Centre for International
Governance Innovation

CIGI Papers No. 139 – August 2017

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A Canadian Perspective

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Centre for International Governance Innovation

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Ton Zuijdwijk is a senior fellow with CIGI's International Law Research Program and a part-time professor of European Union Law, Faculty of Law (Common Law Section), University of Ottawa. He is a former general counsel in the Trade Law Bureau of the Government of Canada. Ton holds an LL.M. from Leiden University, an LL.M. and a master's of international affairs from Columbia University, and an LL.B. and S.J.D. from the University of Toronto. He is a member of the Ontario Bar.

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Acronyms and Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CSPs	certificates of supplementary protection
CUSFTA	Canada-United States Free Trade Agreement
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIs	geographical indications
IP	intellectual property
ISPs	internet service providers
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
NVNI	non-violation nullification or impairment
RECEP	Regional Comprehensive Economic Partnership
TPP	Trans-Pacific Partnership Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Executive Summary

Consistent with promises made in the 2016 presidential campaign, the Trump administration requested a renegotiation of the North American Free Trade Agreement (NAFTA). This paper focuses on the NAFTA intellectual property (IP) chapter and situates the NAFTA renegotiation in the context of Canada's other recent trade agreement negotiations with significant IP components: the Canada-EU Comprehensive Economic and Trade Agreement (CETA), the Trans-Pacific Partnership Agreement (TPP) and the Anti-Counterfeiting Trade Agreement (ACTA).

The upcoming review of the NAFTA IP chapter will provide an opportunity to address issues of alignment of the NAFTA IP chapter and the World Trade Organization's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Canadian negotiators will want to be vigilant to avoid conflicts between any new NAFTA provisions derived from the TPP, on the one hand, and Canada's CETA obligations, on the other. This is particularly pertinent in the area of geographical indications (GIs) in respect of agricultural products and foods and the area of supplementary protection certificates in respect of pharmaceutical patents (which Canada will introduce to comply with its new CETA obligations).

Introduction

The Trump administration has publicly announced its intention to renegotiate NAFTA to secure equitable market access opportunities for US persons and businesses in Canada and Mexico. From Canada's perspective, NAFTA, which built on the preceding Canada-United States Free Trade Agreement (CUSFTA), has been beneficial to Canada.[1] The potential termination[2] or substantial modification of NAFTA is a very serious matter because it may have a significant adverse impact on Canada's economy and its prosperity.

This is happening in an atmosphere in which trade agreements, be they global or regional, have come under attack, in particular, in the 2016 US presidential election campaign. At the same time, one can observe that regional trade agreements have replaced the popularity and significance of the global multilateral platform for trade negotiations. The TPP[3] and CETA[4] are examples of this trend, which may be attributable to the lack of success of the Doha Round in the WTO.

As part of the US domestic process, a letter from the USTR to Congress of May 18, 2017, provides the notice of 90 days required by section 105 of the US Bipartisan Congressional Trade Priorities and Accountability Act of 2015, before the NAFTA renegotiation can begin. This is the US statute that provides the trade promotion authority the Trump administration

1 Canada, "North American Free Trade Agreement (NAFTA) — Fast Facts", online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/facts.aspx?lang=eng>.

2 If the United States were to decide to withdraw from NAFTA, then the CUSFTA would spring back to life because the CUSFTA was suspended, not terminated. In that unlikely event, the CUSFTA would get reactivated, but would not provide IP rules to replace NAFTA Chapter 17. The suspension of the CUFTA was the result of an exchange of letters between the United States Trade Representative (USTR) Michael Kantor and Canada's Minister for International Trade Roy MacLaren of December 30, 1993. The matter is discussed by Matthew Kronby and Milos Barutciski, "Trump, Canada and the future of NAFTA", *The Globe and Mail* (18 January 2017), online: <www.theglobeandmail.com/report-on-business/trump-canada-and-the-future-of-nafta/article33664146/>. The CUSFTA, in article 2106, contains a similar withdrawal provision as that found in NAFTA, requiring six months' notice to the other party.

3 4 February 2016, [*TPP*], online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>. The TPP is a multilateral agreement but it is regional in nature.

4 *Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States [CETA]*, signed on 30 October 2016, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>. Although CETA is bilateral in nature, the text lists all member states of the European Union as parties in their own right because it was the view of the Council of the European Union that certain parts of the CETA text fall under the competence of the EU member states. Therefore, from the European Union's perspective, CETA is a so-called "mixed agreement," which also needs to be ratified by all EU member states, in addition to the approval by the Council of the European Union and the European Parliament. This means that CETA has the appearance of a multilateral treaty, but that in essence the rights and obligations are bilateral in nature.

intends to rely on.[5] A subsequent notice in the US Federal Register, dated May 23, 2017, solicited input from the public by June 12, 2017, on, among other things, "[r]elevant trade-related intellectual property rights issues that should be addressed in the negotiations."[6] The Government of Canada similarly solicited input from all interested parties by July 18, 2017.[7]

Focusing on IP as an integral part of the upcoming NAFTA renegotiation, one can observe that while there are convergences between aspects of Canada's IP system and those of the United States and Mexico, there are also stark differences in each economy's market and IP landscape. While the NAFTA IP chapter prescribes minimum IP standards, it does not impose uniformity on the IP system of each of the NAFTA parties. This is especially important as Canada seeks to create a national IP strategy to strengthen its economic position in domestic and international markets. Thus, there is a valid rationale for a Canadian approach to the NAFTA renegotiation that would resist the inclusion of uniform IP rules for the three NAFTA parties.

It is relevant that in its Summary of Objectives for the NAFTA Renegotiation of July 17, 2017,[8] the USTR included the following item: "Promote adequate and effective protection of intellectual property rights, including through the following: [...] Ensure provisions governing intellectual property rights reflect a standard of protection similar to that found in U.S. law." This language smacks of reciprocity and this may even be an attempt to push for uniformity of IP protection based on US law. From a Canadian perspective, this would be objectionable.

