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THE NORTH AMERICAN FREE TRADE AGREEMENT AND ITS LEGACY ON THE RESOLUTION OF INTELLECTUAL PROPERTY DISPUTES

JAMES M. COOPER*

I. INTRODUCTION

We are approaching the twentieth anniversary of three institutions that provide for intellectual property rights (IPR) dispute resolution and settlement: the North American Free Trade Agreement (NAFTA),¹ the Trade-related Aspects on Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO),² and the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO).³ Now is an apt time to take stock of these important innovations in the financial and legal architecture of our globalized system of IPR.

Given our location near the U.S.-Mexico border,⁴ and this law school's engagement with Latin America,⁵ this essay focuses on

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. Congress approved NAFTA by means of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103 182, 107 Stat. 2057 (codified at 19 U.S.C. § 3311 (2006)). NAFTA became effective on January 1, 1994. Exec. Order No. 12889, 58 Fed. Reg. 69, 681 (Dec. 27, 1993).

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

3. See generally *WIPO Arbitration and Mediation Center*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/amc/en/center/background.html> (last visited Sept. 23, 2012).

4. See *NAFTA Summer Program*, CWSL.EDU., <http://www.cwsl.edu/nafta> (last visited Sept. 23, 2012). See generally JAMES M. COOPER, *THE COMPLICATED*

NAFTA and the contributions that this regional trade pact made to protect IPR and settle intellectual property (IP) disputes. It also explores the legacy of NAFTA in the context of the eventual WTO, and the rights provided by the TRIPS Agreement that was concluded as part of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations.⁶ Section II provides a brief historical background on how NAFTA fit into the world as countries began aligning themselves by creating various trade agreements. Section III surveys the provisions and legacy of NAFTA with respect to IPR, and the lack of real progress in the resolution of disputes using NAFTA's pioneering independent arbitration process. Next, section IV of this essay looks to the manner in which Mexico has attempted to comply with NAFTA. Section V of this essay examines NAFTA's legacy for the rest of the Americas, and section VI concludes with a discussion on how NAFTA can further improve the protection of IPR in the future.

II. NAFTA

NAFTA, the seminal regional trade pact between Canada, the United States, and Mexico, went into force on January 1, 1994.⁷ NAFTA was a remarkable hallmark in U.S. trade policy. It was a revolutionary move to bring together the Canadian, Mexican, and U.S. economies. NAFTA built upon the already existing 1989 Free Trade Agreement between Canada and the United States. However, the

RELATIONSHIP: A SNAPSHOT OF THE U.S.-MEXICO BORDER (Konrad Adenauer Stiftung ed., 2010), available at http://www.kas.de/wf/doc/kas_19916-1522-2-30.pdf?101110153710.

5. California Western School of Law is the home of Proyecto ACCESO, a leading legal skills training and civic education program in Latin America. See James M. Cooper, *Proyecto ACCESO: Using Popular Culture to Build the Rule of Law in Latin America*, 5 RUTGERS J.L. & PUB. POL'Y 378, 383-87 (2008); see also *El Estado de Derecho en las Américas*, PROYECTO ACCESO, <http://www.proyectoacceso.com> (last visited Sept. 23, 2012).

6. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14 (1994) [hereinafter Final Act].

7. *North American Free Trade Agreement (NAFTA)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Nov. 13, 2012).

Canada-United States Free Trade Agreement was not that much of a stretch because it integrated two advanced economies.⁸ However, a paradigm shift occurred when the United States decided to include its southern neighbor in a regional integration pact.⁹

United States' trade policymakers viewed the addition of Mexico as necessary.¹⁰ In fact, some advocates said it was a matter of national security.¹¹ Others even believed it would resolve America's post-Cold War identity crisis.¹² U.S. officials promoted NAFTA as a national security imperative that would ensure the United States could survive the onslaught of competition from other recently formed regional trade blocs, provide jobs for Mexicans, and allow the United States to enjoy economic efficiencies that come with comparative advantage. Creating jobs would encourage Mexican citizens to stay in Mexico and provide them with the means by which they could consume American-made products and services.¹³ Lower-skilled wages would

8. The United States-Canada Free Trade Agreement was implemented by the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified at 19 U.S.C. §§ 1516a, 1677f(d) (1988)), as amended by the Customs and Trade Act of 1990, Pub. L. No. 101-383, §§ 134, 104 Stat. 629 (codified at 19 U.S.C. §§ 1516a, 1677f (Supp. IV 1992)), by the regulations of the International Trade Administration, 19 C.F.R. pt. 356, and of the International Trade Commission, 19 C.F.R. pt. 207.60-69.

9. "NAFTA was a brave new world for the three governments." David A. Gantz, *The Evolution of U.S. Views on FTA Investment Protection: From NAFTA to the United States-Chile Free Trade Agreement*, in *THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA* 503, 507 (Kevin C. Kennedy ed., 2004).

10. See MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 182-83 (2000).

11. See JOHN R. MACARTHUR, *THE SELLING OF "FREE TRADE": NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY* 261 (2000).

12. Judith H. Bello & Alan F. Homer, *The North American Free Trade Agreement: Its Major Provisions, Economic Benefits, and Overarching Implications*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 1, 9-10 (Judith H. Bello, Alan F. Homer & Joseph J. Norton eds., 1994).

13. Wayne A. Cornelius, *Impacts of NAFTA on Mexico-to-U.S. Migration*, in *NAFTA IN THE NEW MILLENNIUM* 287, 290 (Edward J. Chambers & Peter H. Smith eds., 2002) ("Pro-NAFTA political leaders in both Mexico and the United States routinely characterized the agreement as the best possible antidote to illegal immigration, even in the short term."); see also Bello & Homer, *supra* note 12, at 5.

flow to Mexico, as the low cost of labor in Mexico would become a comparative advantage for that country.¹⁴ As a result, all three countries would experience economic growth.¹⁵

A. NAFTA's Influence

In addition to the proposed benefits that NAFTA would bring to the United States, NAFTA greatly influenced subsequent trade agreements. For example, the Free Trade Agreement of the Americas (FTAA) was to be modeled after NAFTA.¹⁶ President George H.W. Bush's administration championed this proposed trade pact as a way to integrate the economies of the thirty-four states of the Western Hemisphere—all but Cuba.¹⁷ NAFTA was thus destined to be the first jigsaw puzzle piece of other trade agreements that would follow, and its provisions were adapted in subsequent years as the United States went on to enter into treaties with other regional trading partners.¹⁸

The NAFTA proposal came at a time when the world began dividing up into regional trading blocs. NAFTA was not the only trade agreement in the Americas. Other countries had competing visions; Brazil and its surrogate organization, MERCOSUR, grew stronger.¹⁹ Brazil's economic growth helped it become a BRIC

14. See Bello & Homer, *supra* note 12, at 8.

15. See *id.* at 3, 5-9.

16. See James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957, 986 (1999). However, the FTAA was never ratified and has not entered into force; it was left stillborn at a summit in Mar del Plata on November 5, 2005. *Americas Summit Fails to End Free-Trade Stalemate*, REUTERS (Nov. 5, 2005, 10:47 PM), available at 11/5/05 Reuters 22:47:06 (Westlaw).

