TRIPS-plus in Four Mega-Regional Agreements
a Plus for Developed Countries?

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List of Abbreviations

CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EPA	Economic Partnership Agreement
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIs	Geographical indications
IP	Intellectual property
IPRs	Intellectual property rights
ITAC	Industry Trade Advisory Committee on Intellectual property rights
MFN	Most-Favoured-Nation
NAFTA	The North American Free Trade Agreement
PTA	Patent Term Adjustment
PTR	Patent Term Restoration
TPP	Trans-Pacific Partnership agreement
TRIPS	Trade-Related Aspects of intellectual property rights
USMCA	US-Mexico-Canada agreement
WTO	World Trade Organization

Chapter 1: Introduction

1.1 Analytical problem

In the world of trade, one specific topic is the trade related aspects of intellectual property rights (IPRs). The extent of protection and enforcement of IPRs varied widely around the world and as intellectual property (IP) became more important in trade, these differences became a source of tension in international economic relations.[1] One of the achievements of the Uruguay Round is the World Trade Organization's (WTO) Agreement on ''Trade-Related Aspects of IPRs'' (TRIPS). This agreement introduced IP rules into the multilateral trading system for the first time by establishing minimum standards of protection and enforcement. It is an attempt to narrow the gaps in the way IPRs are protected and enforced around the world, and to bring them under common international rules.[2]

Since the multilateral negotiations at the TRIPS Council of the WTO stand still, there is a trend of concluding free trade agreements (FTAs).[3] Nowadays these FTAs do not only include traditional provisions reducing tariffs and other barriers to the trade in goods and services, but also include provisions on competition, sustainable development, public procurement and IP protection.[4] The IP provisions in such FTAs often go beyond the minimum standards of the TRIPS and demand the inclusion of the in practice so-called ''TRIPS-plus'' provisions.[5] Both supporters and proponents for any increases of IP protection use FTAs to pursue their interests.[6] Mainly countries such as the US, EU and Japan, who are exporters of IP, try to further increase IP protection and enforcement through FTAs as their technological lead is increasingly challenged by industries in emerging economic powers such as Brazil, China and India. A strong IP protection at home and abroad is often perceived as the only way to sustain a competitive advantage for their industries.[7] On top of that, one of the basic principles of the TRIPS is the Most-Favoured-Nation (MFN) Treatment. This principle entails that any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other WTO Members.[8] This principle is being used to increase IP standards globally through FTAs and thus without multilateral negotiations.[9] Remarkably, the TRIPS does not have a Most-Favoured-Nation

[1] WTO 2019: *Intellectual property: protection and enforcement.*
[2] WTO 2019: *Intellectual property: protection and enforcement.*
[3] Frankel 2008.
[4] Forrest & Hardy 2017.
[5] Fischer 2016, and Handler & Mercurio 2015, p. 325.
[6] Frankel 2008.
[7] Frankel 2008, Voon & Mitchell 2009, p. 187, and Grosse Ruse-Khan, *TL&D* 2009.
[8] See art. 4 TRIPS.
[9] Grosse Ruse-Khan & Kur 2008.

exception equivalent to the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Consequently, all the TRIPS-plus provisions fall into the ''sea'' of international IP norms.[10]

This raises the question whether the FTA trend has implications for the TRIPS as further increased levels of IP protection might have systemic consequences: flexibilities and policy space left open under the TRIPS are made increasingly meaningless because of TRIPS-plus obligations, leading to controversies over undue limitations of national sovereignty in areas such as public health and access to knowledge. Also, the sheer amount of TRIPS-plus agreements, paired with the absence of an applicable MFN exception, effectively globalises these increasing IP standards to become the relevant international norm.[11] Besides, the strength and importance of IP stems from the fact that it affects and regulates important aspects of human activities including but not limited to agriculture, health, environment, human rights, and transfer of technology. The impact of IP is not confined to trade and economics, but rather extends beyond to many other areas.[12]

This research provides an answer to the question raised by examining whether there is IP liberalization in four recent Mega-Regional agreements: the US-Mexico-Canada agreement (USMCA), the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, the Economic Partnership Agreement (EPA) between Japan and the EU, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. For clarity, these four agreements together will be called ''the Mega-Regional agreements'' or ''Mega-Regionals'' in the further process of this research. Specifically these Mega-Regionals are used as they are recent, contain IP provisions, cover different parts of the world, and mainly because these agreements are concluded between the most advanced trade areas containing a major share of world trade.[13] The US, EU and Japan are countries with huge GDP and are exporters of IP, which gives them an incentive to conclude TRIPS-plus agreements. Besides, the US was a Party of the Trans-Pacific Partnership agreement (TPP), which is the predecessor of the CPTPP. US influences are presumably still present.

[10] Grosse Ruse-Khan & Kur 2008.
[11] Grosse Ruse-Khan, *TL&D* 2009.
[12] El Said 2010.
[13] USMCA 27,3%, CETA 23,9%, EPA 27,7% and CPTPP 12,9% of global GDP.
Based on 2018 GDP, retrieved 13 November 2019 at World Bank.