This paper will provide a historical background of IP provisions in NAFTA and its relationship to the IP standards in global multilateral trade agreements. The paper also reviews IP trends in Canada's recent major trade agreement negotiations (the TPP, ACTA[9] and CETA) and the prospect of including similar provisions in a renegotiated NAFTA. The paper concludes by providing a number of recommendations based on the US negotiating objectives in respect of IP announced on July 17, 2017, and on items for which Canada was criticized in the *2017 Special 301 Report*.[10]

The Historical Background of IP Provisions in NAFTA

The inclusion of a comprehensive set of IP provisions in trade agreements was still a novelty in the 1990s. The basic structures of the international protection of patent and trademarks was set out by the Paris Convention for the Protection of Industrial Property (Paris Convention),[11] the original text of which goes back to 1883, and the protection of copyright by the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[12] the text of which goes back to 1886, but comprehensive IP rules were not considered an appropriate part of trade agreements.

5 *Bipartisan Congressional Trade Priorities and Accountability Act of 2015*, Bill S 995, 114th Cong, 2015, online: <www.congress.gov/114/bills/hr1314/BILLS-114hr1314eas.pdf>; also *Customs Duties*, 19 USC § 4204 (2015). See also Ian F Fergusson and Richard S Beth, "Trade Promotion Authority (TPA): Frequently Asked Questions", Congressional Research Service Paper R43491, online: <https://fas.org/sgp/crs/misc/R43491.pdf>.

6 *Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement With Canada and Mexico*, 82 Fed Reg 23699 (2017), online: <www.federalregister.gov/documents/2017/05/23/2017-10603/request-for-comments-on-negotiating-objectives-regarding-modernization-of-the-north-american-free>.

7 Canada Gazette, Part 1, Vol 151, No 22, 3 June 2017, online: <http://www.gazette.gc.ca/rp-pr/p1/2017/2017-06-03/html/notice-avis-eng.php>.

8 Office of the USTR, "Summary of Objectives for the NAFTA Renegotiation" (17 July 2017) [USTR, "Objectives"], online: <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>.

9 Global Affairs Canada, "Anti-Counterfeiting Trade Agreement" (1 October 2011) [ACTA]: online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/acta-text-acrc.aspx?lang=eng>.

10 Office of the USTR, *2017 Special 301 Report* [USTR, *Special 301 Report*], online: <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF>.

11 14 July 1967, 828 UNTS 303, 21 UST 1538 (entered into force 26 April 1970) [*Paris Convention*], online: WIPO <www.wipo.int/treaties/en/text.jsp?file_id=288514>.

12 9 September 1886 [*Berne Convention*], online: WIPO <www.wipo.int/treaties/en/text.jsp?file_id=283698>.

The main explanation for the trend toward the inclusion of comprehensive sets of IP provisions in trade agreements is that dispute settlement systems in trade agreements, backed up by potential trade retaliation, were seen as more effective than the traditional dispute settlement mechanisms. Dispute settlement in trade agreements held the promise of effective enforceability because trade agreements usually open the possibility for the complaining party to impose trade sanctions if the outcome of the dispute settlement proceedings, in which the respondent party lost, is not complied with.

Another explanation may be that the adoption of basic rules for the exercise of regulatory powers by states (such as found in the WTO Agreement on Technical Barriers to Trade and the WTO Agreement on Sanitary and Phytosanitary Measures) made it easier for countries to accept the concept that IP was another important regulatory area where the inclusion of basic rules in trade agreements could be justified.

While both the Paris Convention and Berne Convention contain provisions providing for adjudication of disputes between parties to these conventions by the International Court of Justice, subject to the possibility of an opt-out by each of the parties, this mechanism has never been used.[13] An important obstacle to overcome was the idea of "silos" — in other words, that IP agreements were the responsibility of WIPO and that the General Agreement on Tariffs and Trade (as an organization), and later the WTO, should stay away from IP agreements. It took time to overcome this obstacle. It was not until the mid-1990s that substantive IP provisions were integrated into trade agreements. NAFTA and TRIPS were the first trade agreements with comprehensive sets of IP provisions on various types of IP and on enforcement.[14]

The CUSFTA preceded NAFTA and governed the Canada–United States trade relationship from January 1, 1989, until January 1, 1994 (the date of entry into force of NAFTA).[15] However, it did not include an IP chapter. Although the text of such a chapter was negotiated, in the end, it was not included.[16]

It is important to appreciate that the CUSFTA and NAFTA, being FTAs, had to be justified under the General Agreement on Tariffs and Trade 1947[17] (GATT 1947) and later under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). Both NAFTA and the CUSFTA, in article 101 of each of these agreements, referred to article XXIV of GATT 1947, which allows for the establishment of customs unions and free trade areas.

Since its entry into force on January 1, 1995, the WTO Agreement, through article XXIV of the General Agreement on Tariffs and Trade 1994[18] (GATT 1994) and article V of the General Agreement on Trade in Services[19] (GATS), allows for treaties establishing customs unions and free trade areas. WTO members are obligated to notify the WTO of such treaties.[20] Such treaties may derogate from the provisions of GATT 1994 and GATS.[21] This is particularly important in respect of the obligations of GATT article I (General Most-Favoured-Nation Treatment) and article II (Most-Favoured-Nation Treatment) of GATS.

13 *Paris Convention*, *supra* note 11, art 28; *Berne Convention*, *supra* note 12, art 33.

14 The integration of IP provisions into trade agreements is described and analyzed by John M. Curtis, in his paper "Intellectual Property Rights and International Trade: An Overview", CIGI, CIGI Papers No 3, May 2012. See also Allen Z Hertz, "Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization", (1997) 23 Can-USLJ 261. See further Antony Taubman, "Thematic review: Negotiating 'trade-related aspects' of intellectual property right" in Jayashree Watal and Antony Taubman, eds, *The Making of the TRIPS Agreement – Personal Insights from the Uruguay Round Negotiations* (Geneva: WTO, 2015) at 15.