17. RAYMOND J. AHEARN, CONG. RESEARCH SERV., IB95017, TRADE AND THE AMERICAS 1-2 (2004); see also *Still No Surrender in Cuba*, ECONOMIST (Apr. 19, 2001), <http://www.economist.com/node/579191>.

18. See Mark B. Baker, *No Country Left Behind: The Exporting of U.S. Legal Norms Under the Guise of Economic Integration*, 19 EMORY INT'L L. REV. 1321, 1363-64 (2005).

19. See Andres Oppenheimer, *The Winner of Mercosur's Expansion: Brazil*, MIAMI HERALD (Aug. 2, 2012), <http://www.miamiherald.com/2012/08/01/2925986/the-winner-of-mercours-expansion.html>; see also *Mercosur Has Only Benefited Brazil in the Last Ten Years with a Surplus of 36.8 Bn*, MERCOPRESS (Aug. 7, 2012), <http://en.mercopress.com/2012/08/07/mercotur-has-only-benefited->

country.²⁰ The country now has the sixth largest economy in the world.²¹ Its influence and financial might continued to grow, making it less interested in the proposed U.S.-led FTAA.

Further, a group of left-of-center, populist leaders in Cuba, Bolivia, Ecuador, Nicaragua, and other countries offered an alternative view to the free trade negotiations that were occurring around the Americas.²² In 2004, they created the *Alianza Bolivariana para los Pueblos de Nuestra América*, an agreement that the founders hoped would provide a “geopolitical counterweight to the United States.”²³ But these alternatives did not spell the end of the NAFTA model. Instead, a plethora of agreements came in its aftermath: the U.S.-Chile Free Trade Agreement (FTA),²⁴ the Dominican Republic-Central America-United States FTA (U.S.-CAFTA-DR),²⁵ the U.S.-

brazil-in-the-last-ten-years-with-a-surplus-of-36.8bn.

20. JIM O'NEILL, GLOBAL ECONOMICS PAPER NO: 66: BUILDING BETTER GLOBAL ECONOMIC BRICS 3-4 (2011), *available at* <http://www.goldmansachs.com/our-thinking/brics/building-better.html> (noting that BRIC originally included Brazil, Russia, India, and China). In 2010, South Africa was invited to join the “group of major emerging markets,” creating BRICS. *South Africa Invited to Join Emerging Nations Group*, N.Y. TIMES (Dec. 24, 2010); *see also New Era as South Africa Joins BRICS*, SOUTHAFRICA.INFO (Apr. 11, 2011), <http://www.southafrica.info/global/brics/brics-080411.htm#.UJVSVMXA8pk>.

21. Joe Leahy & Stefano Wagstyl, *Brazil Becomes Sixth Largest Economy*, FIN. TIMES (Mar. 6, 2012), <http://www.ft.com/intl/cms/s/0/e23a2b34-678e-11e1-b4a1-00144feabdc0.html#axzz2BwO44cZI> (U.K.).

22. *See Cuba, Bolivia, Venezuela Reject U.S. Trade*, N.Y. TIMES (Apr. 30, 2006), <http://www.nytimes.com/2006/04/30/world/americas/30iht-web.0430trade.html>.

23. Joel D. Hirst, *The Bolivarian Alliance of the Americas – Hugo Chavez's Bold Plan*, EXCHANGE, Dec. 2010, at 15, 15 (known in English as the Bolivarian Alliance of the Americas). *See generally* BOLIVARIAN ALLIANCE FOR THE PEOPLES OF OUR AMERICA PEOPLES' TRADE TREATY, <http://www.alba-top.org/en> (last visited on Nov. 9, 2012).

24. United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>.

25. United States-Dominican Republic-Central America Free Trade Agreement, Aug. 5, 2004 [hereinafter U.S.-CAFTA-DR], *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

Peru FTA,²⁶ the U.S.-Colombia FTA²⁷ and the Panama Trade Promotion Agreement (TPA).²⁸ The United States ratified both the U.S.-Colombia FTA and the Panama TPA on October 12, 2011.²⁹

*B. Regional Trade Agreements and the Need
for a Rules-Based Trade Regime*

Twenty years ago, the world appeared to be dividing into regional trading groups like the European Union and MERCOSUR,³⁰ as the

26. United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

27. United States-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>.

28. United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>.

29. *WIPO Resources—News on Treaties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/news_treaties [hereinafter *News on Treaties*]; see also Press Release, Office of the U.S. Trade Representative, United States, Colombia Set Date for Entry into Force of U.S.-Colombia Trade Agreement (Apr. 15, 2012), available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-colombia-set-date-entry-force-us-colom>; *Colombian President Praises U.S. Congress for Ratifying Free Trade Agreement*, MERCOPRESS (Oct. 13, 2011, 7:50 AM), <http://en.mercopress.com/2011/10/13/colombian-president-praises-us-congress-for-ratifying-free-trade-agreement>. The U.S.-Colombia FTA entered into force on May 15, 2012. *News on Treaties, supra*. The Panama TPA entered into force on October 31, 2012. Melanie Wheeler, *Date Set for Entry-into-Force of the U.S.-Panama Trade Promotion Agreement*, WHITE HOUSE BLOG (Oct. 23, 2012, 12:53 PM), <http://www.whitehouse.gov/blog>; see also Int'l Ctr. for Trade and Sustainable Dev., *Officials: U.S.-Panama Trade Pact to Enter into Force Next Week*, BRIDGES WKLY. TRADE NEWS DIG., Oct. 24, 2012, at 12, 12, available at <http://ictsd.org/downloads/bridgesweekly/bridgesweekly16-36.pdf>.

