undisclosed Test or Other Data for Pharmaceutical Products

1. If a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, which utilises new chemical entities, the submission of undisclosed test or other data concerning the safety and efficacy of the product,¹² the

¹¹ For greater certainty, a Party may limit the application of this Article to disclosures made by, or obtained directly or indirectly from, the inventor or joint inventor. A Party may provide that, for the purposes of this Article, information obtained directly or indirectly from the patent applicant may be information contained in the public disclosure that was authorised by, or derived from, the patent applicant.

¹² Each Party confirms that the obligations of this Article shall apply to undisclosed test or other data submitted for marketing approval concerning: (a) the safety of the product, (b) the efficacy of the product or (c) both.

origination of which has involved considerable effort, that Party shall protect said data from unfair commercial use.¹³

2. Notwithstanding paragraph 1, a Party may take measures to protect public health in accordance with:

- (a) the Declaration on TRIPS and Public Health;
- (b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration on TRIPS and Public Health and that is in force between the Parties; or
- (c) any amendment of the TRIPS Agreement to implement the Declaration on TRIPS and Public Health that enters into force with respect to the Parties.

3. For the purposes of paragraph 1, a new pharmaceutical product means a pharmaceutical product that contains an active ingredient for which no other pharmaceutical product containing the same active ingredient has previously obtained marketing approval in the country.

Section G: Copyright and Related Rights

ARTICLE 11.30

Rights of Reproduction, Distribution and Communication

1. Each Party shall provide¹⁴ to authors, performers and producers of phonograms¹⁵ the exclusive right to:

- (a) authorise or prohibit all reproduction of their works, performances or phonograms in any manner or form, including in electronic form;
- (b) authorise or prohibit the making available to the public of the original and copies¹⁶ of their works, performances and phonograms through sale or other transfer of ownership; and

¹³ “Unfair commercial use” shall include at least unfair utilisation of the said data in marketing approval of pharmaceutical products according to each Party’s laws and regulations.

¹⁴ For greater certainty, the Parties understand that it is a matter for each Party’s law to prescribe that works, performances or phonograms in general or any specified categories of works, performances and phonograms are not protected by copyright or related rights unless the work, performance or phonogram has been fixed in some material form.

¹⁵ The terms “authors, performers, and producers of phonograms” refer also to any of their successors in interest.

¹⁶ The expressions “copies” and “original and copies”, that are subject to the right of distribution in this Article, refer exclusively to fixed copies that can be put into circulation as tangible objects.

- (c) authorise or prohibit the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of each Party, even after their distribution.

2. Each Party shall provide to authors the exclusive right to authorise or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.¹⁷

ARTICLE 11.31 **Related Rights**

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms that are nationals¹⁸ of the other Party, and to performances or phonograms first published or first fixed¹⁹ in the territory of the other Party.²⁰

2. Each Party shall provide to performers the exclusive right to authorise or prohibit:

- (a) the broadcasting and communication to the public of their unfixed performances, unless the performance is already a broadcast performance; and
- (b) the fixation of their unfixed performances.

3. Each Party shall provide to performers and producers of phonograms the exclusive right to authorise or prohibit the broadcasting or any communication to the public of their performances or phonograms, by wire or wireless means,²¹ and the making available to the public of those performances or phonograms in such a way

¹⁷ The Parties understand that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Chapter or the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The Parties further understand that nothing in this Article precludes a Party from applying Article 11*bis* (2) of the Berne Convention.

¹⁸ For the purposes of determining criteria for eligibility under this Article, with respect to performers, a Party may treat "nationals" as those who would meet the criteria for eligibility under Article 3 of the World Intellectual Property Performances and Phonograms Treaty (WPPT).

¹⁹ For the purpose of this Article, "**fixation**" means the embodiment of sound or moving images or of the representation thereof from which they can be perceived, reproduced or communicated by means of a device.

²⁰ For greater certainty, in this paragraph with respect to performances or phonograms first published or first fixed in the territory of a Party, a Party may apply the criterion of publication, or alternatively, the criterion of fixation, or both. For greater certainty, consistent with Article 11.7 (National Treatment), each Party shall accord to performances and phonograms first published or first fixed in the territory of the other Party treatment no less favourable than it accords to performances or phonograms first published or first fixed in its own territory.

²¹ For greater certainty, the obligation under this paragraph does not include broadcasting or communication to the public, by wire or wireless means, of the sounds or representations of sounds fixed in a phonogram that are incorporated in a cinematographic or other audio-visual work.

that members of the public may access them from a place and at a time individually chosen by them.

4. Notwithstanding paragraph 3 and Article 11.33 (Limitations and Exceptions), the application of the right referred to in paragraph 3 to analogue transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for those activities, is a matter of each Party's law.²²

ARTICLE 11.32

Obligations Concerning Protection of Technological Measures and Rights Management Information

1. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights as provided under Articles 11.30 (Rights of Reproduction, Distribution and Communication) and 11.31 (Related Rights) of this Agreement, that restrict acts, in respect of their works, performances or phonograms, which are not authorised by the authors, performers or producers of phonograms concerned or permitted by law.

2. Each Party shall provide adequate and effective legal remedies against any person who knowingly, without authorisation removes or alters any electronic rights management information and/or distributes, imports for distribution, broadcasts or communicates to the public, without authority, works or copies of works knowing that electronic rights management information²³ has been removed or altered without authorisation.

ARTICLE 11.33

Limitations and Exceptions

With respect to this Section, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.

²² For the purposes of this paragraph the Parties understand that a Party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that these retransmissions are lawfully permitted by that Party's government communications authority; any entity engaging in these retransmissions complies with the relevant rules, orders or regulations of that authority; and these retransmissions do not include those delivered and accessed over the internet. For greater certainty, this footnote does not limit a Party's ability to avail itself of this paragraph.

²³ For the purpose of clarity "rights management information" shall be interpreted in accordance with Article 12 of the WIPO Copyright Treaty.

Section H: Enforcement

ARTICLE 11.34

General Obligation in Enforcement

Each Party shall ensure that enforcement procedures as specified in this Section are available under its law so as to permit effective action against any act of infringement of intellectual property rights covered by this Chapter, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to future infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.