15 Canada, "Canada-U.S. Free Trade Agreement", online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng>.

16 Michael Hart, Bill Dymond and Colin Robertson, *Decision at Midnight: Inside the Canada-US Free-Trade Negotiations* (Vancouver: UBC Press, 1994) at 382–383.

17 30 October 1947, 55 UNTS 194, TIAS 1700 (entered into force 1 January 1948) [*GATT 1947*].

18 15 April 1994, 1867 UNTS 187, 33 ILM 1153 (entered into force 1 January 1995) [*GATT 1994*].

19 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995) [*GATS*].

20 See the texts of *GATT 1994*, *supra* note 18, art XXIV and *GATS*, *supra* note 19, art V, as well as the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. See also the Transparency Mechanism for Regional Trade Agreements, adopted on a provisional basis on December 14, 2006, by the General Council, WTO Doc WT/L/671 (18 December 2006).

21 GATT 1947 was renamed GATT 1994 and became an integral part of the WTO Agreement by virtue of article II.2 (as part of Annex 1A). GATS was a new agreement, negotiated in the Uruguay Round, which also became an integral part of the WTO Agreement pursuant to article II.2 (as Annex 1B).

There is no corresponding exception for customs unions and free trade areas in TRIPS.[22] This can make the negotiation of new IP rights in free trade agreements (FTAs) especially challenging.

It should also be recalled that the texts of TRIPS and of NAFTA Chapter 17 have a common origin. Chapter 17 of NAFTA was based on the IP provisions of the Dunkel Draft of the WTO Agreement of December 20, 1991.[23] Therefore, although the NAFTA IP chapter and TRIPS are not identical, the NAFTA IP provisions and TRIPS are similar. In practice, this has facilitated the compliance of the NAFTA parties with both these sets of IP obligations.

Alignment between NAFTA and TRIPS

Given the important status of TRIPS[24] and the absence of a clause in TRIPS permitting WTO members to derogate from their TRIPS obligations through FTAs or customs unions,[25] the consistency of NAFTA and TRIPS obligations should also be a matter of concern for all three NAFTA parties.

There are significant overlaps between NAFTA Chapter 17 and TRIPS. The renegotiation will provide an opportunity to review the alignment of these texts.

One example is the absence from NAFTA of an "access to medicines regime" that parallels the WTO waiver adopted by the General Council of the WTO and the subsequent TRIPS amendment in respect of TRIPS article 31.[26] Article 31(f) of TRIPS requires that the use of a patent by a government or third party (under a compulsory licence) "shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use." This provision was identified early on in the life of the WTO as a major obstacle to the issuance of compulsory licences by governments of developed economies for the production of generic pharmaceuticals during the life of a patent to deal with pandemics, such as HIV/AIDS, in developing countries.

The TRIPS waiver and the amendment are intended to make it possible to use compulsory licensing in developed countries to produce pharmaceuticals for exporting to least developed and other WTO members under specific conditions, including notification to the TRIPS Council.[27] The TRIPS amendment entered into force on January 23, 2017, for those WTO members that had accepted the amendment.[28] All three NAFTA parties had accepted the TRIPS amendment before that date. Other WTO members have until the end of 2017 to file their acceptances. For those WTO members that have not yet accepted the amendment, the WTO waiver decision will continue to apply.

NAFTA does not contain a waiver mechanism corresponding to that of the WTO. In order to address this issue under NAFTA, Canada and the United States in 2004 put in place a bilateral memorandum of understanding (MOU), achieved through an exchange of letters of July 16, 2004, between Canada's Minister of International Trade and the USTR. The bilateral MOU used the legal mechanism of a conditional suspension of article 1709(10)(f) of NAFTA, which imposes the same

22 TRIPS is also part of the WTO Agreement (as Annex 1C) by virtue of article II of the same agreement.

23 The "Dunkel Draft" (endorsed by the then-Director General of the GATT (organization)) was a close-to-final draft of the TRIPS Agreement. See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London, UK: Sweet and Maxwell, 1998) at 24–25.

24 Keeping in mind the common origin of the texts of TRIPS and of NAFTA Chapter 17, Chapter 17 of NAFTA was based on the IP provisions of the Dunkel Draft of TRIPS, of December 20, 1991, *supra* note 23.

25 Unlike article XXIV of GATT 1994, *supra* note 18, and article V of GATS, *supra* note 19.

26 See WTO, "Declaration on the TRIPS agreement and public health", WTO Doc WT/MIN(01)/DEC/2 (14 November 2001), online: <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm>. The waiver decision (implementing paragraph 6 of the ministerial declaration) was adopted by the WTO General Council on August 30, 2003: WTO, "Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health", WTO Doc WT/L/540 and Corr.1 (1 September 2003), online: <https://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm>. The text of the amendment that would make the waiver decision permanent was adopted by the General Council on December 6, 2005: WTO, "Amendment of the TRIPS Agreement", WTO Doc WT/L/641(8 December 2005), online: <www.wto.org/english/tratop_e/trips_e/wtl641_e.htm>.

27 WTO, "TRIPS: Special Compulsory Licences for Export of Medicines", online: <www.wto.org/english/tratop_e/trips_e/public_health_e.htm>.

28 WTO, "Amendment of the TRIPS Agreement", online: <www.wto.org/english/tratop_e/trips_e/amendment_e.htm>.

requirement as article 31(f) of TRIPS. The basis of the MOU in treaty law was article 58 of the Vienna Convention on the Law of Treaties, which makes it possible to suspend the application of provisions in a multilateral treaty as between certain parties to a multilateral agreement by agreement of these parties only.[29] However, Mexico was not a party to the MOU. The MOU, by its terms, continued in force until the entry into force of the TRIPS amendment.[30] Therefore, the MOU expired on January 23, 2017. However, the need for consistency between TRIPS and NAFTA Chapter 17 continues to exist. The renegotiation of NAFTA would be an appropriate time to deal with this issue in a trilateral mode. One obvious solution would be to incorporate a modified version of the TRIPS amendment into a revised NAFTA IP chapter.

