

# NAFTA'S REGIME FOR INTELLECTUAL PROPERTY: IN THE MAINSTREAM OF PUBLIC INTERNATIONAL LAW\*

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### I. INTRODUCTION

In this Decade of International Law,<sup>1</sup> economic integration is undoubtedly the greatest achievement of global and regional communities. New institutions—particularly the World Trade Organization (WTO);<sup>2</sup> the North American Free Trade Agreement (NAFTA);<sup>3</sup> the Treaty Establishing

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\* This article is based on remarks made during a panel presentation entitled *Protection of Intellectual Property in International and National Law* at a conference on The Role of International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration, which was held in Mexico City, June 6–7, 1996, and was co-sponsored by the American Society of International Law and *El Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México*. Joint copyright is held by the *Houston Journal of International Law*, the author, and *El Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México*.

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1. In 1989, the General Assembly of the United Nations declared the establishment of a Decade of International Law (1990–1999). Its declared purpose is to promote acceptance of and respect for the principles of international law, advance the means for peacefully resolving disputes among states, progressively develop and codify international law, and encourage teaching and wider appreciation of international law. See G.A. Res. 23, U.N. GAOR, 44th Sess., Supp. No. 49, at 31, U.N. Doc. A/44/49 (1989).

2. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1144 (1994).

3. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 [hereinafter NAFTA].

a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay (MERCOSUR);<sup>4</sup> and the Asia Pacific Economic Cooperation Forum (APEC)<sup>5</sup>—are monumental and, on balance, popular achievements. In the United States, President Clinton relied on his ability to gain political support for increased economic integration as a means of bolstering public opinion of his administration during its first two years.

## II. TRANSFORMATION OF UNILATERAL MEASURES INTO PUBLIC INTERNATIONAL LAW

Nowhere is international cooperation in the progressive development and codification of international economic law more evident than in the sphere of intellectual property rights.<sup>6</sup> The creation of new regimes for the protection of these rights excites practitioners and scholars alike. Consider the NAFTA, the first trade agreement to include a comprehensive scheme for protecting intellectual property rights.<sup>7</sup> The pertinent provisions are striking examples not simply of regional integration in traditional terms, but of the capacity of a regional agreement to internationalize what had previously been a domain largely reserved for sovereign authority and private law.

Although the NAFTA parties have also been parties to a variety of multilateral agreements on intellectual property law that supplement and give effect to domestic regulations,<sup>8</sup> the NAFTA provides a wholly new

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4. Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1044; *see also* Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur, Dec. 17, 1994, 34 I.L.M. 1244 (1995).

5. Asia Pacific Economic Cooperation Forum (APEC): Declaration of Common Resolve, Nov. 15, 1994, 34 I.L.M. 758 (1995) (confirming regional commitment to cooperation in trade despite lack of a central organization).

6. *See* Emery Simon, *GATT and NAFTA Provisions on Intellectual Property*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 267, 275–80 (1993) (discussing the monumental changes that have occurred as a result of the GATT and the NAFTA in developing international intellectual property regulations and their impact on international trade and economics).

7. *See* José Angel Canela, *Remarks*, 87 AM. SOC'Y INT'L L. PROC. 6, 7 (1993) (discussing new trends in international dispute resolution and recognizing the “comprehensive section” under NAFTA). Mr. Canela made his remarks as Legal Counsel, NAFTA Office, Embassy of Mexico, Washington, D.C. *See id.* at 6. By contrast, in the European Union (EU), intellectual property rights began only as an exception to provisions for eliminating trade restrictions. *See* Esti Miller, Comment, *NAFTA: Protector of National Intellectual Property Rights or Blueprint for Globalization?*, 16 LOY. L.A. ENT. L.J. 475, 504–05 (1996). Also, the EU has relied heavily upon case law, as opposed to express statutory provisions, to define the extent of protection for some intellectual property, like copyrights. *See id.* at 505. For a discussion of several distinctive features of NAFTA and EU law, *see id.* at 500–07.

8. *See* Lisa B. Martin, *An Analysis of NAFTA's Intellectual Property Provisions*, J. PROPRIETARY RTS., Dec. 1993, at 24, 24–25 (discussing other multilateral agreements on intellectual property that have supplemented the domestic regulations of the signatories, including the United States).

organizational framework of collaboration.<sup>9</sup> Although its requirements are largely consistent with, and therefore a reflection of, domestic legislation,<sup>10</sup> they also harmonize and progressively develop the law to form a more comprehensive, intergovernmental regime.<sup>11</sup> In this way the protection of intellectual property rights is becoming part of the mainstream in public international law, at least in the Western Hemisphere.<sup>12</sup>

While it is arguable that intellectual property rights are no more in the mainstream of public international law than trade, investment, and other topics of international economic law, the NAFTA's provisions for intellectual property rights, in concert with other international agreements, represent a particularly noteworthy transformation in the character of the legal regime.<sup>13</sup> It might also be argued that the protection of intellectual property rights has always been a topic of transnational law, defined to blend elements of public and private law. However, it was a marginal topic at best, and in Romano-Germanic (civil law) terms, it clearly fell on the private side of the law in both the academic world and in practice.<sup>14</sup> Although the distinction between "public" and "private" law often seems abstract to common law attorneys, it has considerable significance in countries like Mexico, which has a civil law tradition. To call this distinction academic is precisely the point: it serves to help determine the curriculum of law faculties, focus scholarly attention, and eventually set the diplomatic agenda. The NAFTA framework of intellectual property rights is significant in both the practice and the study of international law. As an academic matter, it deserves a more prominent place in the classroom, as well as in basic treatises and textbooks on international law.<sup>15</sup>

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9. See Simon, *supra* note 6, at 278–79 (explaining that the distinctiveness of NAFTA is derived partly from the fact that it was negotiated within a much more cooperative framework than other international agreements such as GATT).

10. See Martin, *supra* note 8, at 24 (discussing NAFTA's incorporation and implementation of existing international agreements that are already a part of the intellectual property laws of the United States).

