

CHAPTER 17
INTELLECTUAL PROPERTY

Section A: General Provisions

Article 17.1: Definitions

For the purposes of this Chapter:

Berne Convention means the *Berne Convention for the Protection of Literary and Artistic Works*, as revised at Paris, July 24, 1971;

Budapest Treaty means the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended on September 26, 1980;

Declaration on TRIPS and Public Health means the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2), adopted at Doha on November 14, 2001;

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;

Marrakesh Treaty means the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, done at Marrakesh on June 27, 2013;

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 agreements listed in Article 17.7 or the TRIPS Agreement;

Paris Convention means the *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm, July 14, 1967;

PCT means the *Patent Cooperation Treaty*, as amended on September 28, 1979;

performance means a performance fixed in a phonogram, unless otherwise specified;

right to authorise or prohibit, with respect to copyright and related rights, refers to exclusive rights;

UPOV 1991 means the *International Convention for the Protection of New Varieties of Plants*, as revised at Geneva, March 19, 1991;

WCT means the *WIPO Copyright Treaty*, done at Geneva on December 20, 1996;

WIPO means the World Intellectual Property Organization;

work includes, among other things, a cinematographic work, photographic work and computer program; and

WPPT means the *WIPO Performances and Phonograms Treaty*, done at Geneva on December 20, 1996.

Article 17.2: 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 17.3: 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. 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 17.4: 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 and open and efficient markets,

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

Article 17.5: 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 17.6: Understandings Regarding Certain Public Health Measures

The Parties affirm their existing rights and obligations under the TRIPS Agreement, as well as their commitment to the Declaration on TRIPS and Public Health. In particular, the Parties have reached the following understandings regarding this Chapter:

- (a) the obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should 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. Each Party has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency;
- (b) in recognition of the commitment to access to medicines that are supplied in accordance with the Decision of the WTO General Council of 30 August 2003 on the *Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health* (WT/L/540) and the WTO General Council Chairman's Statement Accompanying the Decision (JOB(03)/177, WT/GC/M/82), as well as the Decision of the WTO General Council of 6 December 2005 on the *Amendment of the TRIPS Agreement*, (WT/L/641) and the WTO General Council Chairperson's Statement Accompanying the

Decision (JOB(05)/319 and Corr. 1,WT/GC/M/100) (collectively, the “TRIPS/health solution”), this Chapter does not and should not prevent the effective utilisation of the TRIPS/health solution; and

- (c) with respect to the aforementioned matters, if any waiver of any provision of the TRIPS Agreement, or any amendment of the TRIPS Agreement, enters into force with respect to the Parties, and a Party’s application of a measure in conformity with that waiver or amendment is contrary to the obligations of this Chapter, the Parties shall immediately consult in order to adapt this Chapter as appropriate in the light of the waiver or amendment.

Article 17.7: International Agreements

Each Party affirms that it has ratified or acceded to the following agreements:

- (a) PCT;
- (b) Paris Convention;
- (c) Berne Convention;
- (d) Budapest Treaty;
- (e) UPOV 1991;
- (f) WCT;
- (g) WPPT; and
- (h) Marrakesh Treaty.

Article 17.8: 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, subject to the exceptions provided under the TRIPS Agreement and multilateral agreements concluded or administered under the auspices of WIPO to which either Party is a party.

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.

2. 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.

3. Paragraph 1 does not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 17.9: Transparency

1. Further to Article 25.2 (Publication) and Article 17.39, each Party shall endeavour to make available on the Internet its laws, regulations, procedures and administrative rulings of general application concerning the protection and enforcement of intellectual property rights.

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

Article 17.10: Application of Chapter to Existing Subject Matter and Prior Acts

1. Unless otherwise provided, this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement 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 For greater certainty, paragraph 2 does not require a Party to make available on the Internet the entire dossier for the relevant application.

³ For greater certainty, paragraph 3 does not require a Party to make available on the Internet the entire dossier for the relevant registered or granted intellectual property right.

2. Neither Party shall be required to restore protection to subject matter that on the date of entry into force of this Agreement has fallen into the public domain in its territory.
3. This Chapter shall not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.