The countries participating in the TPP negotiations dealt with this issue somewhat differently. Article 18.6 of the TPP recognizes the importance of the TRIPS access to medicines regime and indicates that the TPP and TRIPS texts, including the WTO waiver and the WTO amendment, are compatible with each other. Further, article 18.6(c) requires the TPP parties to consult with each "if a Party's application of a measure in conformity with the waiver or amendment is contrary to the obligations of [the] Chapter [on Intellectual Property]" for the purpose of "[adapting the] Chapter as appropriate in the light of the waiver or amendment." The TPP thus recognizes the primacy of the WTO access to medicines regime, while also acknowledging that TRIPS and the TPP are separate treaties, with their own separate obligations.

The United States, in its published NAFTA renegotiation objectives, recognized the importance of the alignment of NAFTA and TRIPS in this regard.[31] This stated objective of the United States should be helpful in arriving at such alignment.

Another example of an area where NAFTA and the WTO potentially diverge is that of complaints concerning non-violation nullification or impairment (NVNI). These complaints concern the denial of trade benefits that could reasonably have been anticipated by WTO members and NAFTA parties as concessions under TRIPS and under NAFTA Chapter 17, but do not amount to violations of treaty obligations. The NVNI remedy is not about a violation of the strict text of IP provisions but about what could have reasonably been expected at the time the agreement came into force for the country concerned. Such actions are possible under Annex 2004(1)(d) of NAFTA and in principle also under TRIPS article 64. However, most WTO members were uncomfortable with the potential application of the NVNI remedy to TRIPS.[32] In this respect, Canada and Mexico are on one side of the debate and the United States on the other.[33]

29 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980), online: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. Article 58 provides:

> 1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:
>   (a) the possibility of such a suspension is provided for by the treaty; or
>   (b) the suspension in question is not prohibited by the treaty and:
>   (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>   (ii) is not incompatible with the object and purpose of the treaty.
> 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

30 See Letter from Robert B Zoellick to The Honorable James S Peterson (16 July 2004), online: <https://ustr.gov/archive/assets/Trade_Sectors/Intellectual_Property/asset_upload_file426_6319.pdf>. The key provision of the MOU was the following: "The Parties, consistent with the *Vienna Convention on the Law of Treaties*, consent to the suspension of Article 1709(10)(f) of NAFTA, as between themselves, with respect to compulsory licenses issued in accordance with the terms of the WTO Decision. Where a compulsory license is granted by a Party in accordance with such terms, the Parties agree that, as between themselves, adequate remuneration pursuant to Article 1709(10)(h) of NAFTA will be paid in the exporting Party taking into account the economic value to the importing country of the use that has been authorized in the exporting Party."

31 The US objective reads as follows: "Respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001, and to ensure that trade agreements foster innovation and promote access to medicines." This declaration was the beginning of a series of events that led to the WTO TRIPS waiver decision and subsequently to the amendment to TRIPS.

32 See Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights – A Commentary on the TRIPS Agreement* (New York: Oxford University Press, 2007) at 488–489.

33 See the summary of the debate on this in the TRIPS Council in November 2015: WTO, "Draft decision agreed on 'non-violation' cases in intellectual property", online: <www.wto.org/english/news_e/news15_e/trip_ss_23nov15_e.htm>. The extension of the political moratorium (recommended by the TRIPS Council) was approved by the Nairobi Ministerial Conference on December 15, 2015. This moratorium applies until the next ministerial conference, later in 2017. The US position was stated in detail in WTO, "Non-violation Complaints under the TRIPS Agreement: Communication from the United States", WTO Doc IP/C/W/599 (10 June 2014).

The concept of NVNI makes some sense in respect of trade in goods and services because of the rationale of a "balance of concessions" that operates in these areas. The NVNI remedy was legally excluded for the first five years following the entry into force of the WTO Agreement — the period from January 1, 1995, to December 31, 1999. The inclusion of IP provisions in trade agreements is more about minimum standards of IP protection and, to some extent, the harmonization of IP rules, rather than about a balance of concessions. Because of the problematic nature of NVNI in respect of TRIPS, a political moratorium currently applies regarding TRIPS.[34] However, the same moratorium does not apply in respect of NAFTA Chapter 17. The renegotiation of NAFTA would present an opportunity to address this issue.

The United States may have had NVNI in mind when it included the following item in its IP negotiating objectives: "Secure fair, equitable, and nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection." This formula appears to put the emphasis on market access, rather than compliance with IP rules. This is at the heart of the debate within the WTO on the applicability of NVNI in respect of TRIPS.

IP Trends in Canada's FTAs

After concluding NAFTA, Canada did not regularly include IP chapters in its FTAs. CETA, which will be applied provisionally commencing on September 21, 2017,[35] is the first FTA since NAFTA that includes a comprehensive IP chapter requiring important modifications to Canada's domestic IP legislation. In respect of GIs and pharmaceutical patents, Canada agreed to significant new obligations in the CETA IP chapter, which will have to be taken into account in the NAFTA renegotiation.

The Canada-Korea FTA, which preceded CETA and entered into force on January 1, 2015, contains a chapter (16) on IP.[36] The most important innovation of this chapter can be found in article 16.10, concerning the protection of GIs. In this article, Canada undertook to protect four specific Korean GIs: *GoryeoHongsam*, *GoryeoBaeksam*, *GoryeoSusam* and *IcheonSsal* (and their translations, "Korean Red Ginseng," "Korean White Ginseng," "Korean Fresh Ginseng" and "Icheon Rice").[37]

In the same article, Korea undertook to protect "Canadian Whisky" and "Canadian Rye Whisky" as GIs. While Korea was already under an obligation to protect these Canadian spirit GIs pursuant to article 23 of TRIPS, this ensured the conferral of GI status without any further domestic procedures in Korea.

