

CIGI Papers No. 235 – January 2020

International Intellectual Property after the New NAFTA

Jeremy de Beer



Centre for International
Governance Innovation

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Jeremy de Beer is a CIGI senior fellow and a professor of law at the University of Ottawa's Faculty of Law, where he creates and shapes ideas about technology innovation and intellectual property, as well as global trade and development.

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Acronyms and Abbreviations

ABS	access and benefit sharing
CETA	Comprehensive Economic and Trade Agreement
CIRA	Canadian Internet Registration Authority
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
CUSMA	Canada-United States-Mexico Agreement
GIs	geographical indications
IGC	Intergovernmental Committee
IP	intellectual property
IPR	intellectual property rights
ISDS	investor-state dispute settlement
ISPs	internet service providers
NAFTA	North American Free Trade Agreement
OAS	Organization of American States
RMI	rights management information
SICE	Foreign Trade Information System
TK	traditional knowledge
TPP	Trans-Pacific Partnership
TRIPS Agreement	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

The Canada-United States-Mexico Agreement (CUSMA)¹ is the new high-water mark in international intellectual property (IP) law. CUSMA includes most of the Trans-Pacific Partnership (TPP)² provisions that were suspended in the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP),³ except for a few pharmaceutical-related provisions amended after signing. Canada will be required to make meaningful changes to domestic IP laws, including copyright term extension, criminal penalties for tampering with digital rights management information (RMI), restoration of patent terms to compensate for administrative and regulatory delays, broader and longer protection for undisclosed testing data and other data, new civil and criminal remedies for the misappropriation of trade secrets, and additional powers for customs officials to seize and destroy IP-infringing goods. The United States used CUSMA to expand protection on trade secrets, a new frontier for international IP law. It also obtained concessions by pushing back against the European Union's efforts to expand protection for geographical indications (GIs), and omitting any mention of access and benefit sharing (ABS) or traditional knowledge (TK). Even in areas where changes to existing laws are not required to comply with CUSMA, the deal locks in the status quo and prevents policy reforms in Canada, the United States and Mexico. Canada should explore ways to promote the best and avoid the worst of CUSMA's IP chapter in future trade negotiations before the chapter becomes further entrenched or expanded in other countries and regions.

1 In the United States, CUSMA is referred to as the United States-Mexico-Canada Agreement and, in Mexico, *El Tratado entre México, Estados Unidos y Canadá*. See *Canada-United States-Mexico Agreement*, 30 November 2018, [CUSMA], online: <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text+texte/toc+tdm.aspx>>.

2 *Trans-Pacific Partnership*, 4 February 2016, art 18.46 (not in force) [TPP], online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tppt/text+texte/18.aspx>.

3 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force in Canada 30 December 2018) [CPTPP], online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/text+texte/cptpp-ptppg.aspx>.

Introduction

A new North American Free Trade Agreement (NAFTA), called CUSMA, was signed in November 2018.⁴ In June 2019, Mexico became the first country to ratify the deal. Canada had introduced a bill to implement CUSMA several weeks earlier,⁵ but it did not pass before the October 2019 election. In the United States, meanwhile, Democrats pushed for amendments. A Protocol of Amendment⁶ was signed on November 30, 2019, to address environmental, labour and IP issues. The United States House of Representatives voted overwhelmingly to pass the amended CUSMA on December 19, 2019. The United States Senate is expected to approve the agreement in 2020, while Canada's Parliament reintroduces and passes implementing legislation. It seems the deal is now done.

Questions have been raised in Canada and globally about CUSMA's significance, especially around one of the most important and controversial chapters: IP. CUSMA requires meaningful changes to domestic IP law in Canada and Mexico and further constrains future policy flexibilities for each party, including the United States.

Other countries and regions around the world will be pressured to accept it as a new international baseline for minimum IP standards. The US Chamber of Commerce is already calling the agreement "a global standard for what IP protection in the 21st century should look like."⁷ CUSMA will impact heavily on the future of international IP norm making.

4 CUSMA, *supra* note 1.

5 Bill C-100, *An Act to implement the Agreement between Canada, the United States of America and the United Mexican States*, 1st Sess, 42nd Parl, 2019 (second reading 20 June 2019) [Bill C-100], online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-100/first-reading/#ID0EGIAG>.

6 *Protocol of Amendment to the Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2019, online: <www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords-cusma-aceum/protocol-amendment-protocole-amendement_eng.pdf>.

7 US Chamber of Commerce, Global Innovation Policy Center, *Setting a New Standard: How the USMCA Could Lay the Foundation for 21st Century IP Protection* (Washington, DC: US Chamber of Commerce, 2019), online: <www.theglobalipcenter.com/wp-content/uploads/2019/04/023626_GIPC_IP_Index_NAFTA_ZoomIn_Report_03-1.pdf>.

Given the importance of CUSMA for domestic and international IP, this paper describes the negotiating context and negotiated text of its IP chapter. It explains how and why the parties agreed to provide longer copyright protection, increased patent protection and more restrictions on the use of undisclosed data. The paper highlights differences between CUSMA and the CPTPP. It exposes tensions between CUSMA and Canada's recent commitments to the European Union in the Canada-EU Comprehensive Economic and Trade Agreement (CETA),⁸ specifically around trademarks and GIs. And it foreshadows developments on the next frontier in international IP and trade secrets. Finally, it contextualizes provisions on cooperation and enforcement.

The IP Chapter

The Agreement in Context

The need to engage in NAFTA renegotiations arose suddenly. After almost a quarter century of successful and relatively stable experiences with North American economic integration,⁹ the 2016 US presidential election unsettled many expectations. While the supposed failings of free trade were a prominent issue during the election campaign, matters escalated as a result of public

statements and policy measures put in place by the new president soon after taking office.¹⁰

Renegotiations took place over 18 months, with a total of seven official meetings in the three member countries.¹¹ A key moment in the negotiation process happened when a bilateral deal between the United States and Mexico was announced on August 27, 2018.¹² The prospect of being left out of that deal changed Canada's risk calculations and heightened the seriousness of efforts to reach a trilateral agreement.

The United States' divide-and-conquer strategy seemed to work, at least on IP. Mexico had, apparently, given in to demands for broader, longer and stronger rules protecting undisclosed data. With a copyright term that was already the longest in the world, Mexico had no incentive to push back against the United States' request to raise the standard Canada must meet. While it would not be fair to say Canada faced a take-it-or-leave-it deal, without Mexico's joint resistance, there was little room left to manoeuvre and high risks from calling a possible bluff.