11. See *id.* (noting that the intellectual property provisions of NAFTA are intended to harmonize copyright, patent, trademark, and trade secret laws among the United States, Canada, and Mexico).

12. See Alan S. Gutterman, *International Intellectual Property: A Summary of Recent Developments and Issues for the Coming Decade*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 335, 335–37 (1992) (noting that intellectual property issues have become increasingly important in discussions of international trade and development).

13. See Simon, *supra* note 6, at 273–79 (discussing the evolution of international agreements that culminated in NAFTA, and noting that while it incorporates many of the concepts and provisions of the previous agreements—especially GATT—NAFTA is a substantial improvement on and transformation of the previous agreements).

14. See BERNARD RUDDEN, *A SOURCE-BOOK ON FRENCH LAW* 10–11 (3d ed. 1991) (describing the general distinction between public and private law in general and illustrating the types of issues that fall under each category).

15. A survey of international law teaching and published materials in the United States 10 years ago impliedly revealed a lack of attention to intellectual property rights. See James A.R. Nafziger, *Teaching International Law in the United States*, 24 ARCHIV DES VÖLKERRECHTS 215, 216–19 (1986).

Not long ago, international protection of intellectual property rights relied heavily on efforts to apply national laws extraterritorially.<sup>16</sup> To be sure, these agreements have significantly influenced domestic law and have introduced public international law into the transnational regulation of intellectual property law. Nevertheless, it would seem that the regulatory regime has remained essentially private and unilateralist. Particularly in the area of resolving disputes over the use of intellectual property rights, the role of multilateral agreements has generally been subordinate to overlapping, essentially domestic, regimes of regulatory law.<sup>17</sup>

It is not surprising, therefore, that issues of private international law—jurisdiction, choice of law, and enforcement of judgments—have abounded even where international agreements spell out pertinent rules.<sup>18</sup> Take for example choice of law. The Huston Film Colorization Controversy<sup>19</sup> is a recent case in point. There, the heirs of film director John Huston and one of his collaborators sought to enjoin French television channel 5 and its licensor, Turner Entertainment, from broadcasting a colorized version of the black-and-white film, *The Asphalt Jungle*, which Huston had directed.<sup>20</sup> French copyright law would have allowed the plaintiffs to assert their standing as successors in interest of Huston and his collaborator.<sup>21</sup> That is, the plaintiffs would have a moral right to preserve the film's artistic (that is, original black-and-white) integrity as an incident of authorship. In contrast, under the "works made for hire" doctrine of U.S. copyright law,<sup>22</sup> neither a director nor his collaborator would qualify as an author entitled to recovery.<sup>23</sup> Hence, under U.S. law, neither Huston's successors in interest nor his collaborator would have had a valid claim

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16. See Simon, *supra* note 6, at 269–73 (discussing shortcomings of the previous framework of international intellectual property law and the improvements that resulted from implementation of GATT and NAFTA).

17. See Faryan Andrew Afifi, Comment, *Unifying International Patent Protection*, 15 LOY. L.A. INT'L & COMP. L.J. 453, 454 (1993) (discussing the inefficiency of the international patent law regime that comprises multilateral agreements such as the Paris Convention, which is hampered by national legislation).

18. See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in Paris on July 24, 1971, S. TREATY DOC. NO. 27, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The Berne Convention provides that, with respect to copyrights, "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." *Id.* art. 5(2). The United States joined the Berne Convention on March 1, 1989. See The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

19. Cass. 1e civ., May 28, 1991, J.C.P. 1991, II, 21731, note A. Francon (Fr.), translated in Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135, 159 (1991). For a discussion of international conflict of laws regarding authorship status, as they related to this case, see *id.* at 138.

20. See *id.* at 135.

21. See *id.*

22. See 17 U.S.C. §§ 101, 201 (1994). The producer, not the director, would be deemed to be the author of a work. See *id.* § 201(b).

23. See Ginsburg & Sirinelli, *supra* note 19, at 136.

based on a moral right of authorship. After considerable controversy, France's highest tribunal, the *Cour de Cassation*, reversed the Paris Court of Appeals and applied French law, allowing the plaintiffs to challenge the colorization of the film.<sup>24</sup> The *Cour de Cassation* thus applied French law extraterritorially to protect creative activity at a foreign site where a film was created, and then remanded the case to the Versailles Court of Appeals on the issue of moral rights.<sup>25</sup>

The Court's rationale, though terse, was essentially that French rules to protect moral rights are "laws of imperative application."<sup>26</sup> What is puzzling in the Court's choice-of-law analysis, however, is that it did not choose to rely on either the Berne Convention<sup>27</sup> or an "*ordre public*" exception that would have evicted the normally competent U.S. law.<sup>28</sup> Either of these approaches would have resulted in the Court's choosing French rather than U.S. law. Instead, the Court premised its decision on two French copyright laws that it construed as imperative obligations.<sup>29</sup> Under the French concept of a *loi de police*—that is, rules of immediate application<sup>30</sup>—the application of the laws was in effect deemed to be "necessary for the nation's political, social, and economic organization."<sup>31</sup> Of the two laws upon which the Court relied, it appears that one, a 1964 French law on reciprocity in international copyright cases, was inapposite, and the other, a 1957 copyright law,<sup>32</sup> was applicable on the issue of authorship but indeterminate on the issue of extraterritoriality.<sup>33</sup>

Had the Court relied on either the Berne Convention or an *ordre public* exception to the normal choice of U.S. law, its decision would have

24. *See id.* at 137.

25. *See id.* In French practice, the *Cour de Cassation* remands a case to an appellate court other than, but at the same level as, the original court. *See id.* at 137 n.15 (explaining the general appellate procedure of French courts).