Because the entry into force of the four Korean GIs preceded the provisional application of CETA, the protection of these four agricultural GIs was completely new in Canada. The GI protection for these Korean products was effected in Canada through sections 16 through 22 of the Canada-Korea Economic Growth and Prosperity Act[38] (Canada's implementation statute of the Canada-Korea FTA). Canada's implementing legislation in respect of CETA (the Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act, which will be referred to as the CETA Implementation Act),[39] when brought into force, will amend Canada's Trade-marks Act and create an elaborate new regime for GIs in respect of agricultural products or foods. In this regard, section 131 of the CETA Implementation Act foresees the transfer of the protection of the four Korean GIs from the Canada-Korea

34 WTO, "'Non-violation' complaints (Article 64.2)", online: <https://www.wto.org/english/tratop_e/trips_e/nonviolation_e.htm>.

35 *CBC News*, "Canada, EU to provisionally apply CETA in September", *CBC News* (8 July 2017), online: <www.cbc.ca/news/politics/ceta-september-provisionally-1.4196210>.

36 *Free Trade Agreement Between Canada and Korea*, 22 September 2014, Can TS 2015 No 3 (entered into force 1 January 2015), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>.

37 The text specifying the obligation in respect of these GIs of agricultural products corresponds to article 20.19 of *CETA*, *supra* note 4.

38 SC 2014, c 28, online: <http://laws.justice.gc.ca/PDF/C-6.48.pdf>.

39 SC 2017, c 6 [*CETA Implementation Act*]. Although the CETA Implementation Act (Bill C-30) was passed and received royal assent on May 16, 2017, the act, or parts thereof, will be brought into force by Order in Council, in accordance with section 138 of the act. Certain provisions of the act will require further implementation through regulations.

Economic Growth and Prosperity Act to the new system of GIs in respect of agricultural products and foods under the Trademarks Act.[40]

The Canada-Ukraine FTA, which entered into force on August 1, 2017, contains a chapter (11) on IP.[41] A particularly interesting provision of the chapter is article 11.3, concerning the protection of GIs. The article is in line with article 23 of TRIPS and provides, in Annex I, listings of Canadian and Ukrainian wine and spirit GIs, which the parties agree will be eligible for protection as GIs in each other's territory. While the internal application procedures in Canada and the Ukraine must still be complied with, this mechanism will facilitate the conferral of GI protection on the listed Ukrainian GIs in Canada and on the Canadian GIs in Ukraine.

Further, it is worth noting that the Canada-Chile FTA,[42] in Annex C-11 (GIs) obligates Canada to protect "Chilean Pisco" (or *Pisco Chileno*) as a GI in Canada and obligates Chile "not [to] permit the import or sale of any product as 'Canadian Whisky' unless it has been manufactured in Canada in accordance with the laws and regulations of Canada, governing the manufacture of 'Canadian Whisky' for consumption in Canada."

Somewhat differently, the Canada-Peru FTA,[43] in Annex 212 ("Geographical Indications for Wines and Spirits") stipulates that *Pisco, Perú* is eligible for protection as a GI in Canada and that "Canadian Whisky" and "Canadian Rye Whisky," as well as *Whisky Canadiense* and *Whisky Canadiense de Centeno* are eligible for GI protection in Peru. However, the text makes it clear that the domestic application process still has to be complied with. In this respect, these Canada-Peru FTA provisions are similar to the GI provisions in the Canada-Ukraine FTA.

Treaties that Can Supply Previously Agreed Texts for the NAFTA Renegotiation

On the basis of the texts of recent trade agreements with substantial IP components, negotiated by Canada, the most obvious sources for new provisions for NAFTA are the following: the TPP, ACTA and CETA. This paper will review the status of each of these agreements in turn.

The TPP

Negotiations of the TPP took place during the period of 2010 to 2015. Canada, Mexico and the United States participated, together with nine other countries (Australia, Brunei, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam). Canada and Mexico joined the negotiations in 2012. All participating countries signed the TPP[44] on February 4, 2016. These signatures did not bring the TPP into force, but were subject to ratification.

From the perspective of the NAFTA parties, the TPP negotiations were not only an opportunity to arrive at an important new multilateral FTA, but also could have served as a means of updating NAFTA. However, the Trump administration decided, by the executive order of January 23, 2017, to reverse the US signing of the TPP.[45]

None of the other TPP negotiating partners of the United States, which had all signed the TPP, reversed their signature. In fact,

40 Section 61 of the CETA Implementation Act, once it has been brought into force, will do this in the new section 11.23 of the Trade-marks Act.

41 *The Canada-Ukraine Free Trade Agreement*, 11 July 2016 (entered into force 1 August 2017), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/canada-ukraine.aspx?lang=eng> and <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng>.

42 *Canada-Chile Free Trade Agreement*, 5 December 1996 (entered into force 5 July 1997), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng>.

43 *Canada-Peru Free Trade Agreement*, 29 May 2008 (entered into force 1 August 2009), online: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>.

44 *TPP*, *supra* note 3.

45 See Peter Baker, "Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal", *The New York Times* (23 January 2017), online: <www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0>. The US letter to the Government of New Zealand as the Depositary of the TPP, dated January 30, 2017, can be found at <https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf>.

these countries seem determined to move forward with the TPP despite the change in position of the United States.[46] Japan and New Zealand have both ratified the TPP (through notifications of completion of the applicable legal procedures under article 30.8 of the TPP).[47]

Despite the disavowal of the TPP text by the United States, the IP chapter negotiated in the TPP remains an obvious source for modernizing the NAFTA IP chapter because the text, at one time, was acceptable to all three NAFTA parties. For those issues that any of the three parties may want to raise with respect to IP, it can be expected that negotiators will be inclined to refer to the text previously agreed in the TPP negotiations.