8 *Comprehensive Economic and Trade Agreement, Canada and European Union*, 30 October 2016, art 20.27 (not in force) [CETA], online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/20.aspx>.

9 Government of Canada, "North American free trade agreement (NAFTA) – Resources" (2018), online: <www.international.gc.ca/trade-commerce/consultations/nafta-alena/toolkit-outils.aspx>.

10 See e.g. White House, Statements & Releases, "Remarks by President Trump at Signing of the Memorandum Regarding the Investigation Pursuant to Section 232(B) of the Trade Expansion Act" (20 April 2017), online: <www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-memorandum-regarding-investigation-pursuant-section-232b-trade-expansion-act/>; Donald J Trump, "Canada has made business for our dairy farmers in Wisconsin and other border states very difficult. We will not stand for this. Watch!" (25 April 2017), posted on @realDonaldTrump, online: Twitter <<https://perma.cc/J6D2-CM8V>>; Donald J Trump, "We are in the NAFTA (worst trade deal ever made) renegotiation process with Mexico & Canada. Both being very difficult, may have to terminate?" (27 August 2017), posted on @realDonaldTrump, online: Twitter <<https://perma.cc/QR2W-7HWY>>; White House, Statements & Releases, "President Donald J. Trump Approves Section 232 Tariff Modifications" (31 May 2018), online: <www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-section-232-tariff-modifications-2/>.

11 With its notification to Congress on May 18, 2017, the United States legally started renegotiations; it would be another 18 months until the USMCA was signed in November 2018. There were seven rounds of negotiations among all three member states, each documented on the Organization of American States (OAS) website, ending on March 5, 2018. See OAS, "Canada-Mexico-United States (USMCA): Renegotiation of the Agreement", online: Foreign Trade Information System (SICE) <www.sice.oas.org/tpd/USMCA/USMCA_e.ASP>.

12 Donald J Trump, "There is no political necessity to keep Canada in the new NAFTA deal. If we don't make a fair deal for the U.S. after decades of abuse, Canada will be out. Congress should not interfere w/ these negotiations or I will simply terminate NAFTA entirely & we will be far better off..." (1 September 2018), posted on @realDonaldTrump, online: Twitter <<https://perma.cc/PL7M-B94Z>>; OAS, "United States-Mexico Trade Fact Sheet: Modernizing NAFTA to be a 21st Century Trade Agreement", online: SICE <www.sice.oas.org/tpd/USMCA/Modernization/USA_MEX_Fact_Sheet_21st_Century_Agt_e.pdf>.

Under these circumstances, Canada did well to salvage whatever flexibilities on IP it could.

In the final agreement, Chapter 20 (“Intellectual Property”) is one of 34 chapters. It is placed immediately after “Digital Trade” and before “Competition Policy” — crucial matters on their own and in relation to IP. The IP chapter is 62 pages, plus an annex, covering 11 different sections (A through K). The conventional fields of copyrights, trademarks and patents are all addressed. There are detailed provisions on lesser known, but equally important, topics of trade secrets, undisclosed data protection and GIs. There are also general provisions, cooperation, enforcement and final provisions. Notably absent, however, are any provisions protecting Indigenous peoples’ TK or cultural expressions.

On many issues in the IP chapter, CUSMA tracks the language of the CPTPP. However, some of the most notable provisions of the CPTPP (patent term adjustment, protection of undisclosed data, copyright term extension, digital rights management rules, internet intermediary liability and safe harbours, and more) were “suspended,” i.e., they have no application under international law, after the United States’ withdrawal from the earlier TPP. Unsuspending those provisions would require the consensus of all CPTPP parties. The suspension of key IP-related facets of the CPTPP makes CUSMA, not the CPTPP, the true new high-water mark in international IP law. The Protocol of Amendment softening CUSMA’s patent and data protection requirements is notable, but does not fundamentally change the chapter.

The text of CUSMA is dense and technical. The following subsections explain the key takeaways in context. Note that the ordering of topics here reflects the relative significance of changes, rather than the structure of the chapter.

Copyright

CUSMA’s copyright provisions have attracted much attention. Experts have highlighted, most notably, the longer term of copyright protection that is

mandated.¹³ The Berne Convention,¹⁴ incorporated by reference into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),¹⁵ sets the international standard term of protection. Under these agreements, and current Canadian law, copyright protection must last for at least 50 years after the death of the author of a work.¹⁶ CUSMA extends that term by two decades: the term shall not be less than the life of the author plus 70 years.¹⁷ The cost of copyright term extension in Canada to individual and institutional consumers of protected material is estimated at hundreds of millions of dollars per year.¹⁸

There is, however, a two-and-a-half-year transition period to implement copyright term extension.¹⁹ Canada will take advantage of this period to determine the best way to implement its obligations,²⁰ including considering a formal registration requirement in order to benefit from longer protection.²¹ Although the Berne Convention prohibits mandatory formalities

13 Michael Geist, “USMCA Sends Canada Back to the Drawing Board on Copyright Law” CIGI, CIGI Opinion, 3 October 2018, online: <www.cigionline.org/articles/usmca-sends-canada-back-drawing-board-copyright-law>.

14 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, S Treaty Doc No 99-27 (1986) (revised at Paris on 24 July 1971 and amended in 1979, entered into force 18 November 1984) [*Berne Convention*].

15 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM (entered into force 1 January 1995) [*TRIPS Agreement*], online: <www.wto.org/english/tratop_e/trips_e/ta_docs_e/1_tripsandconventions_e.pdf>.

16 For international terms of rights standards, see *ibid*, arts 9, 12; for terms of rights in Canada, see also *Copyright Act*, RSC 1985, c C-42, s 23 [*Copyright Act*].

17 The minimum term of protection for a work, performance, or photograph not authored by a natural person is 75 years (up from Canada’s current standard of 70) from its first authorized publication, or 70 years from the creation of an unpublished work. See CUSMA, *supra* note 1, art 20.63.

18 Howard P Knopf, “Canada Can Stand Its Ground on Copyright in NAFTA Renegotiations” CIGI, NAFTA and the Knowledge Economy Series, 9 August 2017, online: <www.cigionline.org/articles/canada-can-stand-its-ground-copyright-nafta-renegotiations>.

19 CUSMA, *supra* note 1, art 20.90.

20 Bill C-100 includes term extension provisions for anonymous and pseudonymous works and for cinematographic works, but does not yet implement any changes in respect of copyright term generally. See the amendments to the *Copyright Act* in Bill C-100, *supra* note 5, cl 22.