26. Ginsburg & Sirinelli, *supra* note 19, at 140–41 (quoting the court).

27. Under the Berne Convention, the law of the place where protection is sought would have applied. *See* Berne Convention, *supra* note 18, art. 14<sup>bis</sup>(2); *see also* Ginsburg & Sirinelli, *supra* note 19, at 136 n.8 (explaining the court's reasoning in declining to apply the pertinent provisions of the Berne Convention).

28. *See* Ginsburg & Sirinelli, *supra* note 19, at 139.

When the forum's "ordre public" is gravely affronted, the forum may refuse to apply the foreign law and will substitute its own substantive rule. . . . The "ordre public" or public policy escape device . . . enable[s] courts to decline to apply a foreign law "injurious or of bad example or against public policy or against morality."

*Id.*

29. *See id.* at 140.

30. *See* Thomas G. Guedj, *The Theory of the Lois de Police, A Functional Trend in Continental Private International Law*, 39 AM. J. COMP. L. 661, 662 (1991).

31. Ginsburg & Sirinelli, *supra* note 19, at 139 (quoting PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ ¶ 122 (3d ed. 1987)).

32. *See id.* at 140.

33. *Cf. id.* at 140 (discussing the Court's reasoning in interpreting the two laws to mean that no matter where a work is first disclosed, the violation of the integrity of a literary or artistic work in France is prohibited).

been limited to the case itself and thus to issues of authorship in cinematography. Apparently, therefore, the Court relied on the two copyright laws as *lois de police* in order to extend its decision beyond the context of cinematographic works in which the case arose. As a result, French courts in subsequent cases, despite the lack of *stare decisis* in the civil law, may feel more comfortable in simply ignoring the authorship law of a foreign country of origin, or for that matter, the law of the place of wrong (*lex loci delicti*) or of the domicile (*lex domicilii*) of allegedly injured parties.<sup>34</sup> Unfortunately, however, the Court's decision may also engender uncertainty about the scope of the French definition of authorship in transnational cases. *Huston* may thus have reached the right result, but on a questionable rationale. It therefore serves as an example of the perils to the international economic system of relying on private international law analysis rather than relying on international agreements to resolve issues.

Within the Western Hemisphere, the transnational protection of intellectual property rights has also been unstable because of its private law and unilateralist premises.<sup>35</sup> In the United States, constitutional encouragement of intellectual property rights has been interpreted to root them firmly in the reserved domain of domestic law.<sup>36</sup> Real international cooperation, other than among registration agencies, has been limited. The famous *Bulova Watch*<sup>37</sup> and *Vanity Fair*<sup>38</sup> cases, in particular, did not simply resolve issues of trademark infringement involving products which had found their way into the United States from Mexico and Canada, respectively.<sup>39</sup> In fact, they became cornerstones of reliance by the United States

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34. Territorialist rules of this sort are still controlling in many civil law jurisdictions and a minority of United States jurisdictions. See JAMES A.R. NAFZIGER, CONFLICT OF LAWS: A NORTHWEST PERSPECTIVE 15, 80 (1985).

35. See, e.g., Afifi, *supra* note 17, at 453-54 (explaining that the national legislation of individual nations has continually complicated the attempts to unify and harmonize intellectual property laws under multilateral agreements such as the Paris Convention).

36. See *Cali v. Japan Airlines, Inc.*, 380 F. Supp. 1120, 1125 (E.D.N.Y. 1974). The court explained:

The power to regulate commerce and the treaty making power are separate and distinct powers of the general government and not connected with the power domestic in its character to promote the progress of science by securing to inventors for a limited time the exclusive right to their discoveries. The patent laws are not intended to have extra-territorial operation.

*Id.* (citation omitted).

37. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952) (successfully alleging infringement in Mexico).

38. *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956) (unsuccessfully alleging infringement with respect to sales in Canada but successfully seeking an appeal for a hearing on less significant claims related to sales in the United States).

39. *Steele v. Bulova Watch* involved a U.S. citizen assembling counterfeit watches in Mexico, some of which found their way back into the United States. See *Steele*, 344 U.S. at 28. The U.S. Supreme Court held that because *Steele* was a U.S. citizen, because the effects of his actions were felt in the United States, and because there would be no interference with the sovereign actions of Mexico, extraterritorial action was appropriate. See *Steele*, 344 U.S. at 289.

as judicial extensions of the Lanham Act<sup>40</sup> to reach conduct occurring abroad with effects in the United States.<sup>41</sup> The fiftieth anniversary of the Lanham Act is a particularly felicitous occasion on which to observe its limitations and the need to set a new course for the next fifty years. Reliance on extraterritorial extensions of other intellectual property legislation has also been precarious.<sup>42</sup>

Canada, on the other hand, has generally not pursued extraterritorial enforcement of its intellectual property laws.<sup>43</sup> Further, its blocking legislation, which bars enforcement of extraterritorial measures taken by foreign authorities (usually the United States) has been significant.<sup>44</sup> Although the legislation may be fully justified, it is yet another example of the unilateralism and dearth of public international law that until recently have characterized the protection of intellectual property rights in the Western Hemisphere.<sup>45</sup>

The Mexican regime, until 1991, likewise discouraged international cooperation.<sup>46</sup> Intellectual property laws "were substantively restrictive and

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*Vanity Fair Mills, Inc. v. T. Eaton Co.*, on the other hand, involved a foreign corporation whose activities, for the most part, did not reach the United States. A valid Canadian trademark was also at issue in the case, so any activity by a U.S. court would infringe Canadian sovereignty. Because of these factors, the Second Circuit refused to act against the Canadian defendant. See *Vanity Fair*, 234 F.2d at 637, 639, 647.

40. 15 U.S.C. §§ 1051–1113 (1994) (originally enacted as The Trademark (Lanham) Act of 1946, ch. 540, 60 Stat. 427).