30. The Mercado Común del Sur (Southern Cone Customs Union), was formed by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay, and the Oriental Republic of Uruguay. Joanna Klonsky, *Mercosur: South America's Fractious Trade Block*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/trade/mercosur-south-americas-fractious-trade-bloc/p12762> (last updated July 31, 2012). These countries signed the Treaty of Asunción on March 26, 1991. Treaty of Asunción, Mar. 26, 1991, 30 I.L.M. 1041, available at <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp>. Venezuela joined officially in

global trade talks through the General Agreement on Tariffs and Trade (GATT) Uruguay Round³¹ were faltering.

In 1993, the successful conclusion of the Uruguay Round trade negotiations was anything but a sure thing.³² The Uruguay Round talks, which would later result in the creation of the WTO, were bogged down with French demands for restricted access of U.S. films to their country's cinema screens.³³ The trade talks nearly collapsed entirely, as French pressure on the European Union made the overall agreement more difficult to achieve.³⁴

A failure to resolve this negotiation deadlock would have meant more than the WTO being pronounced a stillborn institution. Without the WTO, there would be no enforceable trade rules or institutions to adjudicate trade disputes, including those involving IPR.³⁵ The lack of a rules-based trade dispute resolution system leads to a state of nature with trade wars, boycotts, sanctions, and other unilateral—and

2012, some six years after applying for membership. See Shane Romig, *Venezuela to Join Mercosur Trade Bloc*, WALL. ST. J. (June 29, 2012), <http://online.wsj.com/article/SB10001424052702303649504577497123531357032.html?KEYWORDS=Venezuela+Mercosur>.

31. See generally Final Act, *supra* note 6.

32. See, e.g., Alan Riding, *GATT Pact is Sought by Year End*, N.Y. TIMES (Nov. 27, 1992), <http://www.nytimes.com/1992/11/27/business/gatt-pact-is-sought-by-year-end.html>; *The Uruguay Round*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm. The drama of deadlocked trade negotiations is playing itself out again after a decade of negotiations of the Doha Round. Int'l Ctr. for Trade and Sustainable Dev., *2012 Should Not Be a "Wasted Year," Lamy Urges WTO Members*, BRIDGES WKLY. TRADE NEWS DIG., Feb. 15, 2012, at 1, 1-2, available at <http://ictsd.org/i/news/bridgesweekly/125553/>; see also Raj Bhala & James Cooper, Op-Ed., *A World Trade Round Gone Bad*, UTSANDIEGO.COM (June 3, 2011), <http://www.utsandiego.com/news/2011/jun/03/a-world-trade-round-gone-bad/> (“[T]he Doha Round [was] supposed to spark economic development through freer trade and thereby reduce the appeal of extremism to marginalized Muslims.”).

33. See Alan Riding, *The World Trade Agreement: The French Strategy*, N.Y. TIMES (Dec. 15, 1993), <http://www.nytimes.com/1993/12/15/business/world-trade-agreement-french-strategy-months-risk-moments-isolation-now-boasts.html>.

34. See *id.*

35. See WORLD TRADE ORG., 10 BENEFITS OF THE WTO TRADING SYSTEM 2-4 (2008) [hereinafter 10 BENEFITS OF THE WTO], available at http://www.wto.org/english/res_e/doload_e/10b_e.pdf.

often political—practices.³⁶ A rules-based system with more multilateral mechanisms for dispute resolution provides fairness, standardization, and—in the case of the Dispute Settlement Understanding³⁷ that emerged as part of the WTO treaty regime—enforcement remedies.³⁸ Without this system, many countries chose an alternative solution by looking for preferential trade deals with other countries in their region.

Before the Uruguay Round talks were successfully completed, Europe continued down the road of further regional integration with the Maastricht Treaty³⁹ and the creation of the European Union itself, a large step beyond the common market that had operated since the Treaty of Rome in 1957.⁴⁰ As the “twelve become one,”⁴¹ America worried that its traditional trading partner and allies could become a so-called “Fortress Europe.”⁴² The European Union continued to consolidate as other regional trading partners circled their wagons and established preferential trade agreements with neighbors. In Southeast Asia, the member countries of ASEAN⁴³ worked to promote more

36. *See id.* at 2.

37. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994) [hereinafter WTO Dispute Settlement Rules].

38. *See* Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 2-3 (1999); *see also* 10 BENEFITS OF THE WTO, *supra* note 35, at 4.

39. Treaty on European Union [TEU, Maastricht Treaty], Feb. 7, 1992, 1992 O.J. (C191).

40. *See* Michael H. Abbey & Nicholas Bromfield, *A Practitioner's Guide to the Maastricht Treaty*, 15 MICH. J. INT'L L. 1329, 1329-30 (1994).

41. *See* PASCAL FONTAINE, EUROPE IN 12 LESSONS 11 (2006) (noting that the twelve countries that adopted the euro—the single currency of the European Union—were “commonly referred to as the euro zone”).

42. *See, e.g.*, Andrew P. Hoffman, Note and Comment, *Reciprocity in European Community and United States Banking Law*, 11 ANN. REV. BANKING L. 539, 551 (1992) (describing the “Fortress Europe” concept as “a single market open within its borders but closed to outsiders.”).

43. ASEAN [Association of Southeast Asian Nations] was founded on August 8, 1967 and is currently composed of ten member states. *Overview*, ASS'N OF SOUTHEAST ASIAN NATIONS, <http://www.asean.org/asean/about-asean/overview>.

trade among its members.⁴⁴ In Latin America, the Southern Cone countries harmonized their respective tariff policies when MERCOSUR was created in 1991 with the Treaty of Asunción.⁴⁵

As of January 2012, there are approximately 511 Regional Trade Agreements (RTAs) registered with the WTO.⁴⁶ These RTAs, in turn, can stymie multilateral (i.e., WTO) negotiations, like the Doha Round of WTO negotiations. Professor Jagdish Bhagwati called this phenomenon “stumbling blocs” to reaching a global trade deal.⁴⁷

III. NAFTA, DISPUTE RESOLUTION, AND A RULES-BASED IPR REGIME

NAFTA built upon the work of the GATT by providing substantial protection for IPR, and it helped lead to the successful conclusion of the GATT negotiations concerning a new agreement on IPR.⁴⁸

NAFTA, having been completed two years prior to the conclusion of the Uruguay Round, helped the ratification of TRIPS not only by

44. *Id.* (listing one of ASEAN’s aims and purposes as “[t]o collaborate more effectively for . . . the expansion of their trade . . .”).