21 A report of the parliamentary committee officially reviewing the *Copyright Act* recommended a registration requirement to mitigate the harms caused by term extensions. See Parliament of Canada, House of Commons, Standing Committee on Industry, Science and Technology, *Statutory Review of The Copyright Act*, 1st Sess, 42nd Parl, No 16 (3 June 2019) at 99, online: <www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>.

for the existence and exercise of copyright,²² arguably that prohibition corresponds only to Berne's minimum requirements, not Berne-plus measures such as term extension. So, because the Berne Convention sets the minimum copyright term at life plus 50 years, registration requirements are arguably permitted, at least to some extent, as a condition of term extension.²³

The agreement also expands the protection that each party must provide for electronic RMI, such as metadata and digital watermarks that facilitate tracking of copyright-protected content. While the topic of digital rights management is dealt with generally by the 1996 World Intellectual Property Organization (WIPO) Internet Treaties²⁴ and existing Canadian law, the new agreement goes further by requiring that civil *and* criminal remedies be available for willfully tampering with RMI for commercial advantage.²⁵ CUSMA also constrains the flexibility for exceptions that permit circumvention of technological protection measures, far more than the WIPO Internet Treaties or any other agreement. Those provisions may limit each party's ability to deal in the future with issues such as circumvention for fair dealing purposes, consumers' right to repair software-driven electronics, or privacy and interoperability on the internet of things.

Section J's enforcement provisions on "Legal Remedies and Safe Harbours" would ordinarily require each party to enact notice-and-takedown provisions such as those in the United States' Digital Millennium Copyright Act.²⁶ CUSMA, however, also breaks new ground in international IP law dealing with the liability of online intermediaries.²⁷

CUSMA requires each party to condition liability limitations on internet service providers (ISPs) adopting and implementing "a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers."²⁸ Previously, countries such as France and New Zealand had experimented with so-called graduated response systems,²⁹ but this policy has not previously been incorporated into a major regional trade agreement.

ISPs must also accommodate "standard technical measures" that are developed voluntarily by copyright owners and service providers to protect and identify copyrighted material.³⁰ That requirement could, in effect, require the kinds of content identification and upload filters that have been so controversial in the European Union's recent reforms to its copyright directive.³¹ The possibility that CUSMA could require ISPs to accommodate and not interfere with upload filters is a serious issue that has, so far, received little attention.

The only real "win" for Canada on CUSMA's copyright provisions was defensive. Via an Annex to Section J, Canada may keep its unique notice-and-notice system, enacted in 2012 to address allegations of online copyright infringement. Canada need not create notice-and-takedown, graduated response or upload-filtering systems. The Annex is, however, drafted to apply only to a party that had such a system already in place as of September 2018. The effect is to stop the made-in-Canada approach from spreading, specifically to Mexico.

All of the abovementioned CUSMA provisions have nearly identical parallels in the CPTPP. However, all of these (and more) are also among the CPTPP's currently suspended provisions.

22 *Berne Convention*, *supra* note 14, art 5.

23 Maria A Pallante, "The Next Great Copyright Act" (2013) 36:3 *Colum J L & Arts* 315 at 337; Stef van Gompel, *Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future* (The Hague, Netherlands: Kluwer Law International, 2011) at 175-76; Stef van Gompel, "Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing" (2013) 28:3 *BTJ* 1425 at 1444.

24 *WIPO Copyright Treaty*, 20 December 1996, 2186 UNTS 121 (WCT), art 12 (entered into force 6 March 2002); *WIPO Performances and Phonograms Treaty*, 19 December 1996, 36 ILM 76 (entered into force 19 May 2002).

25 See *CUSMA*, *supra* note 1, art 20.68. Currently, in Canada, criminal remedies apply only to the circumvention of technological protection measures, not the removal of RMI: see also *Copyright Act*, *supra* note 16, s 42(3.1).

26 CUSMA imposes effectively the same requirements as the US Digital Millennium Copyright Act: see *Digital Millennium Copyright Act*, 17 USC § 512; see *CUSMA*, *supra* note 1, art 20.89(3).

27 *CUSMA*, *supra* note 1, art 20.89(6).

28 *Ibid*, art 20.89(6)(a).

29 Jeremy de Beer & Christopher D Clemmer, "Global trends in online copyright enforcement: A non-neutral role for network intermediaries" (2009) 49:4 *Jurimetrics* 375.

30 The provision applies to measures that are "developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and non-discriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks." See *CUSMA*, *supra* note 1, art 20.89(6)(b).

31 EC, *Directive on Copyright in the Digital Single Market*, [2019] OJ, C 125/27, arts 15, 17.

Patents

Prior to the Protocol of Amendment, CUSMA was set to introduce a subtle, but significant, change to international law governing the most fundamental aspect of patents: eligible subject matter for protection. The criteria for patents generally — novelty, non-obviousness and utility — remain the same. But new to international trade law on patents was a provision governing so-called secondary use patents. Secondary use patents facilitate “evergreening,” i.e., extending the effective length of protection with new patents on minor changes to existing products or their uses.³²

Whereas the TRIPS Agreement permits World Trade Organization (WTO) members to choose whether to permit secondary patents, CUSMA would have required each party to provide protection for new uses of known products, or methods or processes of using known products. Burcu Kilic notes that Canada and Mexico both offer secondary use patents already, which explains their willingness to agree to this requirement in CUSMA. However, the effect of CUSMA would have been to “cement the practice and block prospects for reform.”³³ Democrats in the United States pushed for the Protocol of Amendment to facilitate legal changes that deter patent evergreening and promote competition in the pharmaceutical industry. The Protocol deletes this provision from CUSMA.

CUSMA provides permission to exclude from patentability inventions that compromise public order or morality, using the language of TRIPS.³⁴ Like TRIPS, a party may also exclude animals and essentially biological processes for the production of plants or animals, as well as methods of medical treatment.³⁵ CUSMA permits a party to enact exceptions to patent

rights in accordance with the three-step test³⁶ and to utilize compulsory licensing.³⁷ There is also a provision requiring (not just permitting) each party to have an exception that permits a generic pharmaceutical manufacturer to make small batches of a patented medicine for market approval prior to the expiry of the patent.³⁸

One of the most notable changes CUSMA makes to international trade law on patents is in respect of term extensions. CUSMA contains provisions requiring each party to offer term extensions to compensate for unreasonable delays in processing applications³⁹ and unreasonable delays in granting marketing approval.⁴⁰ A reasonable period is the later of five years from filing or three years from an examination request. Neither Canada nor Mexico presently offer patent term extensions for delays at the patent office. The TPP would have required it, but the CPTPP suspends the relevant provision.⁴¹ Regarding unreasonable delays in marketing approval, Canadian law was amended in 2017 to provide for a “certificate of supplementary protection.”⁴² *Sui generis* extended protection for delays in marketing approval was introduced to meet Canada’s obligations under the Canada-EU CETA.⁴³ CETA does not, however, require extended protection for patent office delays. The

32 Burcu Kilic, *NAFTA 2.0 Chapter 20 Pharmaceutical-Related Patent Provisions* (Washington, DC: Public Citizen, 2019) at 4, online: <www.citizen.org/wp-content/uploads/nafta-2.0-pharmaceutical-related-patent-provisions.pdf>.