41. Both *Steele* and *Vanity Fair* have been cited numerous times in the years since they were decided, typically as parties attempt to extraterritorially extend the reach of other U.S. laws. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 252 (1991) (involving an EEOC attempt to extend Title VII of the Civil Rights Act of 1964 in the same manner *Steele* extended the Lanham Act); see also Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1227–28 (1992). It should be noted that *Steele* is usually confined to the rather limited circumstances found in that case. See *Totalplan Corp. of America v. Colborne*, 14 F.3d 824, 830 (2d Cir. 1994).

42. The extraterritoriality of copyright legislation raises difficult issues of private international law. See, e.g., Michael T. Crowley, *Raise the Yellow Submarine! Subafilms and Extraterritorial Application of the Copyright Act*, 48 FED. COMM. L.J. 133, 145–54 (1995) (discussing the issues raised by extraterritorial application of the law).

43. See R.J. Roberts, *Technology Transfer Agreements and North American Competition Law*, 9 INTELL. PROP. J. 247, 270 (1995).

44. See *id.* at 258. The blocking legislation empowers Canada's Competition Tribunal to prevent implementation in Canadian courts of judgments, decrees, or other processes of foreign governmental bodies if the action would affect Canadian citizens or Canadian commerce. See *Competition Tribunal Act*, R.S.C., 2d Supp., ch. 19, § 82 (1985) (Can.). The Act also directs the Tribunal to issue orders preventing a Canadian entity from acting under direction of an outside body. See *id.* § 83; see also *Foreign Extraterritorial Measures Act*, R.S.C., ch. F-29 (1985) (Can.).

45. See John R. Thomas, *Litigation Beyond the Technological Frontier: Comparative Approaches to Multinational Patent Enforcement*, 27 LAW & POL'Y INT'L BUS. 277, 288–305 (1996) (discussing the development of international patent rights and describing recent cases in the Dutch courts wherein patent rights obtained in several different countries were adjudicated in a single forum).

46. See Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391, 415 (1993)

procedurally inadequate.”<sup>47</sup> Under pressure from the United States, Mexico enacted a far more congenial *Ley de Fomento y Proteccion de la Propiedad Industrial*.<sup>48</sup> This law rescinded both a 1976 statute on patents and trademarks<sup>49</sup> and, perhaps most significantly, the restrictive 1981 Transfer of Technology Law.<sup>50</sup> To the dismay of foreign investors, the 1976 statute and its subsequent 1983 amendment had retained discretionary concepts regarding suspension and compulsory trademark licensing.<sup>51</sup> Mexico also amended its copyright law in 1991 to encourage investment with greater protection of foreign copyrights.<sup>52</sup> Finally, with the implementation of the NAFTA, Mexico, the United States, and Canada have agreed to implement and enforce basic intellectual property laws similar to those found in the other industrialized nations.<sup>53</sup> Perhaps most notable of these minimum requirements is the establishment of minimum enforcement procedures,<sup>54</sup> which were enacted to remedy the sorry state of the previous Mexican enforcement regime, as perceived by the United States.<sup>55</sup>

Against this background, it is not surprising that texts on public international law are typically bereft of any substantial discussion about intellectual property law.<sup>56</sup> In the absence of a comprehensive regime of treaty law or any general principle requiring a state to recognize administrative acts of other states, there simply has been too little international law on point. This lacuna, wrote one publicist,

is clearly illustrated by the prevailing “nationalistic” system of patents, under which, subject to exceptions, patents are granted

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[hereinafter Zamora, *Americanization*] (describing the limitations on investment and licensing as a result of the Mexican system and noting the woeful state of Mexican enforcement).

47. *Id.*

48. “Law for the Promotion and Protection of Industrial Property,” D.O., 24 de junio de 1992, at 4, as amended, D.O., 2 de agosto de 1994 (Mex.). See also Alejandro López-Velarde, *Trademarks in Mexico: The Effects of the North American Free Trade Agreement*, 17 HOUS. J. INT’L L. 49, 53–69 (1994) (tracking the evolution of Mexican trademark law since 1976).

49. “Ley de Invenciones y Marcas” [Law of Inventions and Trademarks], D.O., 10 de febrero de 1976, at 7 (Mex.).

50. “Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas” [Law on the Control and Registration of Transfer of Technology and the Use and Exploitation of Patents and Trademarks], D.O., 11 de enero de 1982 (Mex.) (enacted Dec. 29, 1981).

51. See López-Velarde, *supra* note 48, at 60–61.

52. D.O., 17 de julio de 1991, at 40, amending “Ley Federal de Derechos de Autor” [Federal Law of the Rights of an Author]; see also Zamora, *Americanization*, *supra* note 46, at 416 (noting that the positive effects of the comprehensive reforms).

53. See Thomas, *supra* note 45, at 295; see also Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT’L & COMP. L. 401, 409, 411–12 (1995) [hereinafter Zamora, *NAFTA*].

54. See Zamora, *NAFTA*, *supra* note 53, at 412.

55. See Zamora, *Americanization*, *supra* note 46, at 415 n.86 (noting that in 1988 the U.S. International Trade Commission ranked Mexico as the fourth-worst country in the world for overall intellectual property protection).

56. See Nafziger, *supra* note 15, at 219–31.

solely on a domestic national basis, without any general obligation to recognize a foreign grant. A fortiori, if civil liability is excluded under the laws of a country, no action will lie in the courts of another state to enforce such liability.<sup>57</sup>

Times are changing, however. *Subafilms, Ltd. v. MGM-Pathe Communications*,<sup>58</sup> a 1994 copyright case involving the *Yellow Submarine*, an animated motion picture co-produced by The Beatles, reflects emerging judicial restraint in reviewing claims based on extraterritorial extensions of U.S. legislation on intellectual property.<sup>59</sup> In *Subafilms*, the plaintiffs claimed that foreign videocassette distribution of the *Yellow Submarine* infringed their copyright.<sup>60</sup> The Ninth Circuit Court of Appeals held, however, that the plaintiffs had failed to overcome a general presumption against the extraterritorial application of U.S. laws—in this case, the Copyright Act.<sup>61</sup>

More important than developments in the common law, today's regime includes a stronger World Intellectual Property Organization (WIPO);<sup>62</sup> the recent establishment of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS);<sup>63</sup> the WTO, with its mechanism for resolving disputes; and such regional institutions as the EU and the NAFTA. A regime based on general principles of collaboration is emerging.<sup>64</sup> Gone are endless academic debates about how many of the

57. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 106 (9th ed. 1984).