As a matter of drafting styles, it should be noted that the NAFTA IP provisions and TRIPS, on the one hand, and the TPP IP provisions, on the other, are very different. While NAFTA and TRIPS have adopted a "civil law" approach of stating general rules in a fairly abstract manner, the TPP IP chapter reads almost like a tax statute, with provisions of great specificity, specific exceptions and multiple footnotes, often intended to justify measures of specific countries. Marrying these styles will not be easy, but is, of course, not impossible.

ACTA

Another potential source of inspiration would be the text of ACTA, which focused on the enforcement of IP rights, in particular with respect to anti-counterfeiting of trademarks and piracy of copyright. ACTA was negotiated during the period of 2007 to 2010 by Australia, Canada, the European Union and its (then 27) member states, Japan, Morocco, New Zealand, the Republic of Korea, Singapore, Switzerland and the United States.[48] The ACTA text was finalized in 2011,[49] opened for signature on May 1, 2011, and subsequently signed by all negotiating partners, except Switzerland and five member states of the European Union (although the European Union itself signed ACTA).[50]

The European Parliament of the European Union rejected the text of ACTA on July 4, 2012, and thereby blocked the European Union from becoming a party to ACTA.[51] Since, as a matter of EU law, most of the subject matter of ACTA is under the competence of the European Union and the participation of the member states is ancillary to that of the European Union, this also means that the EU member states will not ratify ACTA unless the European Union can do so. The rejection of ACTA by the European Parliament has made that impossible. Japan ratified the agreement on October 5, 2012, but it remains the only signatory to have done so. While ACTA may not have a bright future as a multilateral agreement, the fact remains that the text of ACTA was, at one time, signed by all three NAFTA parties. That is obviously not to say that each and every provision of ACTA should be acceptable to all NAFTA parties at this time.

CETA

CETA was negotiated between Canada and the European Union during the period of 2009 to 2014. Following the conclusion of negotiations and legal review of the text, Canada and the European Union signed CETA on October 30, 2016.[52] Because CETA is considered (from an EU perspective) a "mixed agreement," the text was also signed by all EU member states and will be subjected to the treaty-approval procedures of each of the member states. On the EU side, the European Parliament approved CETA on February 15, 2017. On Canada's side, it was necessary to pass implementing legislation to bring domestic Canadian (federal) law in conformity with CETA, through the CETA Implementation Act.[53]

46 Maija Kappler, "Canada, 10 other countries to move on with new TPP after U.S. withdrawal", *The Globe and Mail* (21 May 2017), online: <www.theglobeandmail.com/report-on-business/international-business/pacific-trade-ministers-commit-to-moving-ahead-with-tpp-without-us/article35075058/>.

47 "New Zealand ratifies TPP despite U.S. withdrawal", *The Japan Times* (11 May 2017), online: <www.japantimes.co.jp/news/2017/05/11/business/new-zealand-ratifies-tpp-despite-u-s-withdrawal/#.WShschQryJo>.

48 ACTA, *supra* note 9.

49 *Ibid.*

50 The Ministry of Foreign Affairs of Japan, which is the Depositary of ACTA, provided information about the signatures of the negotiating partners: online: <www.mofa.go.jp/policy/economy/i_property/acta.html>.

51 By virtue of article 218(6)(a)(v), in conjunction with article 207(2) of the *Treaty on the Functioning of the European Union*, 13 December 2007, [2008] OJ, C 115/47 (entered into force 1 December 2009). See also European Parliament, Press Release, "European Parliament rejects ACTA" (4 July 2012), online: <www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta>.

52 *CETA*, *supra* note 4.

53 *CETA Implementation Act*, *supra* note 39.

Given that the EU member states will become parties to CETA in their own right in addition to the European Union, CETA can only enter into force after all EU member states have notified the completion of their domestic procedures. This process may take several years. However, CETA provides for provisional application and it is expected that those parts of CETA that fall under EU competence (rather than under the competence of the member states) will be applied between Canada and the European Union, starting on September 21, 2017.[54] The scope of the CETA provisions that will be provisionally applied remains to be formally determined between Canada and the European Union through the procedure prescribed in CETA article 30.7. However, Decision 2017/38 of the Council of the European Union of October 28, 2016,[55] makes it clear that only one provision of the CETA IP chapter will be excluded from provisional application: article 20.12 (Camcording), presumably because it deals with criminal law (which remains to a very large extent under member state competence[56]). The exclusion, however, is not significant because the article is permissive only.

Canadian negotiators will need to take into account the provisions of the CETA chapter (20) on IP to ensure that there are no inconsistencies between revised NAFTA obligations and CETA. Because the CETA IP chapter is only the first comprehensive set of IP obligations that will come into force for Canada since NAFTA, it would also be logical for Canadian negotiators to use CETA as a source of inspiration.

CETA may provide inspiration for the other NAFTA parties as well. Given the stated US interest in strengthening the enforcement of IP rights,[57] the extensive provisions of CETA on the enforcement of IP rights and on border measures, in articles 20.32 through 20.49, may be of particular interest. The relevance of these CETA provisions is reinforced by links to provisions found in ACTA. For example, CETA articles 20.44 (which provides for applications by the IP rights holders to the competent authorities, with sufficient information to identify the goods, for detention of the goods that are under customs control), 20.46 (which provides for the possibility of the competent authorities requiring reasonable security from the IP right holder in such cases), 20.47 (requiring procedures by which the competent authorities may determine, within a reasonable period, whether an infringement of IP rights has occurred) and 20.48 (concerning the possible destruction of infringing goods) correspond to articles 17–20 of ACTA, respectively. However, CETA article 20.43 (on the scope of border measures) is much more precisely worded than the corresponding provision of ACTA article 16 (on border measures).[58] The links between ACTA and CETA may make these CETA provisions all the more interesting for the participants in the NAFTA renegotiation.

54 CBC News, "Canada, EU to provisionally apply CETA in September", *CBC News* (8 July 2017), online: <www.cbc.ca/news/politics/ceta-september-provisionally-1.4196210>.