33 *Ibid* at 6.

34 CUSMA, *supra* note 1, art 20.36(3).

35 Concerns exist, however, that the secondary use provisions previously discussed could enable a workaround to permit “Swiss-type” claims that cover a process for use of a medical method, effectively protecting the method itself. See CUSMA, *supra* note 1, art 20.36(3)(a)-(b); see also Kilic, *supra* note 32 at 5.

36 CUSMA, *supra* note 1, art 20.39. The three-step test in international IP law requires that limitations or exceptions be confined to exclusive rights to, first, certain special cases that, second, do not conflict with a normal exploitation of the work and, third, do not unreasonably prejudice the legitimate interests of the right holder. See e.g. *TRIPS Agreement*, *supra* note 15, art 13.

37 *Ibid*, art 20.40.

38 Article 30 of TRIPS, *supra* note 15, permits but does not require World Trade Organization (WTO) member states to adopt a regulatory review exception. Kilic notes that the TPP included a footnote to confirm that the regulatory review exception could apply to domestic and foreign regulatory reviews. CUSMA did not specify (or limit) the provision’s application to exported medicines. See Kilic, *supra* note 32 at 8. The Protocol of Amendment, *supra* note 6, amends article 20.47 to require a regulatory review exception that specifically permits a third person to make, use, sell, offer to sell, or import “in the territory of that Party.” The language suggests a party may, but need not, permit exports of medicines produced under this provision. In other words, the provision does not prohibit a regulatory review exception that allows for exports.

39 CUSMA, *supra* note 1, art 20.44.

40 *Ibid*, art 20.46.

41 TPP, *supra* note 2; but see CPTPP, *supra* note 3, Annex 7(d).

42 The amendment was implemented through the *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act*, SC 2017, c 6, ss 32–59 [CETA Implementation Act]; see also *Patent Act*, RSC 1985, c P-4, ss 104–34, *Certificate of Supplementary Protection Regulations*, SOR/2017-165.

43 CETA, *supra* note 8, art 20.27.

Protocol of Amendment adds a new footnote on patent term adjustment. Examples of permitted limitations include granting only one patent adjustment for each pharmaceutical product and limiting the maximum patent adjustment to five years or maximum supplemental certificate protection (as Canada offers) to two years.

Undisclosed Data

The data protection provisions of CUSMA generated much controversy during negotiations and are among the most critiqued aspects of the agreement.⁴⁴ While not as widely known or well established as more conventional IP rights (for example, copyrights, patents and trademarks), the relevance and value of exclusive rights to control data are rapidly increasing. In fact, data protection almost derailed the entire agreement for Democrats in the United States and is among the most significant areas amended by the Protocol.

Data protection is, in effect, an IP right that ensures exclusive use of test or other data. Health, environmental, or food safety regulators typically require companies that market certain products — pharmaceutical and agrichemical products most notably — to submit data from clinical trials or field tests proving the products' safety and efficacy. Those products are often patented too, but when patents expire, competitors will want to rely on the same test or other data that regulators already have. It is inefficient (and, for clinical trials, unethical) to require competitors later selling the same products to retest and resubmit data to prove what regulators already know, i.e., that the products are safe and that they work. Data protection law says that for a certain period of time, separate and apart from patents or other IP rights, only the original data provider can rely on the data and third parties must wait.

TRIPS requires WTO members to protect data, “the origination of which involves considerable effort,” against “unfair commercial use,” but specifies no minimum term of protection.⁴⁵ NAFTA requires

each party to give the person submitting such data the exclusive right for five years to rely on it for regulatory approvals. CUSMA maintains this five-year period for pharmaceuticals, but doubles the protection from five to 10 years for agrichemical products.⁴⁶ The TPP would have done the same, but the pharmaceutical (not agrichemical) data protection provisions are suspended in the CPTPP.⁴⁷

CUSMA also eliminates any qualitative threshold for the protection of data, i.e., there is no minimum level of effort, let alone “considerable” effort, required for data to be protectable. CUSMA's removal of the threshold to get protection significantly expands IP rights in data.

The Canada-EU CETA sets the period of pharmaceutical data protection at a minimum of six years. CETA's provisions on agrichemical products require only “a limited period of data protection,” but also require “a right to be compensated for a fair share of the costs incurred” by the data provider.⁴⁸ As well, CETA requires each party to establish rules to avoid duplicative testing on vertebrate animals, reflecting the ethical principle that is in tension with exclusive data protection.

Canada presently offers eight years of pharmaceutical data protection.⁴⁹ Competitors may not file applications for approval until six years, and approval may not be granted until eight years, after the first approval.

The most significant change for international IP law would have come via required data protection for new “biologics.” Biologics are likely to be key to the future of personalized medicine. These are not chemical-based but biotechnology-based products made from living organisms, for example, a virus, serum, toxin, vaccine, blood, protein or analogous product.⁵⁰ CUSMA would have set the new international high-water mark for protecting data related to biologics at 10 years. The article on data protection for biologics, however, is deleted entirely by the Protocol of Amendment.

44 See Paul Wiseman, “A political ‘bomb’ over drug prices could threaten NAFTA 2.0”, *Associated Press* (12 February 2019), online: <www.apnews.com/52fd2fe15baf481eac7cfde5d9dbf85d>.

45 *TRIPS Agreement*, *supra* note 15, art 39.3.

46 *CUSMA*, *supra* note 1, art 20.45.

47 *CPTPP*, *supra* note 3, Annex 7(g).

48 *CETA*, *supra* note 8, art 20.30.

49 *Food and Drug Regulations*, CRC, c 870 at C.08.004 3(b), online: <https://laws-lois.justice.gc.ca/eng/regulations/c.r.c.,_c._870/page-143.html#docCont>.

50 *CUSMA*, *supra* note 1, art 20.49.