Article 17.11: Exhaustion of Intellectual Property Rights

Each Party shall be free to establish its own regime for the exhaustion of intellectual property rights.

Section B: Cooperation

Article 17.12: Contact Points for Cooperation

Further to Article 20.3 (Contact Points for Cooperation and Capacity Building), each Party may designate and notify under Article 26.5.2 (Contact Points) one or more contact points for the purpose of cooperation under this Section.

Article 17.13: 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, to be determined by each Party. 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) implementation of multilateral intellectual property agreements, such as those concluded or administered under the auspices of WIPO; and
- (e) technical assistance.

Article 17.14: Patent Cooperation and Work Sharing

1. The Parties recognise the importance of improving the quality and efficiency of their respective patent registration systems as well as simplifying and streamlining the

procedures and processes of their respective patent offices for the benefit of all users of the patent system and the public as a whole.

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

- (a) making search and examination results available to the patent office of the other Party;⁴ and
- (b) exchanging information on quality assurance systems and quality standards relating to patent examination.

3. In order to reduce the complexity and cost of obtaining the grant of a patent, the Parties shall endeavour to cooperate to reduce differences in the procedures and processes of their respective patent offices.

Article 17.15: Plant Varieties

The Parties shall endeavour to cooperate to promote and ensure the protection of plant varieties based on UPOV 1991.

Article 17.16: Cooperation on Genetic Resources and Traditional Knowledge

1. The Parties shall endeavour to cooperate through their respective agencies responsible for intellectual property, or other relevant institutions, to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources. Such cooperation may include information about publicly available patent databases, as well as, upon request Party, the provision of publicly available regarding applications related to genetic resources or traditional knowledge associated with genetic resources.

2. The Parties shall endeavour to pursue quality patent examination, which may include:

- (a) that in determining prior art, relevant publicly available documented information related to traditional knowledge associated with genetic resources may be taken into account;
- (b) an opportunity for third parties to cite, in writing, to the competent examining

⁴ The Parties recognise the importance of multilateral efforts to promote the sharing and use of search and examination results, with a view to improving the quality of search and examination processes and to reducing the costs for both applicants and patent offices.

authority prior art disclosures that may have a bearing on patentability, including prior art disclosures related to traditional knowledge associated with genetic resources;

- (c) if applicable and appropriate, the use of databases or digital libraries containing traditional knowledge associated with genetic resources; and
- (d) cooperation in the training of patent examiners in the examination of patent applications related to genetic resources and traditional knowledge associated with genetic resources, including the determination of prior art.

Article 17.17: Cooperation on Request

Cooperation activities and initiatives undertaken under this Chapter shall be subject to the availability of resources, and on request, and on terms and conditions mutually agreed by the Parties.

Section C: Genetic Resources and Traditional Knowledge

Article 17.18: General Provisions

1. The Parties recognise the relevance of intellectual property systems and traditional knowledge associated with genetic resources to each other, when that traditional knowledge is related to those intellectual property systems.
2. The Parties further affirm their continuing commitment to working towards a multilateral outcome on intellectual property including patent-related aspects of traditional knowledge associated with genetic resources through the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).
3. Subject to each Party's international obligations, each Party may establish appropriate measures to protect genetic resources, traditional knowledge and traditional cultural expressions.

Section D: Trademarks

Article 17.19: Types of Signs Registrable as Trademarks

Neither Party shall require, as a condition of registration, that trademarks be visually perceptible, nor deny registration of a trademark solely on the grounds that the

sign of which it is composed is a sound or a scent. A Party may require a concise and accurate description, or graphical representation, or both, as applicable, of the trademark.

Article 17.20: Collective and Certification Marks

Each Party shall provide that trademarks include collective marks and certification marks. Each Party shall also provide that signs that may serve as geographical indications are capable of protection under its trademark system.

Article 17.21: 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, including subsequent geographical indications,⁵ 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 17.22: 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.

Article 17.23: Well-Known Trademarks

1. Neither 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 6*bis* 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 trademark,⁶ whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner

⁵ For greater certainty, the exclusive right in this Article applies to cases of unauthorised use of geographical indications with goods for which the trademark is registered, in cases in which the use of that geographical indication in the course of trade would result in a likelihood of confusion as to the source of the goods.