45. Klonsky, *supra* note 30; see also Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHI. J. INT’L L. 597, 626 n.100 (2010).

46. See *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited on Nov. 9, 2012).

47. JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 77 (1991).

48. In 1986, the eighth round of global trade talks included IPR. According to the September 20, 1986 Ministerial Declaration: “In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.” General Agreement on Trade and Tariffs, Ministerial Declaration of 20 September 1986, pt.I.D, 25 I.L.M. 1623 (1986), available at http://www.sice.oas.org/trade/Punta_e.asp. There would be a rules-based system for the protection of IPR once a full dispute settlement system was integrated into the WTO. See WTO Dispute Settlement Rules, *supra* note 37. It would be a direct *alto voce* as the WTO established positive standards for the conduct of domestic policies rather than negative standards. See generally *id.*

drawing attention to IP rights as a “free trade” issue, but also by undermining the cohesion of the Latin American opposition. Latin American countries considered these intellectual property standards as an “admission price” for becoming members of NAFTA.⁴⁹

NAFTA provides for protection of copyrights (including sound recordings), patents and trademarks, plant breeders’ rights, industrial designs and trade secrets, and integrated circuits (semiconductor chips).⁵⁰ NAFTA expanded the existing protection under Mexican law for patents, copyrights, trademarks, service marks, and trade secrets.⁵¹ Mexico agreed to protect patents, including process patents for pharmaceuticals and agriculture chemicals; it also agreed to “protect foreign registered patents for twenty years.”⁵² NAFTA details procedures for enforcement of IPR and for damages in the event of violations of such rights in the three jurisdictions.⁵³

NAFTA includes several internal dispute resolution methods.⁵⁴ For example, “consultation is the most common method . . . in NAFTA. The most important consultation involves committees that assemble at the request of the signatory countries, or sometimes at periodic intervals.”⁵⁵ There are a number of dispute resolution mechanisms under NAFTA, but only two are relevant to protecting against IPR violations by a NAFTA Party (Canada, Mexico, and the

49. Emir Aly Crowne, *Fishing TRIPS: A Look at the History of the Agreement on Trade-related Aspects of Intellectual Property*, 2 CREIGHTON INT’L & COMP. L.J. 77, 85 (2011) (citations omitted).

50. NAFTA, *supra* note 1, ch. 17.

51. David A. Gantz, *Principal Features of the North American Free Trade Agreement*, in MAKING FREE TRADE WORK IN THE AMERICAS 34, 46 (Boris Kozolchyk ed., 1993).

52. *Id.*

53. *See, e.g.*, NAFTA, *supra* note 1, ch. 20.

54. Leonel Pereznieta, *Dispute Resolution in NAFTA: A Comparative and Sectoral Review*, in MAKING FREE TRADE WORK IN THE AMERICAS 671, 674 (Boris Kozolchyk, ed., Yvonne Boyed & Boris Kozolchyk, trans., 1993) (“Occasionally, NAFTA does not set forth a mechanism for dispute resolution, but refers parties to a variety of international agreements, each of which has its own system for dispute resolution.”).

55. *Id.* at 675.

United States).⁵⁶ The most relevant to this essay's discussion are Chapter 11, which deals with investor-state disputes, and Chapter 20, which provides a mechanism for all other disputes among the sovereign Parties to NAFTA concerning the other chapters.

A. NAFTA Ch. 11—Investor-State Disputes

Chapter 11 “establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal.”⁵⁷ A NAFTA investor, an individual or corporation that is a non-state actor rather than one of the signatory countries, who alleges that a host government has breached its investment obligations, may choose one of three arbitral mechanisms: the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), ICSID's Additional Facility Rules, or the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).⁵⁸ Alternatively, the investor may choose the remedies available in the host country's domestic courts.⁵⁹ An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals.⁶⁰

56. *Id.* at 674. For example, chapter 14 provides for the settlement of financial services disputes. NAFTA, ch. 14, arts. 1414-1415. Chapter 19 provides for settling dumping and counter-veiling duties disputes. *Id.* ch. 19. These provisions are not related to IPR or the settlement of IP disputes. *See id.* Chs. 14 & 19. Disputes relating to the following chapters may be referred to dispute settlement procedures under Chapter 20: including Chapters 7 (Agriculture and Sanitary and Phytosanitary Measures), 10 (Government Procurement), 11 (non-compliance by a Party with final award), and 14 (Financial Services). *Id.* chs. 7, 10, 11, 14, 20.

57. NAFTA, *supra* note 1, ch. 11, art. 1115. “[T]here is a relative dearth of information on the cases reviewed under Chapter 11.” Antonio Ortiz-Mena L.N., *Dispute Settlement under NAFTA*, in NAFTA IN THE NEW MILLENNIUM 425, 428 (Edward J. Chambers & Peter H. Smith eds., 2002).

58. NAFTA, *supra* note 1, ch. 11, art. 1120.

59. *Id.* ch. 11, art. 1135(2)(c).

60. *Id.* ch. 11, art. 1136(4).

While parties have launched a number of investor-state disputes,⁶¹ most of which settled, there is no real record concerning IPR dispute settlement.⁶²

B. NAFTA Ch. 20—Institutional Arrangements and Dispute Settlement Procedures

Chapter 20 provides for Institutional Arrangements and Dispute Settlement Procedures.⁶³ The dispute settlement provisions of Chapter 20 are applicable to all disputes “regarding the interpretation or application” of NAFTA⁶⁴ and can be brought only by a NAFTA Contracting Party (one of the three signatory states). The steps set out in Chapter 20 are intended to resolve disputes by agreement, if possible.⁶⁵ The process begins with government-to-government (i.e., the Parties) consultations.⁶⁶ If the dispute is not resolved, a Party may request a meeting of the NAFTA Free-Trade Commission (comprised of the Trade Ministers of the Parties).⁶⁷ If the commission is unable to resolve the dispute, a consulting Party may call for a five-member arbitral panel to be established.⁶⁸ With its preference for consultation and pre-panel settlement, there is no history of an IPR dispute being arbitrated to date.⁶⁹ Chapter 20 also provides for scientific review boards.⁷⁰ A panel, in consultation with the disputing Party, may select these boards.⁷¹ The board’s purpose is to provide a written report “on

61. See GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 224 (2005).

62. E-mail from Todd Weiler, Founder of NAFTAClaims.com, to James M. Cooper, Institute Professor of Law, Cal. W. Sch. of Law (Feb. 29, 2012) [hereinafter E-mail from Todd Weiler] (on file with author); Interview with Jorge H. Amigo Casteñeda, Vice Chairman, Int’l Intellectual Prop. Inst., in Wash. D.C. (Jan. 18, 2012) [hereinafter Interview with Jorge H. Amigo Casteñeda].