The TPP would have given parties the choice to provide either eight years of market exclusivity from the date the biologic is approved or, more flexibly, five years' protection plus "other measures" to deliver a comparable market outcome.⁵¹ These requirements are suspended in the CPTPP.

The eight-year data exclusivity Canada presently provides for innovative drugs covers both biologic and small-molecule products, so in effect Canada no longer needs to offer two more years of protection for biologics. The Protocol also adds a new Annex to CUSMA that affirms Mexico may continue using administrative rather than judicial proceedings to deal with data protection. And the Protocol clarifies in footnotes that certain existing laws in the United States are enough to comply with CUSMA's new obligations.⁵²

Longer periods of protection for patents and the clinical trial data produced primarily by foreign pharmaceutical companies would have cost the Canadian health-care system a half-billion dollars annually, according to estimates by the Office of the Parliamentary Budget Officer.⁵³ Canada could have addressed this problem with effective price controls and by ensuring, like the United States already does, that in certain circumstances governments have rights to use patented inventions funded by taxpayer dollars.

Lawmakers in the United States were rightly concerned about CUSMA's pharmaceutical data protection provisions, as locking minimum standards into an international agreement limits the flexibility to reduce the term of protection at

home and abroad.⁵⁴ However, the United States' own reversals in trade policy since 2016 are surprising. By walking away from the TPP, the United States gave up IP protection that it demanded and from which it would have primarily benefited. Similarly, by reversing itself on CUSMA, the United States gave Canada and Mexico (and American patients) a gift at the expense of its own pharmaceutical industry. Canada and other countries had only to wait for American political instability and disunity to reshape international norms in their favour.

Trade Secrets

Confidential information that is not shared with government regulators, industry competitors or the public is protectable as a trade secret. Recent developments suggest that legal protection of trade secrets is likely to be the next frontier of increasing international IP standards.

First, the United States in 2016 reformed its domestic trade secrets law by enacting the Defend Trade Secrets Act,⁵⁵ which supplements state-by-state protection with a new federal right of action in respect to trade secret theft involving interstate or foreign commerce.

Second, the theft of trade secrets has become an increasingly prominent issue in US government studies and statements about IP.⁵⁶ An executive order from the White House in 2019 even went as far as declaring economic and industrial espionage a national emergency.⁵⁷

Third, trade secrets are one of the few areas of IP law where existing international IP law is presently general and not prescriptive.

51 TPP, *supra* note 2, art 18.51; see also Kilic, *supra* note 32 at 13.

52 Protocol of Amendment, *supra* note 6, s 3.

53 Office of the Parliamentary Budget Officer, *Patent restoration and the cost of pharmaceuticals* (Ottawa: Office of the Parliamentary Budget Officer, 2018), online: <www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2018/Patent%20Restoration/Patent_Restoration_EN.pdf>. In a recent publication for the Macdonald-Laurier Institute, Richard Owens accepts that competition in biologics would lead to some savings, i.e., that the additional two years of data protection will lead to increased health-care costs, but argues that savings from competing biologics will be much less than for conventional generics. See Richard C Owens, *Who's Afraid of the USMCA? Why the intellectual property provisions in the US Mexico Canada Agreement are good for Canada and its trading partners* (Ottawa: Macdonald-Laurier Institute, 2019) at 12–14, online: <http://macdonaldlaurier.ca/files/pdf/20190521_ML_USMCA%20and%20IP%20%28Owens%29%20PAPER_web%20ready.pdf>.

54 Ways & Means Committee, Press Release, "Chairman Neal Statement on USMCA Agreement" (10 December 2019), online: <<https://waysandmeans.house.gov/media-center/press-releases/chairman-neal-statement-usmca-agreement>>.

55 See *Defend Trade Secrets Act of 2016*, 18 USC 1 § 90.

56 Commission on the Theft of American Intellectual Property, *IP Commission 2019 Review: Progress and Updated Recommendations* (Washington, DC: IP Commission, 2019), online: <ipcommission.org/report/ip_commission_2019_review_of_progress_and_updated_recommendations.pdf>.

57 White House, "Executive Order on Securing the Information and Communications Technology and Services Supply Chain" (15 May 2019), online: <www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/>.

Arguments have been made, therefore, for further harmonization of trade secrets law internationally, specifically in North America.⁵⁸

Similar to its data protection provisions, TRIPS provisions on trade secrets are general. TRIPS requires that WTO members “shall have the possibility of preventing” confidential information “from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices.” To be protected, the information must not be generally known or readily accessible and must be commercially valuable and subject to reasonable steps to keep it secret.⁵⁹

CUSMA harmonizes North American trade secrets law. Concerning trade secrets in CUSMA, the Office of the United States Trade Representative (USTR) touts boldly in its summary: “Key Achievement: Strongest Standards of Protection for Trade Secrets of Any Prior FTA.”⁶⁰

CUSMA’s trade secrets requirements are modelled closely upon US federal and state laws. The agreement requires protection under both civil and criminal law, clearly applies to state-owned enterprises and government officials, prohibits a party from discouraging or impeding the licensing of trade secrets, and regulates disclosure of trade secrets during litigation.

Canada has no comparable trade secrecy statutes, relying instead on a combination of common law causes of action in the civil context.⁶¹ There is legislation in Canada that criminalizes the theft of trade secrets by or with foreign entities,⁶² but the Supreme Court has held that confidential information is not property in the context of Criminal Code provisions on theft.⁶³ To implement its obligations

under CUSMA, therefore, Canada proposed to create a new criminal offence — obtaining or communicating or making available a trade secret by deceit, falsehood or other fraudulent means — punishable by up to 14 years’ imprisonment.⁶⁴

Trademarks

CUSMA makes few changes to international trademarks law. A new provision governs well-known trademarks. The original NAFTA elaborates on a provision of the Paris Convention⁶⁵ (itself incorporated by reference into TRIPS) that requires countries to protect a mark that is well known in the country where it is registered or used. NAFTA sets out criteria to apply in determining whether a mark is well known, specifically knowledge of the trademark in the relevant sector of the public, including knowledge in the party’s territory obtained as a result of the promotion of the trademark. CUSMA builds on this by requiring each party to recognize the importance of (but not actually implement) recommendations adopted at WIPO that would better protect well-known marks.⁶⁶ Changes to Canadian law on well-known marks are unlikely to result from this aspect of CUSMA, as the WIPO recommendations merely elaborate on the general NAFTA criteria consistent with Canada’s existing approach.⁶⁷

Also, unlike the original NAFTA, TRIPS, or CETA (but like the CPTPP), CUSMA incorporates rules regarding internet domain names.⁶⁸ The provisions adopt the principles of the Uniform Domain-Name Dispute Resolution Policy. These provisions are already reflected in Canada, via

58 Jonathan K Heath, “Keeping Secrets: The Case for a North American Trade Secret Agreement” (2016) 9:2 J Business, Entrepreneurship & L 411 at 423–27, online: <<http://digitalcommons.pepperdine.edu/jbel/vol9/iss2/7/>>.