55 *Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, [2017] OJ, L 11/1080.

56 European Commission, *Criminal law policy*, online: <http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm>.

57 The United States expressed its interest in strengthening the enforcement of IP rights in the following items of its published NAFTA renegotiation objectives; USTR, "Objectives," *supra* note 8 at 9–10: "Promote adequate and effective protection of intellectual property rights, including through the following: Ensure accelerated and full implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in particular with respect to meeting enforcement obligations under TRIPS.... Provide strong standards [of] enforcement of intellectual property rights, including by requiring accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms." In the *2017 Special 301 Report*, the United States criticized Canada's border enforcement of IP rights, *supra* note 10 at 62.

58 In respect of this part of CETA, the European Union stated explicitly that it avoided the inclusion in CETA of other ACTA provisions, such as articles 27.1 and 27.2 and any provisions concerning criminal sanctions: European Commission, "The EU's Free Trade Agreement with Canada and Its Intellectual Property Rights Provisions" (18 October 2013), online: <http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc_149866.pdf>.

Issues that May Arise from the Inclusion of Certain TPP IP Provisions in a Revised NAFTA

While there are no direct conflicts between NAFTA Chapter 17 and CETA, it is worthwhile to note some potential problems that might arise from certain provisions in the IP chapter of the TPP if these were incorporated into Chapter 17 of NAFTA. Obviously, Canada will wish to avoid any inconsistencies between its CETA obligations and a revised NAFTA IP chapter. Adoption of TPP provisions that may give rise to such issues will likely fall into the areas of GIs and pharmaceutical patents. The possible inclusion of TPP provisions on the responsibility of ISPs (internet service providers) for copyright infringement by third parties raises other issues.

The TPP, in section E of the IP chapter,[59] sets out a series of provisions that would constrain a party to the TPP in respect of making available legal protection of GIs. TPP article 18.31 stipulates a number of administrative requirements that are intended to ensure that the application process for the protection of GIs (either under a party's trademark system or its *sui generis* system for the protection of GIs) resemble the application process for ordinary trademarks, for example, by requiring the acceptance of applications for GIs without the intercession of a government and the availability of an opposition procedure to review applications for GIs.[60]

TPP article 18.36 provides for diminished obligations for a party that protects GIs pursuant to treaty obligations that were in effect before the deadlines specified in TPP article 18.36.6. It appears that, under TPP article 18.36.6(a), Canada would be exempted from the obligations imposed by the TPP in respect of its obligations regarding GIs pursuant to articles 18.36.1 through 18.36.5. That grandfathering provision exempts GIs protected pursuant to an international agreement that was concluded or agreed in principle prior to the conclusion or agreement in principle of the TPP.

The United States expressed its concerns about Canada's new GI commitments both in one of the US negotiating objectives and in the *2017 Special 301 Report*.[61] In this connection, it should be noted that issues related to GIs in certain countries participating in the TPP negotiations were carefully considered and resulted in specific provisions on GIs. Canada, in its CETA Implementation Act, created a carefully crafted system allowing for the filing of statements of objections to proposed GIs (both in respect of wine and spirit GIs and in respect of GIs for agricultural products and foods).[62]

Some questions may arise if TPP provisions on pharmaceutical patents were included in the NAFTA IP chapter. In CETA article 20.27, Canada accepted the obligation to grant a period of *sui generis* protection (of two to five years) in respect of pharmaceuticals, following the expiry of the patent period, as a form of compensation for part of the patent period that may be taken up by the approval process for marketing authorization.[63] The European Union has granted this extra period of protection for a long time.[64]

In respect of its CETA obligation, Canada intends to issue certificates of supplementary protection (CSPs), created by Canada in amendments to its Patent Act as part of the CETA Implementation

59 *TPP*, *supra* note 3, arts 18.30–18.36.

60 *Ibid*, art 18.31, paras (a), (e), respectively. Article 18.32 concerns the grounds of opposition and cancellation.

61 The relevant US negotiating objective reads: "Prevent the undermining of market access for U.S. products through the improper use of a country's system for protecting or recognizing geographical indications, including failing to ensure transparency and procedural fairness and protecting generic terms." USTR, "Objectives," *supra* note 8 at 10. The relevant item in the USTR, *Special 301 Report*, *supra* note 10 at 62, concerned the transparency and due process with respect to GIs, including aspects related to the protection of existing trademarks, safeguards for the use of common food names and effective opposition and cancellation procedures.

62 *CETA Implementation Act*, *supra* note 39, s 62 [amending section 11.13 of the *Trademarks Act*].

63 *CETA*, *supra* note 4, art 20.27.6 stipulates a maximum period of two to five years of extra protection. Subsection 116(3) of the Patent Act as enacted by the CETA Implementation Act establishes a maximum of two years.

64 *Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products*, [2009] OJ, L 152/1, online: <http://ec.europa.eu/health//sites/health/files/files/eudralex/vol-1/reg_469_2009/reg_469_2009_en.pdf>. The original regulation dates from June 18, 1992: *Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products*, [1992] OJ, L 182.

Act.[65] Given the establishment of CSPs, there may be issues regarding the cumulative effects of the CSPs and TPP article 18.48 (which in paragraph 2 deals with unreasonable curtailment of the patent term of pharmaceutical products due to the marketing approval process). In the TPP, this was dealt with in footnote 46, which provided assurance that the new CSPs in Canada would be considered compensation for the curtailment of the patent period of pharmaceutical patents due to the marketing approval process.

Further, TPP article 18.46, on "Patent Term Adjustment for Unreasonable Granting Authority Delays," which is of a general nature and applies to all patents, may raise difficult issues of interpretation and implementation if this article were included in a NAFTA IP chapter.