58. 24 F.3d 1088 (9th Cir. 1994).

59. *See id.* at 1089.

60. *See id.*

61. 17 U.S.C. §§ 101–1101 (1994). Of particular significance was the court's observation:

[B]ecause an extension of the extraterritorial reach of the Copyright Act by the courts would in all likelihood disrupt the international regime for protecting intellectual property that Congress so recently described as essential to furthering the goal of protecting the works of American authors abroad . . . we conclude that the presumption [against extraterritoriality] must be applied.

*Subafilms*, 24 F.3d at 1098 (citation omitted) (applying the presumption against extraterritoriality as espoused in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1990)). For an argument that the Copyright Act should therefore be amended, see Crowley, *supra* note 42, at 154–61.

62. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3.

63. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. For a summary of the TRIPS Agreement, see ALAN C. SWAN & JOHN F. MURPHY, SUPPLEMENT TO THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS (1994).

64. With respect to trademark protection, one writer has concluded:

[G]eneral principles seem to be emerging around the world with respect to the development of the criteria and parameters of well-known marks, assessing the relevance of the element of bad faith and the issues surrounding damages. Such common principles can probably form the basis of a harmonized approach and a

three jurisdictional elements identified in *Bulova Watch*—nationality, effect on U.S. interests, and non-conflict with foreign law—must be present to apply the Lanham Act extraterritorially.<sup>65</sup> In developing a new agreement, the tension between technology transferor and transferee states was acknowledged and confronted as the “developed” nations attempted to reach agreement with the “undeveloped” nations regarding the scope of technology access.<sup>66</sup> We now have far more effective (though still incomplete) global and regional systems for protecting intellectual property and resolving related disputes.

In this new era, the global focus is on a WTO instrument, the TRIPS. Its extension of copyright law to include computer software,<sup>67</sup> its broad premise on the standards of national treatment<sup>68</sup> and most-favored nation treatment,<sup>69</sup> along with new requirements for trademark<sup>70</sup> and patent protection<sup>71</sup> are among a number of bold steps forward.

In sum, multilateral collaboration is replacing unilateral measures to enforce an expanding regime of intellectual property rights. In the New World we have engaged in rethinking and replacing national sovereignty in the interest of human creativity and economic development.

### III. THE NAFTA REGIME

One of the six objectives of the NAFTA is to “provide adequate and effective protection and enforcement of intellectual property rights in each party’s territory.”<sup>72</sup> Chapter 17 qualifies this objective by requiring each party to ensure that measures to enforce these rights “do not themselves become barriers to legitimate trade.”<sup>73</sup> The minimum standard of adequacy and effectiveness is defined in terms of four international agreements,<sup>74</sup>

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nascent *ius gentium* which can be incorporated in a multi-lateral treaty. This in turn, [sic] will serve to promote uniformity and certainty which is so profoundly required by the needs of the modern international market place.

Frederick W. Mostert, *Well-Known and Famous Marks: Is Harmony Possible in the Global Village?*, 86 TRADEMARK REP. 103, 141 (1996) (footnote omitted).

65. See, e.g., *Totalplan Corp. of America v. Colborne*, 14 F.3d 824, 830 (2d Cir. 1994); Neil A. Smith, *Obtaining Trademark and Copyright Enforcement in the United States for Infringement Abroad*, J. PROPRIETARY RTS., Dec. 1994, at 8.

66. See Doris Estelle Long, *The Protection of Information Technology in a Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMPUTER & INFO. L. 129, 155 (1996) (arguing that many of the differences in attitudes regarding the protection of intellectual property can be traced to basic cultural factors).

67. See TRIPS Agreement, *supra*, note 63, art. 10, at 87.

68. See *id.* art. 3, at 85–86.

69. See *id.* art. 4, at 86.

70. See *id.* arts. 15–21, at 89–90.

71. See *id.* arts. 27–34, at 93–97.

72. NAFTA, *supra* note 3, art. 102(1)(d), at 297.

73. *Id.* art. 1701, at 670. Parties may impose stricter measures of international regulation “provided that such protection is not inconsistent with this Agreement.” *Id.* art. 1702, at 671.

74. The four conventions are:

more extensive protection under domestic law, national treatment, and a myriad of detailed rules set forth in Chapter 17 itself.<sup>75</sup> These rules, to be adopted by each party, have been described as “the most extensive”<sup>76</sup> in the NAFTA.

Under Chapter 17, protected property extends beyond other treaty law to embrace a longer, more comprehensive list of creative works.<sup>77</sup> Categories of protected property include copyrights, sound recordings, encrypted program-carrying satellite signals, trademarks, patents, layout designs of semiconductor integrated circuits, industrial designs, rights in geographical indications, and trade secrets.<sup>78</sup> The NAFTA is the first international agreement to provide a working mechanism for protecting trade secrets—a milestone in the development of international economic cooperation.

The core definitions of protected rights are consistent with the general practice. Under Article 1705(1), copyright protection is generally coextensive with Article 2 of the Berne Convention,<sup>79</sup> but literary works are newly defined to include all types of computer programs.<sup>80</sup> Article 1705(2)(a) enables one NAFTA state to prohibit the importation from another NAFTA state of copies of a product “made without the right holder’s authorization.”<sup>81</sup> Finally, a copyright owner retains the right to “the first public distribution of the original and each copy of the work by sale, rental or

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- (a) the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms*, 1971 (Geneva Convention);
  - (b) the *Berne Convention for the Protection of Literary and Artistic Works*, 1971 (Berne Convention);
  - (c) the *Paris Convention for the Protection of Industrial Property*, 1967 (Paris Convention); and
  - (d) the *International Convention for the Protection of New Varieties of Plants*, 1978 (UPOV Convention), or the *International Convention for the Protection of New Varieties of Plants*, 1991 (UPOV Convention).