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.

of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by such use.

Section E: Geographical Indications

Article 17.24: Protection of Geographical Indications

1. The Parties recognise that geographical indications may be protected through a trademark or *sui generis* system or other legal means.

2. Where a Party is considering protecting or recognising a geographical indication, that Party shall:

- (a) make its regulations governing filing of such applications, as relevant, readily available to the public;
- (b) provide that the grounds for objecting to or refusing an application for protection or recognition of a geographical indication shall include the following⁷:
 - (i) the geographical indication is likely to cause confusion with a trademark that is the subject of a pre-existing good faith pending application or registration in the territory of the Party; and
 - (ii) the geographical indication is likely to cause confusion with a pre-existing trademark, the rights to which have been acquired in accordance with the Party's law; and
- (c) publish geographical indications which have been protected or recognised.

3. The Parties shall exchange information concerning procedural requirements for the protection or recognition of geographical indications under their respective intellectual property systems including, for Australia, procedural requirements with respect to any proposed protection or recognition of *Pisco* and *Pisco Peru*.

4. The Parties may, through the contact points referred to Article 17.12, exchange views on issues relating to the protection and recognition of geographical indications, including with respect to any proposed protection and recognition of *Pisco* and *Pisco Peru*.

5. The Parties shall review this Article two years after the date of entry into force of

⁷ For greater certainty, this provision shall not require a Party to establish in its legislation an objection procedure for the protection or recognition of a geographical indication.

this agreement, or before if the Parties otherwise agree, with a view to considering further provisions governing the protection or recognition of geographical indications. The Parties shall undertake a further review two years after the date of the first review. Such reviews shall consider the Parties' interests and sensitivities in seeking the protection or recognition of certain terms including, for Peru, protection or recognition of *Pisco* and *Pisco Peru*.

Section F: Patents

Article 17.25: Patentable Subject Matter

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application.⁸
2. Nothing in this Chapter shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 of the TRIPS Agreement.

Article 17.26: 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 17.27: Other Use Without Authorisation of the Right Holder

The Parties understand that nothing in this Agreement shall limit a Party's rights and obligations pursuant to Article 31 and Article 31*bis* of the TRIPS Agreement, and the Annex and Appendix to the Annex to the TRIPS Agreement.

⁸ For the purposes of this Section, a Party may deem the terms "inventive step" and "capable of industrial application" to be synonymous with the terms "non-obvious" and "useful", respectively.

Section G: Copyright and Related Rights

Article 17.28: Definitions

For the purposes of Article 17.29, Article 17.31, Article 17.32, Article 17.33, Article 17.34, Article 17.35 and Article 17.36, the following definitions apply with respect to performers and producers of phonograms:

broadcasting means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;

communication to the public of a performance or a phonogram means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram;

fixation means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

performers means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

phonogram means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audio-visual work;

producer of a phonogram means a person that takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and

publication of a performance or phonogram means the offering of copies of the performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.

Article 17.29: Right of Reproduction

Each Party shall provide⁹ to authors, performers and producers of phonograms¹⁰ the exclusive right to authorise or prohibit all reproduction of their works, performances or phonograms in any manner or form, including in electronic form.

Article 17.30: Right of Communication to the Public

Without prejudice to Article 11(1)(ii), Article 11*bis*(1)(i) and (ii), Article 11*ter*(1)(ii), Article 14(1)(ii), and Article 14*bis*(1) of the Berne Convention, 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.¹¹

Article 17.31: Right of Distribution

Each Party shall provide to authors, performers and producers of phonograms the exclusive right to authorise or prohibit the making available to the public of the original and copies¹² of their works, performances and phonograms through sale or other transfer of ownership.

Article 17.32: 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

⁹ 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.

¹⁰ References to "authors, performers, and producers of phonograms" refer also to any of their successors in interest.

¹¹ 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. The Parties further understand that nothing in this Article precludes a Party from applying Article 11*bis*(2) of the Berne Convention.