63. NAFTA, *supra* note 1, ch. 20.

64. *Id.* ch. 20, art. 2004.

65. See *id.* ch. 20, art. 2003.

66. *Id.* ch. 20, art. 2006.

67. *Id.* ch. 20, art. 2007.

68. *Id.* ch. 20, art. 2008, 2011.

69. Email from Todd Weiler, *supra* note 62; interview with Jorge H. Amigo Casteñeda, *supra* note 62.

70. NAFTA, *supra* note 1, ch. 20, art. 2015(1).

71. *Id.* ch. 20, art. 2015(2).

any factual issue concerning environmental, health, safety, or other scientific matters” to assist panels in rendering their decisions.⁷²

Each NAFTA country appoints ministers to comprise the NAFTA commission; the commission is responsible for enforcing NAFTA’s provisions.⁷³ A secretariat assists the commission in coordinating the dispute resolution panels.⁷⁴ When disputes arise between the countries, the process works as follows:

[A] consultation can be requested at which all three NAFTA countries can participate. If consultation does not resolve the dispute, the commission will seek to settle the dispute through mediation or similar means of alternative dispute resolution procedures. If those measures are unsuccessful, a complaining country can request that an arbitration panel be established. The panel is composed of five members selected from a trilaterally agreed upon list of trade, legal, and other experts. After study, the panel issues a confidential initial report. After receiving comments from the parties, a final report will be prepared and conveyed to the commission. If the panel finds that a NAFTA country violated its NAFTA obligations, the disputing parties have 30 days to reach an agreement. If none is reached, NAFTA benefits may be suspended against the violating country in an amount equivalent to the panel’s recommended penalty until the dispute is resolved.⁷⁵

While there are a few Chapter 20 arbitration panels that have been constituted under NAFTA, none have dealt with IPR specifically.⁷⁶ This is not to say there have been no major failures to protect the IPR of the businesses of the Parties in the other partners’ territories.

72. *Id.* ch. 20, art. 2015(1).

73. *Id.* ch. 20, art. 2001(1); *see also About NAFTA—North American Free Trade Agreement*, NAFTANOW.ORG, http://www.naftanow.org/about/default_en.asp (last visited Nov. 15, 2012) [hereinafter *About NAFTA*].

74. *See* NAFTA, *supra* note 1, ch. 20, art. 2002(3); *see also About NAFTA*, *supra* note 73.

75. *North American Free Trade Agreement (NAFTA)*, REFERENCE FOR BUS., http://www.referenceforbusiness.com/encyclopedia/Mor-Off/North-American-Free-Trade-Agreement-NAFTA.html?&lang=en_us&output=json (last visited Nov. 18, 2012); NAFTA, *supra* note 1, ch. 20.

76. Email from Todd Weiler, *supra* note 62; interview with Jorge H. Amigo Casteñeda, *supra* note 62.

Mexico, for example, has consistently failed to grant the concessions to the NAFTA Parties concerning IPR protections as agreed upon in Chapter 17 of the trilateral agreement.⁷⁷

IV. *LA MEXICANA*: NAFTA RULES AND THE SYSTEMATIC DISREGARD FOR INTELLECTUAL PROPERTY RIGHTS

Bringing Mexico into the fold by aligning its laws with that of Canada and the United States was not an easy task. Integrating the economies of the United States and Canada was much easier. However, NAFTA was not just an extension of the 1989 Canada-U.S. Free Trade Agreement. Prior to NAFTA, Mexico was considered a third world country. Its labor practices, institutions, and judicial processes were different and more vulnerable to corruption.⁷⁸ Data collected from various organizations illustrates these differences. One need only examine the Bertelsmann Foundation's Transformation Index;⁷⁹ the latest report from the national chapter of Transparency International in Mexico, *Transparencia Mexicana*,⁸⁰ and the Organization for Economic Cooperation and Development.⁸¹

77. See AMBASSADOR RONALD KIRK, *2012 Special 301 Report*, OFF. U.S. TRADE REPRESENTATIVE, at 47 (2012), available at <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>.

78. See, e.g., *People Say Corruption in Mexico is Getting Worse*, TRANSPARENCY INT'L (May 11, 2011), http://www.transparency.org/news/pressrelease/20110511_Mexico_worse; Eduardo Bohórquez & Deniz Devrim, *Mexico and the G20 Presidency: Stronger Leadership and Anticorruption Effort Needed*, TRANSPARENCY INT'L (Nov. 7, 2011), <http://blog.transparency.org/2011/11/07/mexico-and-the-g20-presidency-the-need-for-stronger-leadership-and-higher-consistency-in-anticorruption-efforts/> (describing the difficulties Mexico has with fighting bribery and corruption).

79. See generally BERTELSMANN STIFTUNG, *BTI 2010 MEXICO COUNTRY REPORT* (2009), available at <http://www.bti-project.org/fileadmin/Inhalte/reports/2010/pdf/BTI%202010%20Mexico.pdf>.

80. See generally TRANSPARENCIA MEXICANA, *ÍNDICE NACIONAL DE CORRUPCIÓN Y BUEN GOBIERNO—INFORME EJECUTIVO 2010* [National Index of Corruption and Good Government—Executive Report], Mayo 10, 2011, (Mex.), available at http://www.transparenciamexicana.org.mx/documentos/INCBG/2010/1_InformeejecutivoINCBG2010%209mayo2011.pdf.