*Id.* art. 1701(2), at 670–71.

75. *See id.* ch. 17, at 670–81.

76. *See Zamora, NAFTA, supra* note 53, at 409.

77. For analytical summaries of Chapter 17, see RALPH H. FOLSOM & W. DAVIS FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS 200 (1996); THE LAW FIRM OF PAUL, HASTINGS, JANOFSKY & WALKER, NORTH AMERICAN FREE TRADE AGREEMENT: SUMMARY AND ANALYSIS 83 (1993) [hereinafter NAFTA SUMMARY]; Charles S. Levy & Stuart M. Weiser, *The NAFTA: A Watershed for Protection of Intellectual Property*, 27 INT’L LAW. 671, 672–75 (1993); Karen Kontje Waller, Comment, *NAFTA: The Latest Gun in the Fight to Protect International Intellectual Property Rights*, 13 DICK. J. INT’L L. 347, 375–79 (1995); *see also* George Y. Gonzalez, Note, *An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement*, 34 HARV. INT’L L.J. 305, 321–29 (1993) (focusing on parallel imports of gray market goods, a topic not specifically covered by NAFTA).

78. *See NAFTA, supra* note 3, arts. 1705–1713, 1721, at 671–76, 680.

79. *See Berne Convention, supra* note 18, art. 2 (listing protected works of authorship).

80. *See NAFTA, supra* note 3, art. 1705(1), at 671.

81. *Id.* art. 1705(2)(a).

otherwise.”<sup>82</sup> The question then arises whether a NAFTA state can *prohibit* the importation of gray market goods.<sup>83</sup> The NAFTA does not regulate parallel goods.<sup>84</sup> Thus, it is uncertain whether one NAFTA state, acting on behalf of a copyright holder of that state’s nationality, can prohibit importation of a product that was resold in the territory of another NAFTA state.<sup>85</sup> In the spirit of free trade and in the absence of any express authorization, it would seem that the NAFTA should deny national regulation of parallel imports.<sup>86</sup>

Article 1708(1) extends trademark protection to all distinguishing signs, including service and collective marks and, optionally, certification marks.<sup>87</sup> Article 1709(1) requires patent protection for all inventions that are new, result from an inventive (nonobvious) step, and are capable of (useful) industrial application.<sup>88</sup>

Enforcement of rights—a “chronic shortcoming”<sup>89</sup> in Mexico, at least—should gradually improve, despite problems in the administrative and judicial machinery of Mexico. To remedy these problems, the NAFTA

82. *Id.* art. 1705(2)(b).

83. “A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 285, 294 (1988) (entry permitted for gray market goods when foreign and U.S. trademark rights are under common ownership or control).

84. See Neil Jetter, *NAFTA: The Best Friend of an Intellectual Property Right Holder Can Become Better*, 9 FLA. J. INT’L L. 331, 337 (1994).

85. See Miller, *supra* note 7, at 506, 510.

86. See, e.g., NAFTA, *supra* note 3, art. 1705(3), at 671–72.

Each Party shall provide that for copyright and related rights:

- (a) any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee; and
- (b) any person acquiring or holding such economic rights by virtue of a contract, including contracts of employment underlying the creation of works and sound recordings, shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights.

*Id.* But see Levy & Weiser, *supra* note 77, at 686 (discussing the fact that the NAFTA does not include an explicit prohibition of parallel imports and asserting that such imports should be prohibited).

87. See NAFTA, *supra* note 3, art. 1708(1), at 672.

88. See *id.* art. 1709(1), at 673.

89. Zamora, *Americanization*, *supra* note 46, at 416. Doubts about the effectiveness of Mexican law stem from a perception of “(1) widespread infringement and counterfeiting; (2) a judicial system unable to act quickly in cases of trademark infringement; (3) a lack of injunctive relief; (4) inadequate border controls to prevent infringing goods from entering the country; and (5) restrictions on licensing.” Gonzalez, *supra* note 77, at 309 (citation omitted). As the author is quick to add, however, “[t]hese specific doubts may prove groundless if, as the director of the Mexican Intellectual Property Agency claims, the new Industrial Property Law puts the three countries ‘on a flat platform’ and credibly provides a ‘unified standard of protection.’” *Id.* (quoting *ABA Meeting Looks at NAFTA and Intellectual Property Rights*, INT’L TRADE REP., Apr. 22, 1992, at 724, 724).

sets forth several voluntary and mandatory measures in admirable detail.<sup>90</sup> Parties may take enforcement measures at the border or other port of entry,<sup>91</sup> and must provide administrative and judicial enforcement.<sup>92</sup>

Articles 1714–1717 establish minimum requirements of procedure and remedies, including provisional measures and criminal sanctions.<sup>93</sup> Provisional measures permit a NAFTA state to deny importation of allegedly infringing goods after posting security and on proof of irreparable harm in the absence of such measures.<sup>94</sup> Criminal sanctions include seizure, forfeiture, and destruction of contraband goods and any accessory objects used in committing an infringement.<sup>95</sup> Criminal penalties against infringing defendants include fines and imprisonment.<sup>96</sup>

A list of specific procedures and remedies, to be made available to nationals of NAFTA member countries and non-nationals alike, includes the following rights: written notice of claims, representation by independent legal counsel, freedom from the imposition of overly burdensome requirements of mandatory personal appearances, production of evidence, and a means to identify and protect confidential information.<sup>97</sup> In sum, “these provisions top the NAFTA access hierarchy by providing private parties with *the* strongest mechanisms to achieve transnational justice.”<sup>98</sup>

Article 1719 requires mutual cooperation among NAFTA states, an exchange of information among them concerning trade in infringing goods, and a provision for the mutual extension of technical assistance, including the training of personnel.<sup>99</sup> These cooperative provisions will help ensure that all nationals within the NAFTA region enjoy full protection of their intellectual property rights in the agencies and courts of other NAFTA parties, in accordance with national laws of those Parties and minimum international standards.<sup>100</sup>

There are several exceptions to this grand design of multilateralism, particularly in the definition of national treatment. Moral rights, otherwise available under the Berne Convention,<sup>101</sup> are excluded.<sup>102</sup> The Agreement turns a blind eye to a few formalities of enforcement that constitute trade barriers in the name of copyright protection. With respect to sound re-

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90. See Zamora, *Americanization*, *supra* note 46, at 416.