¹² 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.

phonograms that are nationals¹³ of the other Party; and to performances or phonograms first published or first fixed¹⁴ in the territory of the other Party.¹⁵ A performance or phonogram shall be considered first published in the territory of a Party if it is published in the territory of that Party within 30 days of its original publication.

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,^{16,17} and the making available to the public of those performances or phonograms in such a way 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 17.34, the application of the right referred to in paragraph 3 to analog transmissions and non-interactive free over-the-air broadcasts, and exceptions or limitations to this right for those activities, is a matter for each Party's law.¹⁸

¹³ 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 WPPT.

¹⁴ For the purposes of this Article, fixation means the finalisation of the master tape or its equivalent.

¹⁵ 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 17.8, 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.

¹⁶ With respect to broadcasting and communication to the public, a Party may satisfy the obligation by applying Article 15(1) and Article 15(4) of the WPPT and may also apply Article 15(2) of the WPPT, provided that it is done in a manner consistent with that Party's obligations under Article 17.8.

¹⁷ 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.

¹⁸ 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.

Article 17.33: Application of Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement

Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to works, performances and phonograms, and the rights in and protections afforded to that subject matter as required by this Section.

Article 17.34: Limitations and Exceptions

1. 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.
2. This Article does not reduce or extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, the WCT or the WPPT.

Article 17.35: Balance in Copyright and Related Rights Systems

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 17.34, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

Article 17.36: Collective Management

The Parties recognise the important role of collective management societies for copyright and related rights in collecting and distributing royalties based on practices that are fair, efficient, transparent and accountable, which may include appropriate record keeping and reporting mechanisms.

Section H: Enforcement

Article 17.37: General Obligations

1. Each Party shall ensure that enforcement procedures as specified in this Section are

available 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.

2. Each Party shall ensure that its procedures concerning the enforcement of intellectual property rights are fair and equitable. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

3. This Section does not create any obligation:

- (a) to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of each Party to enforce its law in general; or
- (b) with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.

4. In implementing the provisions of this Section in its intellectual property system, each Party shall take into account the need for proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties, as well as the interests of third parties.

Article 17.38: Presumptions

In civil, criminal and, if applicable, administrative proceedings involving copyright or related rights, each Party shall provide for a presumption¹⁹ that, in the absence of proof to the contrary:

- (a) the person whose name is indicated in the usual manner²⁰ as the author, performer or producer of the work, performance or phonogram, or if applicable the publisher, is the designated right holder in that work, performance or phonogram; and
- (b) the copyright or related right subsists in such subject matter.

¹⁹ A Party may also provide that these presumptions are rebuttable presumptions that may be rebutted by evidence to the contrary.

²⁰ For greater certainty, a Party may establish the means by which it shall determine what constitutes the “usual manner”.

Article 17.39: Enforcement Practices with Respect to Intellectual Property Rights

Each Party shall provide that final judicial decisions and administrative rulings of general application pertaining to the enforcement of intellectual property rights:

- (a) are in writing and state any relevant findings of fact and the reasoning or the legal basis on which the decisions and rulings are based; and
- (b) are published²¹ or, if publication is not practicable, otherwise made available to the public in the national language of the Party in such a manner as to enable interested persons and Parties to become acquainted with them.

Article 17.40: Civil Procedures and Remedies

1. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered in this Chapter.²²

2. Each Party shall provide that its judicial authorities have the authority to order injunctive relief that conforms to Article 44 of the TRIPS Agreement, including to prevent goods that involve the infringement of an intellectual property right under the law of the Party providing that relief from entering into the channels of commerce.

3. Each Party shall provide^{23, 24} that, in civil judicial proceedings, its judicial authorities have the authority at least to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

4. In determining the amount of damages under paragraph 3, each Party's judicial authorities shall have the authority to consider, among other things, any legitimate measure of value the right holder submits.

²¹ For greater certainty, a Party may satisfy the requirement for publication by making the decision or ruling available to the public on the Internet.

²² For the purposes of this Article, the term "right holders" shall include those federations and associations that have the legal standing and authority to assert such rights.

²³ For greater certainty, there is no obligation for a Party to provide for the possibility of any of the remedies in paragraphs 3 and 5 to be ordered in parallel.