59 TRIPS Agreement, *supra* note 15, art 39(2).

60 Office of the United States Trade Representative (USTR), “United States-Mexico-Canada Trade Fact Sheet Modernizing NAFTA into a 21st Century Trade Agreement”, online: <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing>>.

61 See e.g. *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142.

62 *Security of Information Act*, RSC 1985, c O-5, s 19.

63 *R v Stewart*, [1988] 1 SCR 963 at paras 32–33.

64 Bill C-100 proposes this amendment by adding trade secret theft as section 391 of the Criminal Code. See Bill C-100, *supra* note 5, ss 33–36.

65 *Paris Convention for the Protection of Industrial Property as last revised at Stockholm*, 14 July 1967, 21 UST 1583, 828 UNTS 305, art 6bis (entered into force 26 April 1970) [*Paris Convention*].

66 CUSMA, *supra* note 1, art 20.21.

67 Assembly of the Paris Union for the Protection of Industrial Property & General Assembly of the World Intellectual Property Association (WIPO), *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks*, WIPO Publication No 833(E), 34th Series of Meetings of the Assemblies of the Member States of WIPO (1999), online: <www.wipo.int/edocs/pubdocs/en/wipo_pub_833-accessible1.pdf>.

68 CUSMA, *supra* note 1, art 20.C.11.

the Canadian Internet Registration Authority's Domain Name Dispute Resolution Policy.⁶⁹

Going beyond NAFTA, TRIPS and CETA on the protection for sound and scent marks, CUSMA contains the same requirements as the CPTPP. Visual perceptibility is prohibited as a condition of registration, therefore, sound marks cannot be denied registration. While protection of scent marks is not mandatory, "each Party shall make best efforts" to permit their registration.⁷⁰

Canada has recently overhauled its trademarks regime in order to implement other international trademarks agreements — the Madrid Protocol, the Singapore Treaty and the Nice Agreement — that came into force June 17, 2019. The Madrid Protocol facilitates international protection with a single application; the Singapore Treaty harmonizes registration procedures internationally and allows states to protect non-traditional trademarks; and the Nice Agreement provides for consistent classification of goods and services across countries. CUSMA does not change the way any of these international systems function in Canada.

GIs

CUSMA's provisions on GIs have not received as much attention as its copyright, patent and data protection provisions. Yet this is an area where Canada faced challenges reconciling the different perspectives and competing interests of the United States and European Union.⁷¹ The US and EU positions on GIs have long been in conflict, with each attempting to influence practices in the rest of the world through trade agreements, capacity building and other means. Many other countries are likely to face similar pressure as Canada and Mexico did in the middle of a transatlantic tug-of-war.

The EU position reflects the view that the names of places historically associated with certain products can only be used by certified producers from those places. The US position reflects the view that many place names are validly used by migrant diaspora or have become generic descriptors of products. Generally, the European Union promotes adoption of a specific legal regime for the protection of GIs, while the United States favours the application of conventional trademark rules.

CUSMA is a strategic compromise. The Canada-EU CETA requires Canada to extend its GI protection beyond wine and spirits to include a list of foods and other agricultural products.⁷² Canada implemented its obligations with reforms to trademark law in 2017.⁷³ The United States wanted to push back against the expansion of GIs and successfully negotiated the inclusion of several provisions in CUSMA that do so. TRIPS and the original NAFTA mention the need to protect GIs, but are flexible about the means to do so. CUSMA, like the CPTPP, specifies that GIs can be protected either by a *sui generis* system or by standard trademarks.⁷⁴

While CETA and the 2018 EU-Mexico Agreement in principle⁷⁵ contain provisions that primarily expand protection to a list of specific GIs and establish procedures for the recognition of new GIs, CUSMA establishes mechanisms to limit the availability of GIs.⁷⁶ CUSMA obliges each party to provide for denial, opposition and cancellation of GIs — procedures that are likely to benefit American trademark owners.⁷⁷ For example, CUSMA requires sufficient time to oppose applications for new GIs and includes guidelines for determining whether a proposed GI is a customary term or common name. CUSMA also states that a party may, "in the interest of advancing transparency," request a special intellectual property rights (IPR) committee to reach a mutually agreeable solution before taking measures in connection with future requests of recognition or protection of a GI from any other

69 Canadian Internet Registration Authority (CIRA), *CIRA Domain Name Dispute Resolution Policy* (22 August 2011), online: <cira.ca/policy/domain-name/cira-domain-name-dispute-resolution-policy>.

70 CUSMA, *supra* note 1, art 20.17.

71 Bassem Awad & Marsha Cadogan, "CETA and the Future of Geographical Indications Protection in Canada" CIGI, CIGI Papers No 131, 25 May 2017, online: <www.cigionline.org/publications/ceta-and-future-geographical-indications-protection-canada>.

72 CETA, *supra* note 8, arts 20.16–20.23.

73 CETA Implementation Act, *supra* note 42, s 60.

74 CUSMA, *supra* note 1, art 29.29.

75 EC, *New EU-Mexico agreement: The agreement in principle*, 23 April 2018, online: <trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf>.

76 CUSMA, *supra* note 1, art 20.31.

77 *Ibid.*

country through a trade agreement.⁷⁸ Moreover, CUSMA establishes a mechanism for consultation and opposition before *other* international agreements further expand GI protection.⁷⁹

While the drafting is technical, even convoluted, these CUSMA provisions on GIs are a thinly veiled reference to CETA and the EU-Mexico Agreement. Toeing a fine line between its international obligations vis-à-vis Europe and North America, Canada and Mexico did get carve-outs regarding GIs that are specifically mentioned in their pre-existing agreements. Nonetheless, the USTR touts the new limiting provisions as significant accomplishments.⁸⁰ CUSMA is clearly the new American template for measures to defend against European efforts to expand GIs globally.