91. See NAFTA, *supra* note 3, art. 1718, at 678.

92. See *id.* art. 1714, at 676.

93. See *id.* arts. 1714–1717, at 676–78.

94. See *id.* art. 1716, at 677.

95. See *id.* art. 1717(2), at 678.

96. See *id.* art. 1717(1).

97. See *id.* art. 1715(1), at 677.

98. Robert F. Housman, *Access to Transnational Justice Under the NAFTA: Different Interests, Different Access*, 88 AM. SOC'Y INT'L L. PROC. 531, 532 (1994) (emphasis added).

99. See NAFTA, *supra* note 3, art. 1719, at 679.

100. See *id.* art. 1701, at 670.

101. See Berne Convention, *supra* note 18, art. 6<sup>bis</sup>.

102. See NAFTA SUMMARY, *supra* note 77, at 88.

cordings, Article 1703 allows a party to require reciprocity in extending secondary-use rights to another party's performers.<sup>103</sup> This requirement of reciprocity opens up the possibility of nationalistic interpretations and continuing barriers to a free flow of intellectual property. On the other hand, reciprocity may itself be seen as a form of international cooperation and a means of harmonizing domestic laws. Article 1703 also permits limited derogation from the national treatment requirement to accommodate special judicial and administrative procedures for enforcement of intellectual property rights.<sup>104</sup> Furthermore, WIPO-based procedures trump national treatment obligations under Article 1703.<sup>105</sup> Finally, Articles 2106 and 2107 of the NAFTA, in Chapter 21's general list of exceptions, enable Canada to continue the controversial practice of protecting its own "cultural industries" from outside—that is, primarily United States—domination.<sup>106</sup> United States-Mexican trade, however, is not subject to the cultural exclusion.<sup>107</sup>

Chapter 18 of the NAFTA is a rule of general application that requires publication, notification, and administration of domestic law.<sup>108</sup> Accordingly, NAFTA parties must ensure the publication of all pertinent laws, regulations, procedures, and administrative rulings.<sup>109</sup> A party must also notify any other party of all proposed or actual measures that might materially affect the operation of the agreement or otherwise substantially affect the other party's interests under the NAFTA.<sup>110</sup> Article 1804 provides minimum standards for administrative proceedings covered by the Chapter.<sup>111</sup> Parties must therefore establish three administrative safeguards: (1) reasonable notice when a proceeding is initiated, including a description of its nature, a statement of the legal authority under which it is initiated, and a general statement of the issues; (2) reasonable opportunity to be heard "when time, the nature of the proceeding and the public interest permit;" and (3) conformity with domestic law.<sup>112</sup> Chapter 18 also provides requirements and standards for review and appeal of administrative actions.<sup>113</sup>

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103. See NAFTA, *supra* note 3, art. 1703(1), at 671. "[S]econdary uses of sound recordings means the use directly for broadcasting or for any other public communication of a sound recording." *Id.* art. 1721(2), at 680.

104. See *id.* art. 1703(3), at 671.

105. See *id.* art. 1703(4).

106. See *id.* arts. 2106–2107 & annex 2106, at 701–02. See generally Stacie I. Strong, Note, *Banning the Cultural Exclusion: Free Trade and Copyrighted Goods*, 4 DUKE J. COMP. & INT'L L. 93, 110–11 (1993).

107. See Strong, *supra* note 106, at 111.

108. See NAFTA, *supra* note 3, arts. 1801–1805, at 681–82.

109. See *id.* art. 1802, at 681.

110. See *id.* art. 1803.

111. See *id.* art. 1804.

112. *Id.*

113. See *id.* art. 1805.

## IV. DISPUTE RESOLUTION UNDER THE NAFTA

Resolution of disputes within this framework depends in the first instance on private initiative.<sup>114</sup> Chapter 17 relies fundamentally on enforcement of the substantive and procedural laws of each party rather than on a central or uniform system of dispute resolution.<sup>115</sup> Nevertheless, this mechanism provides a cooperative framework within the mainstream of public international law.

If a national of one party is denied effective access to relief by the agencies or courts of another party in violation of the national treatment standard, that individual can pursue the inter-governmental dispute resolution procedures of Chapter 20.<sup>116</sup> There is, of course, no assurance that an individual will gain diplomatic protection in order to pursue Chapter 20 remedies. Moreover, the intergovernmental procedures of Chapter 20 are not only potentially unreliable but are also highly political. On the other hand, they are expeditious and encourage a substantial measure of state responsibility. A successful claim under Chapter 20 can result in the imposition of trade sanctions to offset proven damages stemming from NAFTA violations.

Chapter 20 proceedings involve substantial recourse to alternative dispute resolution (ADR).<sup>117</sup> The more collaborative techniques of ADR have several advantages in the almost inevitable technical proceedings.<sup>118</sup> ADR avoids complex issues of private international law such as jurisdiction and choice of law.<sup>119</sup> It also encourages expediency, confidentiality, greater assurance of technical expertise, an emphasis on problem-solving rather than vindication of rights, greater flexibility in fashioning solutions, and encouragement of mutually satisfactory settlements.<sup>120</sup>

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114. See, e.g., Dan A. Naranjo, *Alternative Dispute Resolution of International Private Commercial Disputes Under the NAFTA*, TEX. BAR J., Feb. 1996, at 116, 119 (discussing the NAFTA's provisions regarding ADR).