²⁴ Australia may also provide that the right holder may not be entitled to any of the remedies set out in paragraphs 3 and 5 if there is a finding of non-use of a trademark.

5. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer, at least in cases described in paragraph 3, to pay the right holder the infringer's profits that are attributable to the infringement²⁵.

6. Each Party shall provide that its judicial authorities, if appropriate, have the authority to order, at the conclusion of civil judicial proceedings concerning infringement of at least copyright or related rights, patents and trademarks, that the prevailing party be awarded payment by the losing party of court costs or fees and appropriate attorney's fees, or any other expenses as provided for under the Party's law.

7. Each Party shall provide that in civil judicial proceedings:

- (a) at least with respect to pirated copyright goods and counterfeit trademark goods, its judicial authorities have the authority, at the right holder's request, to order that the infringing goods be destroyed, except in exceptional circumstances, without compensation of any sort;
- (b) its judicial authorities have the authority to order that materials and implements that have been used in the manufacture or creation of the infringing goods be, without undue delay and without compensation of any sort, destroyed or disposed of outside the channels of commerce in such a manner as to minimise the risk of further infringement; and
- (c) in regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed is not sufficient, other than in exceptional circumstances, to permit the release of goods into the channels of commerce.

Article 17.41: Provisional Measures

1. Each Party's authorities shall act on a request for relief in respect of an intellectual property right *inaudita altera parte* expeditiously in accordance with that Party's judicial rules.

2. Each Party shall provide that its judicial authorities have the authority to require the applicant for a provisional measure in respect of an intellectual property right to provide any reasonably available evidence in order to satisfy the judicial authority, with a sufficient degree of certainty, that the applicant's right is being infringed or that the infringement is imminent, and to order the applicant to provide security or equivalent assurance set at a level sufficient to protect the defendant and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to those

²⁵ A Party may comply with this paragraph through presuming those profits to be the damages referred to in paragraph 3.

procedures.

3. In civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting, each Party shall provide that its judicial authorities have the authority to order the seizure or other taking into custody of suspected infringing goods, materials and implements relevant to the infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

Article 17.42: Special Requirements Related to Border Measures

1. Each Party shall provide for applications to suspend the release of, or to detain, any suspected counterfeit or confusingly similar trademark or pirated copyright goods that are imported into the territory of the Party²⁶.

2. Each Party shall provide that any right holder initiating procedures for its competent authorities²⁷ to suspend release of suspected counterfeit or confusingly similar trademark or pirated copyright goods into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the law of the Party providing the procedures, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspect goods reasonably recognisable by its competent authorities. The requirement to provide that information shall not unreasonably deter recourse to these procedures.

3. Each Party shall provide that its competent authorities have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit or confusingly similar trademark or pirated copyright goods, to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance does not unreasonably deter recourse to these procedures. A Party may provide that the

²⁶ For the purposes of this Article:

- (a) counterfeit trademark goods means any goods, including packaging, bearing without authorisation a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the Party providing the procedures under this Section; and
- (b) pirated copyright goods means any goods that are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the Party providing the procedures under this Section.

²⁷ For the purposes of this Article, unless otherwise specified, competent authorities may include the appropriate judicial, administrative or law enforcement authorities under a Party's law.

security may be in the form of a bond conditioned to hold the defendant harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good.

4. Each Party shall provide that its competent authorities may initiate border measures *ex officio* with respect to goods under customs control that are:

- (a) imported; or
- (b) destined for export.

5. Each Party shall adopt or maintain a procedure by which its competent authorities may determine after the initiation of the procedures described in paragraph 1, whether the suspect goods infringe an intellectual property right. If a Party provides administrative procedures for the determination of an infringement, it may also provide its authorities with the authority to impose administrative penalties or sanctions, which may include fines or the seizure of the infringing goods following a determination that the goods are infringing.

Article 17.43: Criminal Procedures and Penalties

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

2. Each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties.²⁸

²⁸ The Parties understand that a Party may comply with its obligation under this paragraph by providing that distribution or sale of counterfeit trademark goods or pirated copyright goods on a commercial scale is an unlawful activity subject to criminal penalties.