TK

Despite optimism that the new NAFTA would better recognize and protect the rights of Indigenous peoples,⁸¹ the agreement includes nothing on TK. Oluwatobiloba Moody points out how, since the original NAFTA was negotiated, TK issues have taken centre stage in international IP law. Important work has been done or is ongoing around the Convention on Biological Diversity and its Nagoya Protocol, the WTO TRIPS council and the WIPO Intergovernmental Committee (IGC), which “have played a vital role in mainstreaming TK issues within multilateral, regional and bilateral negotiations.”⁸²

The CPTPP and the TPP, which included the United States, make explicit mention of TK.⁸³ These agreements recognize the relevance of TK

and IP to one another and call for cooperation to enhance understanding of the issues. The CPTPP also promotes quality patent examination, including taking account of TK in prior art searches, permitting third party citations to TK, using databases to better identify TK and training patent examiners to deal with TK issues.

While there is a provision that states CUSMA cannot undermine the ability of parties to fulfill legal obligations to Indigenous peoples, CUSMA does not contain any specific provision on TK.⁸⁴ Despite large Indigenous communities, rich Indigenous cultural heritage and biodiversity, and extensive Indigenous knowledge associated with genetic resources — in Canada, Mexico and the United States — CUSMA gives no recognition to the value of TK.

Although CUSMA does not directly address TK obligations, there are two articles that mention Indigenous peoples’ cultural knowledge and TK. Article 24.15 recognizes the importance of respecting, preserving and maintaining the knowledge and practices of Indigenous peoples in relation to the environment.⁸⁵ Furthermore, article 6.2 allows Indigenous handcrafted goods to be eligible for duty-free treatment at North American borders.⁸⁶ This article mainly serves to economically leverage Indigenous trade, thus supporting the creation of traditional goods.

While the failure of CUSMA to address TK is disappointing, it is not surprising, given the past alignment of Canadian and American positions in other international fora, such as the WIPO IGC. Trade agreements in other regions of the world are increasingly referencing ABS around genetic resources and associated TK, while agreements involving Canada and the United States lag behind.⁸⁷

Despite CUSMA being regarded as one of the most inclusive trade deals for Indigenous

78 *Ibid*, art 29.14(2)(e).

79 *Ibid*, art 20.35.

80 USTR, *supra* note 60.

81 See Konstantia Koutouki, “Canada Has an Obligation to Promote Rights of Indigenous Peoples in NAFTA” CIGI, NAFTA and the Knowledge Economy Series, 22 August 2017, online <www.cigionline.org/articles/canada-has-obligation-promote-rights-indigenous-peoples-nafta>; see also Oluwatobiloba Moody, “Indigenous Knowledge Has Key Place in NAFTA Renegotiations” CIGI, NAFTA and the Knowledge Economy Series, 22 August 2017, online: <www.cigionline.org/articles/indigenous-knowledge-has-key-place-nafta-renegotiations>.

82 Moody, *supra* note 81.

83 CPTPP, *supra* note 3, art 18.16; see also Moody, *supra* note 81.

84 CUSMA, *supra* note 1, art 32.5.

85 *Ibid*, art 24.15.

86 *Ibid*, art 6.2.

87 Jean-Frédéric Morin & Mathilde Gauquelin, “Trade Agreements as Vectors for the Nagoya Protocol’s Implementation” CIGI, CIGI Papers No 115, 28 November 2016, online: <www.cigionline.org/publications/trade-agreements-vectors-nagoya-protocols-implementation>; see also Chidi Oguamanam, “TK and TCEs Again Under Focus at 37th WIPO IGC”, ABS Canada (September 2018), online: <www.abs-canada.org/news/tk-and-tces-again-under-focus-at-37th-wipo-igc/>.

peoples to date,⁸⁸ there were many missed opportunities to facilitate the protection of TK. During renegotiations, the Assembly of First Nations advocated for the inclusion of an Indigenous peoples chapter, which was well received by Mexico.⁸⁹ Ultimately, a unanimous decision was not reached, and the chapter was not included. The Native Women's Association of Canada also criticized CUSMA for failing to incorporate the United Nations Declaration on the Rights of Indigenous Peoples.⁹⁰

Cooperation, Enforcement and Other Issues

One subtle, but important, way that CUSMA will influence IP in North America is via a new Committee on Intellectual Property Rights.⁹¹ While cooperation is not a novel idea, CUSMA includes a relatively specific mandate. The IPR Committee shall “exchange information” about “how intellectual property protection contributes to innovation, creativity, economic growth, and employment.”⁹² Such language could further promote the circulation of “lobbysomics” by special interest groups, as happens with the USTR's Special 301 watchlist process,⁹³ which inhibits rather than promotes evidence-based IP policy making.⁹⁴ For example, the US Chamber of Commerce, via its Global Innovation Policy Center,

absurdly attempts to rank TRIPS, NAFTA, the TPP and the USMCA against a benchmark index where the maximum score reflects laws that include all of the protections, but none of the limitations, exceptions and flexibilities of US law.⁹⁵ In contrast, Canada could align the IPR Committee's work with the recent recommendations of a parliamentary committee⁹⁶ to create more credible statistics and empirical evidence for a well-balanced IP system.

The article on cooperation also gives insights into each party's IP priorities. A clause requiring the IPR Committee to discuss proposals to enhance procedural fairness, including choice of venue,⁹⁷ was likely inserted in order to address Canada's concern that its companies are treated unfairly in patent litigation in certain US courts. Meanwhile, the United States was probably behind clauses that require work toward strengthening border enforcement, exchanging information on the value of trade secrets and economic loss associated with trade secret misappropriation, and discussing any future requests of recognition of GIs from any other country through a trade agreement.⁹⁸ Also indicative of the United States' emerging emphasis on trade secrets is a provision promoting cooperation on technical assistance to non-parties on this and other trade-related IP protection and enforcement.⁹⁹

Provisions governing ISPs, discussed above, are substantively related to copyright issues, but are formally set out in the chapter's section on enforcement.¹⁰⁰ There are also specific requirements to impose criminal penalties for camcorder recordings of movies, as well as civil and criminal penalties for satellite and cable signal theft. The inclusion of these and other enforcement provisions leads the USTR to boast that CUSMA

88 According to Assembly of First Nations National Chief Perry Bellegarde, “The provisions addressing Indigenous Peoples in the USMCA would make it the most inclusive international trade agreement for Indigenous Peoples to date.” Cited in Jorge Barrera, “New trade agreement a ‘step up’ from NAFTA on Indigenous rights”, CBC News (1 October 2018), online: <www.cbc.ca/news/indigenous/usmca-trade-deal-indigenous-rights-1.4846073>.

89 Assembly of First Nations, Issue Update, “North American Free Trade Agreement (NAFTA) and Trade Relations” (October 2018).