115. See NAFTA, *supra* note 3, arts. 1714–1716, at 676–78. Criminal procedures and penalties are “to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.” *Id.* art. 1717, at 678.

116. See *id.* art. 2005, at 694.

117. Article 2022(1) of the NAFTA provides that “[e]ach party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.” *Id.* art. 2022(1), at 698. Article 2006 provides for consultations between pertinent NAFTA states after a request in writing by one of them on “any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.” *Id.* art. 2006(1), at 694. Article 2007 provides for good offices, conciliation and mediation. See *id.* art. 2007, at 695. Articles 2008–2019 provide for arbitral “Panel Proceedings.” *Id.* arts. 2008–2019, at 695–98.

118. See Jennifer Mills, Note, *Alternative Dispute Resolution in International Intellectual Property Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 227, 230–31 (1996).

119. See *id.* at 230.

120. See *id.* at 231.

As applied to intellectual property rights, ADR under Chapter 20 reinforces a trend in U.S. law that was highlighted in 1983, when federal patent law abandoned its traditional insistence on vindicating the public interest in court and for the first time allowed arbitration of patent disputes.<sup>121</sup> Generally, the Inter-American Convention on International Commercial Arbitration<sup>122</sup> would provide the mechanism and rules of procedure to govern arbitration under Chapter 20.<sup>123</sup>

## V. CONCLUSION

The NAFTA's regime of intellectual property rights highlights a new cooperation among scholars, government officials, and practitioners within the Western Hemisphere.<sup>124</sup> The new regime is not only a crucial element in the larger system of NAFTA cooperation, but an excellent example of the capacity of regional authority to create an inclusive regime of international economic law. It has had the further effect of channeling tributaries of private law into the mainstream of public international law. Issues of private international law—jurisdiction, choice of law, and enforcement of judgments based on domestic law—will continue to be important. But intellectual property rights are now, far more fundamentally than had previously been the case, a significant element in the intergovernmental legal process.

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121. For example:

A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

35 U.S.C. § 294 (1994). This provision reversed a policy favoring governmental intervention in private patent disputes on behalf of the public interest. See Karl P. Kilb, Note, *Arbitration of Patent Disputes: An Important Option in the Age of Information Technology*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 604–09 (1993) (discussing legislative acts that have made arbitration an option in the resolution of patent disputes).

122. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 449, Pan-Am. T.S. 42.

123. See Naranjo, *supra* note 114, at 119.

124. A good example of this new cooperation was the inaugural U.S.-Mexico Conference at which this writer's remarks were first presented. The Constitution of the American Society of International Law sets forth that "[t]he object of this Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will cooperate with similar societies in this and other countries." Constitution of the American Society of International Law, 85 AM. SOC'Y INT'L L. PROC. 621, 621 (1991) (emphasis added). Until recently, the cooperative object of the Society was virtually dormant. Now, however, new partnerships with the *Instituto de Investigaciones Jurídicas* at UNAM and other centers of learning abroad offer promising new directions in international cooperation.

A fuller realization of this mainstreaming will require clarification of the relationship between the new regime under Chapter 17 of the NAFTA and the geographically broader regimes of WIPO and WTO (TRIPS).<sup>125</sup> This should not, however, present a major obstacle. As the only multilateral instruments on intellectual property rights that impose substantive legal standards for incorporation into domestic law, the NAFTA and TRIPS generally coincide with each other. One example of this harmony is their identical provision for twenty-year patent terms from the date of filing.<sup>126</sup> Moreover, the NAFTA makes clear that in the event of conflict between Chapter 17 and TRIPS, “[n]o Party shall have any obligation under this Article with respect to *procedures* provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights.”<sup>127</sup> Both the NAFTA and TRIPS enable their parties to provide more extensive protections under domestic law than the multilateral agreements themselves would require.<sup>128</sup>

Although some commentators have been skeptical about Chapter 17, writing it off, for example, as merely “a patchwork quilt of compromises,”<sup>129</sup> the general consensus is favorable.<sup>130</sup> One thing is certain: significant hurdles in implementing Chapter 17 lie ahead.<sup>131</sup> Only time will tell if the NAFTA’s enforcement measures will give real effect to the new regime of intellectual property rights, but the way, if not the will, is clear, and that way is now within the mainstream of public international law.

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125. The relationship between WIPO and WTO is gradually being clarified. *See, e.g.*, World Intellectual Property Organization—World Trade Organization: Agreement Between WIPO and WTO, 35 I.L.M. 754 (1996).

126. *See* TRIPS Agreement, *supra* note 63, art. 33, at 1210; NAFTA, *supra* note 3, art. 1709(12), at 674.

127. NAFTA, *supra* note 3, art. 1703(4), at 671 (emphasis added).

128. *See id.* art. 1702; TRIPS Agreement, *supra* note 63, art. 1(1), at 1198.

129. NAFTA SUMMARY, *supra* note 77, at 83.

130. *See, e.g.*, SWAN & MURPHY, *supra* note 63, at 8 (“[NAFTA’s] intellectual property provisions are among its most notable features.”); Levy & Weiser, *supra* note 77, at 672 (describing NAFTA as “a watershed in the history of protection of intellectual property rights . . . vastly increasing the level of protection afforded to holders of such rights”).

131. One author analogizes the implementation process as follows:

[T]he NAFTA reminds me of a barn raising. A barn raising is when you invite your friends over to help you assemble and raise the frame of a new barn, and then you throw a party to celebrate. Now there are two things to remember about a barn raising. One, if you let your friends drink before the frame is up you’re likely to end up with a crooked frame, and two, the really hard work—building the walls and the roof—starts the next day.

It seems to me that at the NAFTA barn raising some of the helpers were a bit intoxicated with the deal before the work was done. The NAFTA framework we are left with is a bit askew in places and it needs to be set right.

The hard work lies ahead.

Housman, *supra* note 98, at 535.