81. Mexico has made some progress fighting corruption. Mexico has opened

Mexico had to change many of its laws in order to comply with the dictates of NAFTA. For example, Mexico had to amend Article 27 of its Constitution⁸² to address Mexico's communal landholding doctrine, the *ejido*.⁸³ It also had to change its investment laws to allow for full legal foreign ownership.⁸⁴ For the purposes of this essay, no change was more important than that necessary to comply with Chapter 17 of NAFTA—the provisions concerning IPR.⁸⁵ Prior to 1991, Mexico was the exemplar of state intervention; the country had a Technology Transfer Commission with a veto power over most IP licensing and franchising agreements.⁸⁶ The Commission also controlled the terms and conditions of technology transfer agreements.⁸⁷ The Commission even decided the level of acceptable

its first two foreign bribery investigations. See Bohórquez & Devrim, *supra* note 78; see also OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN MEXICO 4 (2011) [hereinafter PHASE 3 REPORT], available at <http://www.oecd.org/dataoecd/60/7/48897634.pdf>. Mexico has also made some improvements to its legislative framework for fighting foreign bribery, such as by amending the foreign bribery offence. PHASE 3 REPORT, *supra*, at 9.

82. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

83. See M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL34733, NAFTA AND THE MEXICAN ECONOMY 11-12 (2010); see also Ronald H. Schmidt & William C. Gruben, *Ejido Reform and the NAFTA*, FRBSF WKLY LETTER, Oct. 2, 1992, available at <http://www.frbsf.org/publications/economics/letter/1992/el92-34.pdf>.

84. Dean C. Alexander, *Mexico's Foreign Investment Law of 1993, Amendments to the Maquila Decree, and an Overview of Maquiladoras*, in NAFTA AND INVESTMENT 65, 65 (Seymour J. Rubin & Dean C. Alexander eds., 1995).

85. Joseph S. Papovich, *NAFTA's Provisions Regarding Intellectual Property: Are They Working as Intended?—A U.S. Perspective*, 23 CAN.-U.S. L.J. 253, 259 (1997). “[O]n intellectual property protection, Mexico has made generous concessions, simply because Mexico expects to profit immensely from preferential access to a [sic] gigantic markets.” Jagdish Bhagwati, *NAFTA*, in SHADOW OPEN MARKET COMMITTEE 12 (Sept. 13-14, 1992), available at http://www.shadowfed.org/pdfs/1992_09_14.pdf.

86. See Catherine Brown & Christine Manolakas, *Trade in Technology Within the Free Trade Zone: The Impact of the WTO Agreement, NAFTA, and Tax Treaties on the NAFTA Signatories*, 21 NW. J. INT'L L. & BUS. 71, 73 & n.7 (2000-2001).

87. *Id.* at 73 n.7.

royalties.⁸⁸ In 1991, Mexico abolished the Commission and most technology transfer controls, enabling licensors and licensees the freedom to strike their own bargains.⁸⁹

The Mexican Institute of Industrial Property (IMPI) was created to administer Mexico's trademark and patent registries.⁹⁰ The IMPI is responsible for handling administrative cases of IPR infringement and has four regional offices to receive documentation.⁹¹ Mexico divides its IP laws into two areas: intellectual property and industrial property. Mexico adopted its new Industrial Property Law in 1991,⁹² and its new Federal Copyright Law took effect in 1997.⁹³ In 1994, Mexico joined the Patent Cooperation Treaty.⁹⁴ NAFTA provided for minimum standards through a plethora of international IP treaties,⁹⁵ including the Geneva Convention on Phonograms,⁹⁶ the Berne Convention for the Protection of Literary and Artistic Works,⁹⁷ the

88. Geoffrey Kransdorf, *Intellectual Property, Trade, and Technology Transfer Law: The United States and Mexico*, 7 B.C. THIRD WORLD L.J. 277, 285-86 (1987) ("Because excessive licensing fees or royalties are one of the prohibited conditions [of the law], the government essentially has the power to set prices for the purchase of technology at whatever level it feels is reasonable.").

89. See Keith J. Kanouse, *Franchising Internationally*, in FRANCHISE L. & PRAC. §13.16 (Fla. B. ed., 2d ed. 1996).

90. See *About IMPI*, INSTITUTO MEXICANO DE LA PROPIEDAD INDUSTRIAL, http://www.impi.gob.mx/wb/impi_en/about_impi (last visited Oct. 26, 2012) (Mex.).

91. See *Regional Offices*, INSTITUTO MEXICANO DE LA PROPIEDAD INDUSTRIAL, http://www.impi.gob.mx/wb/impi_en/regional_offices_ok (last visited Oct. 26, 2012) (Mex.).

92. Ley de la Propiedad Industrial [LPI] [Industrial Property Law], as amended, Diario Oficial de la Federación [DO], 25 de Junio de 1991 (Mex.), available at <http://www.wipo.int/wipolex/en/details.jsp?id=11711>.

93. Ley Federal del Derecho de Autor [LFDA] [Federal Copyright Law], as amended, Diario Oficial de la Federación [DO], 5 de Diciembre de 1996 (Mex.), available at <http://www.wipo.int/wipolex/en/details.jsp?id=3079>.

94. See *Contracting Parties—Patent Cooperation Treaty*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=6 (last visited Oct. 26, 2012).

95. NAFTA, *supra* note 1, ch. 17, art. 1701.

96. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309.

97. Berne Convention for the Protection of Literary and Artistic Works (Paris Act), last revised July 24, 1971, 25 U.S.T. 1341.

Paris Convention for the Protection of Industrial Property,⁹⁸ and the International Convention for the Protection of New Varieties of Plants.⁹⁹ In essence, Mexico had to completely revise many of its domestic rules to meet its obligations with its NAFTA partners. Further, NAFTA imposes criminal penalties for “willful trademark counterfeiting or copyright piracy undertaken on a commercial scale.”¹⁰⁰ NAFTA also provides for the general duty to protect IP adequately and effectively as long as barriers to legitimate trade are not created.¹⁰¹

Despite NAFTA’s expansive provisions, Mexico has a history of weak enforcement of IPR, and this area of law is developing slowly. Thus, Mexico remains on the U.S. Trade Representative’s Special 301 “Watch List” due to “inadequate IPR protection and enforcement,”¹⁰² although it was taken off the Watch List from 2000 to 2002.¹⁰³ Mexico continues to struggle with IPR infringement issues, such as pirated and counterfeit goods sold in various local markets. For

98. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised at Stockholm on July 14, 1967, 21 U.S.T. 1583.

99. International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 33 U.S.T. 2703.

100. NAFTA, *supra* note 1, ch. 17, art. 1717(1).

101. *Id.* art. 1701.

102. Ambassador Ronald Kirk, *2011 Special 301 Report*, OFF. U.S. TRADE REPRESENTATIVE, at 37 (2011), available at http://www.ustr.gov/webfm_send/2841; see also OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2009 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 339 (2009) [hereinafter FOREIGN TRADE BARRIERS], available at http://www.sice.oas.org/ctyindex/USA/ftbmex2009_e.pdf.