90 Native Women's Association of Canada, News Release, “A new deal, a new day: What the USMCA means for the rights of Indigenous women” (3 October 2018).

91 CUSMA, *supra* note 1, art 20.14.

92 *Ibid*, art 20.14.2(a).

93 Referencing section 301 of the *Trade Act of 1974*, 19 USC § 2242.

94 Jeremy de Beer, “Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions” (2016) 19:5-6 *J World Intellectual Property* 150 at 154, online: <<https://onlinelibrary.wiley.com/doi/full/10.1111/jwip.12069>>.

95 US Chamber of Commerce, *supra* note 7.

96 The parliamentary report reviewing the Copyright Act recommended that the government establish research chairs on business models in the digital economy and on the economics of copyright, and that Statistics Canada be mandated to develop authoritative data on the impacts of copyright legislation in Canada. See Parliament of Canada, *supra* note 21 at 117, Recommendations 3, 4, online: <www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-258#72>.

97 CUSMA, *supra* note 1, art 20.14.2(d).

98 *Ibid*, art 20.14.2(b), (c), (e).

99 *Ibid*, art 20.14.3.

100 *Ibid*, arts 20.88–20.89.

contains the most comprehensive enforcement provisions of any trade agreement so far.¹⁰¹

Canadian law already aligns with some, but not all, of CUSMA's enforcement provisions.¹⁰² The most notable changes are required in respect to border measures.¹⁰³ Going further than Part III of the TRIPS Agreement on border measures, customs officials under CUSMA must be given new powers to seize allegedly infringing goods without a court order. They must also be permitted to destroy suspected counterfeit or pirated goods if the determination of infringement was made by "competent authorities," which is not necessarily the courts. Customs officials must also be given new powers to *initiate* border measures and not just respond to complaints. Furthermore, new powers must apply to goods that are in transit via Canada, not just goods that are destined for import.

Canada must also expand the availability of pre-established (i.e., statutory) damages. Canada already provides for statutory damages in cases of copyright infringement and now must also offer statutory damages for trademark counterfeiting that will deter future infringements.¹⁰⁴

Also relevant to the international enforcement of IP rights is the phasing out of NAFTA's Chapter 11 investor-state dispute settlement (ISDS) mechanism, which allowed foreign corporations to sue the Canadian government for alleged "interference" with investments. This was one of the ways US pharmaceutical giant Eli Lilly tried to bully Canada in its \$500-million lawsuit complaint about Canadian patent law.¹⁰⁵ While Lilly lost that particular case,¹⁰⁶ Canada will no

longer need to worry about the threat of weak, but risky, claims that require a costly defence and impose a regulatory chill.

While the elimination of ISDS between Canada and the United States seemed to come at the request of the United States, it is a "win" for Canada. Canada has already moved toward a better, although not perfect, system in its CETA with the European Union. In this respect, Canada and the rest of the world are leaving the United States behind.

Conclusion

CUSMA is the new high-water mark for international IP protection. It goes significantly beyond the previous international standards in WIPO's treaties and the WTO's TRIPS Agreement by extending the term of copyright protection, mandating patent term restoration for examination and regulatory delays, expanding the scope and duration of confidential data protection, introducing new civil and criminal liabilities for trade secrets, and ratcheting up enforcement measures. Similar, but less restrictive, provisions in the mega-regional TPP were suspended and are of no effect in the CPTPP. At the same time, CUSMA pushes back against the European Union's efforts to expand protection for GIs obtained via the Canada-EU CETA. Also, unlike recent trade deals done elsewhere, CUSMA omits any reference to ABS or the protection of Indigenous peoples' TK.

CUSMA's IP chapter is not as favourable to the United States as the deal it had, but is still an American win. It requires meaningful changes to different aspects of IP law in Canada and Mexico, respectively. The Protocol of Amendment deletes provisions on secondary use patents and data protection for biologics, and limits other pharmaceutical-related provisions. Even with the Protocol, CUSMA goes beyond any of the world's previous IP agreements. CUSMA will be used by the United States as a template for future trade agreements with other countries and in other regions.

Canada did well to salvage whatever flexibilities it could in this chapter. The transition period for copyright term extension gives Canada the ability to carefully consider ways of mitigating harms,

101 USTR, *supra* note 60.

102 Canada enacted legislation against camcorder recording in 2007. See *An Act to amend the Criminal Code (unauthorized recording of a movie)*, SC 2007, c 28, online: <https://laws-lois.justice.gc.ca/eng/annualstatutes/2007_28/page-1.html>. The reception or retransmission of satellite or cable signals, or doing almost anything with a device used for such purpose, is also a criminal offence under Canada's *Criminal Code*, RSC 1985, c 46, ss 326–27, online: <<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-326.html>>; *Radiocommunications Act*, RSC 1985, c R-2, ss 9–10, online: <<https://laws.justice.gc.ca/eng/acts/r-2/fulltext.html>>.

103 CUSMA, *supra* note 1, art 20.84.

104 *Ibid*, art 20.82.

105 *Eli Lilly and Co v Canada*, Notice of Arbitration, 12 September 2013, ICSID Case No UNCT/14/2, online: <www.italaw.com/sites/default/files/case-documents/italaw1582.pdf>.

106 *Eli Lilly and Co v Canada*, Final Award, 16 March 2017, ICSID Case No UNCT/14/2, online: <www.italaw.com/sites/default/files/case-documents/italaw8546.pdf>.

such as with a registration requirement. Canada was also able to retain its own unique notice-and-notice system for dealing with allegations of online copyright infringement. Canada was gifted a concession on data protection for biologics, rather than the 12 presently offered in the United States, and held the line on protection of agricultural and pharmaceutical data. However, new criminal sanctions for trade secret theft are being introduced in Canada as a result of CUSMA, with uncertain effects. And Canada's recently revised system for dealing with IP issues at the border must already be overhauled to give customs officials more powers, which will come with real financial and administrative costs.

Despite the IP chapter, or maybe because of it, Canada and Mexico won on CUSMA overall. They salvaged free trade in North America while confronting always unpredictable and sometimes irrational behaviour by their partner, the United States. A question for Canada is how it will integrate CUSMA's new IP obligations into its strategic trade relationships. As Canada moves forward with engaging in bilateral or mega-regional deals in Asia, Latin America, Africa and elsewhere, it must consider ways to avoid the worst and promote the best of CUSMA's IP chapter. Whether Canada has the wherewithal and willingness to shape international IP law in that way remains to be seen.