Given the technological developments since NAFTA was drafted, one item of obvious interest in the copyright area might well be the adoption of new provisions on legal remedies and safe harbours in respect of ISPs regarding copyright infringement. This was dealt with in the TPP in articles 18.81 and 18.82, as well as in Annex 18-E. Annex 18-E is of particular significance for Canada because it creates the option of a "notice and notice" regime[66] as an alternative to "notice and takedown," which is what the TPP would normally require. The United States, in one of its negotiating objectives, expressed its general interest in ensuring standards of enforcement that keep pace with technological developments.[67]

In addition to the TPP provisions previously discussed concerning the processing of patent applications and the special provisions in respect of pharmaceutical patents, the United States may put forward the TPP provisions on data protection regarding pharmaceutical products and biologics of articles 18.50 and 18.51 of the TPP (although this aspect was not explicitly mentioned in the US negotiating objectives).

Finally, article 18.7 of the TPP provides a list of multilateral IP treaties administered by WIPO that could serve to modernize the current NAFTA article 1701(2). In respect of these treaties, Canada is a party to all multilateral treaties, except the Madrid Protocol[68] and the Singapore Treaty.[69] However, Canada has already made it clear that it intends to become a party to both these treaties. Canada passed legislation in 2014 to implement the provisions of these treaties into domestic law.[70] Further, article 20.13 of CETA obliges Canada to make all reasonable efforts to comply with articles 1 through 22 of the Singapore Treaty and to accede to the Madrid Protocol. Thus, it can be expected that a revision of NAFTA article 1701(2), based on article 18.7 of the TPP, will not present a problem for Canada.[71]

More generally, it must be noted that as a consequence of its CETA IP obligations, Canada has already made significant changes to its domestic IP regime, in particular with regard to GIs in respect of agricultural products and foods and in respect of the additional period of protection for holders of pharmaceutical patents.[72] Canada has created an open system

65 *CETA Implementation Act*, *supra* note 39. The relevant part of the CETA Implementation Act is section 59, which sets out a series of new provisions of Canada's Patent Act. Of these new sections, sections 106 to 117 of the Patent Act are the relevant provisions for CSPs.

66 Innovation, Science and Economic Development Canada – Office of Consumer Affairs, "Notice and Notice Regime", online: <www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html>. The differences between the Canadian and US rules are explained in the following note by Dentons: "Online Infringement: Canadian 'Notice and Notice' vs US 'Notice and Takedown'", *Dentons* (27 June 2012), online: <www.entertainmentmedialawsignal.com/online-infringement-canadian-notice-and-notice-vs-us-notice-and-takedown>.

67 The relevant negotiating objective reads as follows: "Promote adequate and effective protection of intellectual property rights, including through the following:...Ensure standards of protection and enforcement that keep pace with technological developments, and in particular ensure that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works." USTR, "Objectives", *supra* note 8 at 9.

68 WIPO, *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, 27 June 1989, online: <www.wipo.int/wipolex/en/wipo_treaties/text.jsp?file_id=283484>.

69 WIPO, *Singapore Treaty on the Law of Trademarks*, 27 March 2006, online: <www.wipo.int/treaties/en/ip/singapore/>.

70 Through the *Budget Implementation Act 2014*: "Trademarks legislative changes and international treaties", online: <www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03964.html>.

71 TPP article 18.7 requires that TPP countries must have "ratified or acceded to" the treaties listed there. NAFTA article 1701(2) currently requires that the NAFTA parties "give effect to the substantive provisions of (and be a Party to)" the four treaties listed there. The obligation to become a party to a particular treaty is a lighter one than an obligation to comply with or give effect to a particular obligation in an extraneous treaty. The former formula requires showing that ratification or accession occurred, which is a burden that can usually be discharged quite easily. By contrast, an obligation to comply with or give effect to provisions in an extraneous treaty imports that substantive obligation into the new treaty, including all possible issues of legal interpretation.

72 Pursuant to CETA, *supra* note 4, arts 20.16–20.22, 20.27, 20.28.

for the protection of new GIs, without discrimination. The same is true for the additional period of protection that Canada has decided to make available to holders of pharmaceutical patents. These are significant concessions by Canada to the rest of the world in its IP system, for which it should be given credit in the upcoming NAFTA renegotiation.

Conclusion

The NAFTA renegotiation will provide an opportunity for negotiators to review the alignment of TRIPS and the NAFTA IP chapter. Examples identified are, first, the WTO waiver/amendment in respect of the WTO access to medicines regime and the absence of a parallel mechanism in respect of the same issue under NAFTA, other than a bilateral Canada-US MOU that attempted to address this issue; and, second, the issue of NVNI, both under TRIPS and NAFTA.

The texts of trade agreements with significant IP components, in particular those in the negotiations of which all three NAFTA parties participated, will likely be sources of inspiration for the upcoming renegotiation.

Although the Trump administration has disavowed the TPP, the TPP negotiations did result in a wide-ranging IP chapter, which all three NAFTA parties participated in drafting. Therefore, certain parts of the TPP text will likely be of interest to negotiators in the NAFTA renegotiation. The CETA provisions on IP enforcement and border measures may be of interest to negotiators because of the emphasis the United States has already placed on enforcement and border measures in its negotiating objectives. Further, there are certain links between these CETA provisions and provisions in ACTA, which all three NAFTA parties also participated in drafting.

Canadian negotiators will want to be vigilant to avoid conflicts between any new NAFTA provisions derived from the TPP, on the one hand, and Canada's CETA obligations, on the other. This is particularly pertinent in the area of GIs in respect of agricultural products and foods and the area of CSPs in respect of pharmaceutical patents.

While the emphasis in this paper is on possible textual changes that may be the outcome of the NAFTA renegotiation, it must be emphasized that there will be broader considerations at play that will determine the ultimate acceptability of amendments to the current text of the NAFTA Chapter 17. Such amendments will need to be assessed in terms of what their impact will be on Canada's IP system and Canada's economy. Obviously, such amendments will also have to be assessed in the context of amendments to other parts of NAFTA that will be under review in the NAFTA renegotiation.

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