103. See *2000 USTR Special 301 Report*, KNOWLEDGE ECOLOGY INT’L (Sept. 16, 2009) <http://www.keionline.org/ustr/2000special301>; Ambassador Robert B. Zoellick, *2001 Special 301 Report*, OFF. U.S. TRADE REPRESENTATIVE, at 3 (2001), available at http://www.keionline.org/sites/default/files/ustr_special301_2001.pdf; Ambassador Robert B. Zoellick, *2002 Special 301 Report*, OFF. U.S. TRADE REPRESENTATIVE, at 1 (2002), available at http://www.keionline.org/sites/default/files/ustr_special301_2002.pdf. In 2003, the U.S. Trade Representative once again placed Mexico back on the Watch List. Ambassador Robert B. Zoellick, *2003 Special 301 Report*, OFF. U.S. TRADE REPRESENTATIVE, at 27 (2003), available at http://www.ustr.gov/archive/assets/Document_Library/Reports_Publications/2003/2003_Special_301_Report/asset_upload_file665_6124.pdf.

example, the Office of the U.S. Trade Representative issued its annual Foreign Trade Barriers report in 2009, where it noted the continuing IP violations that occur in Mexico. The report noted that “local authorities in Mexico City [attempted] to move street vendors into the formal economy,” and the Office of the Attorney General employed a similar strategy of “market reconversion.”¹⁰⁴ But, these efforts have not been successful:

[W]ell-known markets selling pirated and counterfeit goods, such as Tepito Market in Mexico City, San Juan de Dios Market in Guadalajara, and others in Monterrey and San Luis Potosi, continue to operate openly. In 2008, Mexico City authorities removed unlicensed vendors from certain parts of the historic center of the city and seized two properties that were being used for illicit commerce in Tepito, but these actions were narrowly targeted.¹⁰⁵

As a consequence of these illegal operations, the Office of the U.S. Trade Representative published its Notorious Markets list (“List”) on December 20, 2011.¹⁰⁶ The List is an out-of-cycle review of the presence of marketplaces that “deal in goods and services that infringe upon intellectual property rights.”¹⁰⁷ On the List was the Tepito Market, which is reportedly the main warehousing and distribution center for pirated and counterfeit products sold at numerous informal markets throughout Mexico.¹⁰⁸ The List states that “[d]espite enforcement actions that resulted in significant seizures, illicit activity allegedly persists in Tepito.”¹⁰⁹ There is also an increasing connection between the *narcotraficantes*¹¹⁰ and IP piracy activities.¹¹¹ Despite this wholesale violation of IPR, there has been

104. FOREIGN TRADE BARRIERS, *supra* note 102.

105. *Id.*

106. OFFICE OF THE U.S. TRADE REPRESENTATIVE, OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS (2011) [hereinafter NOTORIOUS MARKETS], available at http://www.ustr.gov/webfm_send/3215.

107. *Id.*

108. *Id.*

109. *Id.*

110. See COOPER, *supra* note 4, at 3-4, for a summary of drug trafficking issues in Mexico.

111. See David Luhnnow & José de Cordoba, *The Perilous State of Mexico*,

no movement using Chapter 11 or Chapter 20 by the United States (or Canada).

V. NAFTA'S LEGACY CONCERNING INTELLECTUAL PROPERTY RIGHTS IN THE AMERICAS

Mexico is not alone in Latin America when it comes to IPR infringement.¹¹² The various *San Andresitos* marketplaces operating throughout Colombia (e.g., Bogotá and Cali), also made the list of notorious markets.¹¹³ These Colombian markets “are notorious for unauthorized reproduction of music, video games, and movies, and for the unauthorized distribution of pirated and counterfeit goods.”¹¹⁴ There is also the internationally renowned piracy center of Ciudad del Este in Paraguay—very close to the borders of Argentina and Brazil—the so-called “Triple Frontier” area.¹¹⁵

Argentina is always on the radar and not just because of the immense *La Salada* market in Buenos Aires, which is dangerous to law enforcement on its best days. The illicit counterfeiting industry funds terrorism, like the November 1994 bombing of the Jewish Community Center (AMIA) in Buenos Aires by Hezbollah.¹¹⁶ In addition, the U.S. government is concerned by the annual loss of millions of dollars of revenue—money due to legitimate rights holders—that Argentina does not pay.

WALL ST. J. (Feb. 21, 2009), <http://online.wsj.com/article/SB123518102536038463.html>.

112. See generally Inti Linkletter Knapp, *The Software Piracy Battle in Latin America: Should the United States Pursue Its Aggressive Bilateral Trade Policy Despite the Multilateral TRIPS Enforcement Framework?*, 21 U. PA. J. INT'L ECON. L. 173 (2000), for an examination of copyright law differences in Latin America, with a particular focus on Argentina and Brazil.

113. NOTORIOUS MARKETS, *supra* note 106.

114. *Id.*

115. James M. Cooper, *Piracy 101*, 36 CAL. W. INT'L L.J. 89, 98 (2005).

116. See Matthew Levitt, *Hezbollah Finances: Funding the Party of God*, WASH. INST. FOR NEAR EAST POL'Y (Feb. 2005) <http://www.washingtoninstitute.org/policy-analysis/view/hezbollah-finances-funding-the-party-of-god>.

The trade agreements in the Americas that followed NAFTA made a major change in the investor-dispute provisions.¹¹⁷ For example, Chapter 10 of the U.S.-CAFTA-DR (the chapter dedicated to investor-state disputes like Chapter 11 of NAFTA), states that the term “investment” covers all forms of investment, including enterprises, securities, debt, IPR, licenses, and contracts.¹¹⁸ NAFTA did not provide for the inclusion of IPR in this definition of “investment.”¹¹⁹ Chapter 10 of the U.S.-CAFTA-DR also provides a mechanism for an investor of a Party to submit a damages claim to binding international arbitration.¹²⁰ Hence, under a NAFTA Chapter 20 dispute panel, the only litigants are NAFTA countries themselves, rather than individuals (or corporations), the latter of which can be a party in a Chapter 11 investment dispute.

It is also important to note that the IP provisions in FTAs that followed NAFTA have strengthened their respective enforcement provisions.¹²¹ The IP chapters of the trade agreements, which the United States entered into with countries in the Americas from 2003 to 2008, also provide for the adoption of innovations that did not appear in similar trade agreements before 2003.¹²²

VI. CONCLUSIONS—NAFTA AS METAPHOR

We are living, at least in the United States, in a post-industrial,¹²³ or knowledge-based, economy.¹²⁴ As the United States outsourced

117. See Gantz, *supra* note 9, at 503, 508-09.

118. U.S.-CAFTA-DR, *supra* note 25, ch. 10, art. 10.28.

119. See NAFTA, *supra* note 1, ch. 11, art. 1139.

120. U.S.-CAFTA-DR, *supra* note 25, ch. 10, art. 10.17.

121. See Charles S. Levy & Stuart Weiser, *Intellectual Property*, in *A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENTS IN THE AMERICAS* 269, 270 (Judith H. Bello, Alan F. Holmer & Joseph J. Norton, eds., 1994) (“[E]xisting agreements like the NAFTA are a floor to be built on, and the United States will likely pursue a strategy of ratcheting up the protection provided to intellectual property rights in each subsequent initiative.”).

122. Horacio Rangel-Ortiz, *Patent Rights in Commercial Agreements Recently Entered by the U.S.A. with Nations of the South*, 16 *CURRENTS: INT’L TRADE L.J.* 52, 53 (2008).

123. See generally, DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* (1976).

millions of manufacturing jobs to Mexico, China, and any number of other industrializing countries with abundant low-cost unskilled labor, the United States was able to base its economic growth on services and new innovations. Hence, a well-developed regime of enforcement of IPR is an essential part of the development strategies for economic growth in the developed world.¹²⁵ IPR protection is often viewed as the signal of a country's development into a fully functioning liberal democracy, which is capable of sustainable economic growth.¹²⁶ There are clearly a number of humanitarian concerns that come with compulsory licensing, costs of innovation, and accessibility of drugs to people in poor and developing countries.¹²⁷ But this does not discount the need to provide incentives for innovation and the

124. See Robin Cowan & Elad Harison, *INTELLECTUAL PROPERTY RIGHTS IN A KNOWLEDGE-BASED ECONOMY* 10 (2001), available at <http://edocs.uu.unimaas.nl/loader/file.asp?id=231>.

125. See generally Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 *IDEA* 261 (1997) (assessing and comparing national intellectual property regimes through a numerical rating system). "The rating system examines regime effectiveness from the perspective of private investment stimulation, particularly national private investment. This system, in turn, may provide a basis for assessing the contribution which intellectual property protection makes to the process of economic development." *Id.* at 261.

126. See, e.g., Amir H. Khoury, "Measuring the Immeasurable" – *The Effects of Trademark Regimes: A Case Study of Arab Countries*, 26 *J. L. & COM.* 11, 13 (2006-2007). "Arab countries lag behind developed countries in all three levels of trademark registration namely the 'Absolute,' 'Relative' and 'Particular.' Arab countries are at a disadvantage in terms of actual trademark registration both within their respective jurisdictions and beyond. Not only is the number of registrations much smaller than that of developed countries, but, also the relative share of non-resident owned marks that are registered in Arab countries is much higher than the comparable rate in developed countries. Furthermore, the 'particular level' indicates that developed countries dominate 'foreign registrations' in Arab countries. This situation has been largely constant throughout three decades (1970-2000)." *Id.* at 68. Further, "products and services that dominate Arab economies have a very low 'trademark potential.'" *Id.*

127. See generally Juan Bacalsk, *Mexico's Pharmaceutical Patent Dilemma and the Lesson of India*, 23 *ARIZ. J. INT'L & COMP. L.* 717 (2006) (exploring the mature Indian pharmaceutical industry and the manner in which it may be a model for Mexico's industry; also describing how the two industries may be compared and what important lessons may be learned).

recouping of investment of research and development. These are not new discussions.

The advances in the internet, social media, wireless technology, and electronic commerce over the last two decades require us to take stock of how to best monetize innovation, reward risk and discovery, and grow economies. While NAFTA's benefits are still being debated, evidence is emerging that the Mexican middle class, decimated in the 1995 currency devaluation (the so-called *tequila effect*¹²⁸), is coming back (even in the face of the escalating drug war in Mexico).¹²⁹ But we must still query what were the spillover effects to the change in IP rules? In the case of NAFTA, was this positive or negative for Mexico? Was this a form of judicial imperialism or part of an overall development strategy that worked? How has the lack of enforcement of IPR contributed to the overall breakdown in the rule of law in Mexico? We need only look at the direct relationship between *narcotraffickers* and IP pirates (as well as arms, human, and other trafficking) to begin to understand the dynamics behind Mexico's failings.

There are a number of formal dispute resolution mechanisms that involve states but also those that involve non-state partners. Clearly, the state Parties (at least under NAFTA) have not used Chapter 20 to deal with systemic lack of concessions granted to the other partner Parties. The countries themselves can complain that their individuals and corporations trading in the trade area are not receiving the concessions provided for under NAFTA—in other words, they are not having their rights protected, nor are they living up to the minimum standards provided for under Chapter 17 of NAFTA. This leaves individuals, firms, or corporations to utilize the investor-state dispute resolution provisions under Chapter 11—a process that still has not

128. See William R. Long, *Latin Markets Dive in "Tequila Effect" Reaction to Mexico*, L.A. TIMES (Jan. 11, 1995), http://articles.latimes.com/1995-01-11/business/fi-18831_1_tequila-effect.

129. Mary Anastasia O'Grady, *The Rise of Mexico's Middle Class*, WALL ST. J. (Mar. 2, 2012), <http://online.wsj.com/article/SB10001424052970203986604577257341514055760.html>. See generally LUIS DE LA CALLE & LUIS RUBIO, MEXICO: A MIDDLE CLASS SOCIETY—POOR NO MORE, DEVELOPED NOT YET (Mexico Inst. 2012), available at <http://www.wilsoncenter.org/sites/default/files/Mexico%20A%20Middle%20Class%20Society.pdf>.

been utilized due to the costs and time involved. Alternatively, victims of IPR violations must find some other way to negotiate at a non-state to non-state level (like traditional nationally-based litigation).

As the twentieth anniversary of NAFTA approaches, we can examine the last two decades and determine how far we have come in terms of the settlement of IP disputes in international trade agreements. While NAFTA was an important milestone in providing for dispute resolution for IPR violations, the mechanisms that this agreement provides have not been utilized.