1.2 Research question

The research question central to this thesis is as follows:

''To what extent is there an increase of IP liberalization in the aforementioned Mega-Regional agreements compared to the TRIPS, and if so, what implications does this have for the TRIPS?''

1.3 Research methodology

To answer the central question, a literature, and comparative research was used. On the basis of literature a short sketch is made about the TRIPS and FTAs. Literature is also used for the comparative part. It is used to support the findings and to elaborate on provisions. Some literature of the TPP is referred to as well, as the CPTPP is in principle the same agreement. The difference is that eleven provisions of the TPP are suspended under the CPTPP. With comparative research, the IP chapters of the Mega-Regionals were analysed and compared with the TRIPS and each other. First, part I and II of the TRIPS were read entirely, followed by the IP chapters and the general provision chapters of the Mega-Regionals. This was done by a line-by-line reading of the provisions. Secondary sources were used to ensure rigour in the assessment. For clarity, all Mega-Regionals are compared per IP-section in one chapter.

1.4 Limits of the research

For this research, the definition ''TRIPS-plus'' means: a provision requiring bilateral or multilateral trade agreement partners to impose higher standards of IP protection than those set in the TRIPS, or when the TRIPS leaves discretion to its Members.[14] Discretion occurs when the TRIPS awards its Members with an option, or when the TRIPS is silent. This being categorized as TRIPS-plus might sound odd as specifying certain terms or provisions does not provide a higher or lower IP protection than the TRIPS.[15] But what is does do is creating a scope. Without specifying, the scope of protection would be vague. Jurisprudence would be needed to clarify the scope of protection. By specifying certain terms or provisions Members provide legal certainty and more exclusivity to IP-holders. It ensures compliance with the TRIPS with the highest and utmost efficiency.[16] This is protection in a different form.

Moreover, in FTAs there is also the possibility of ''TRIPS-minus provisions''. The meaning thereof in this research is: a provision requiring bilateral or multilateral trade agreement partners to impose lower standards of IP protection than those set in the TRIPS. TRIPS-minus provisions are contrary to the TRIPS as the TRIPS provides minimum standards of protection.

[14] Voon & Mitchell 2009.
[15] El Said 2010, p. 94.
[16] El Said 2010, p. 94.

This research does not cover IP protections mentioned in the Mega-Regional agreements which are not covered by the TRIPS agreement. The research only focusses on part I and part II of the TRIPS.

1.5 Reading guide

The research starts with an introduction of the TRIPS and FTAs in chapter 2. In this chapter a few critiques are discussed. Chapter 3 covers the comparison between the IP chapters of the Mega-Regionals and the TRIPS. After an introduction of the four Mega-Regionals, the TRIPS-plus findings are discussed per IP-section. The topics reviewed are copyright and related rights, trademarks, geographical indications (GIs), industrial designs, patents, trade secrets and undisclosed test or other data, and the general provision of the Mega-Regionals. Finally, chapter 4 provides a summarizing answer to the research question.

Chapter 2: Introduction TRIPS and FTAs

This chapter provides a small introduction of the TRIPS and FTAs, and the critiques thereon. Due to space constraints, the introduction is limited. The mentioned issues and critiques are addressed briefly.

2.1 Introduction TRIPS

The TRIPS is an agreement on trade related aspects of IPRs between all WTO Members.[17] Ratification of the TRIPS is compulsory for WTO membership. Any country seeking to obtain access to the international markets opened by the WTO, must therefore comply with the TRIPS provisions.[18] TRIPS is an attempt to narrow the gaps in the way IPRs are protected and enforced around the world, and to bring them under common international rules.[19] Nowadays, this harmonization seems continued through TRIPS-plus in FTAs.[20]

As mentioned in chapter 1, the TRIPS sets minimum standards of IP protection and enforcement. Members may implement a more extensive protection in their national law, provided that the protection does not contravene the TRIPS.[21] The TRIPS covers minimum protection for: copyright and related rights; trademarks; GIs; industrial designs; patens; layout-designs of integrated circuits; and protection of undisclosed information and test data.[22] Not all areas of IP are covered, either because there was no consensus at the time, or because the areas in question had not yet emerged, or simply because the negotiators did not consider these as problematic.[23] In addition, the TRIPS also provides rules on administration and enforcement of IPRs, and provides for the application of the WTO dispute settlement mechanism to resolve disputes between Members.[24] The Council for TRIPS monitors the operation of the TRIPS and, in particular, Members' compliance with the TRIPS.[25]

The starting point of protection are the obligations of the main international agreements of the World IP Organization that already existed before the WTO was created: the Paris and the Berne Convention. Some IP areas are not covered by these agreements and in some cases the standards of IP protection described in these agreements were thought to be inadequate. The TRIPS therefore significantly add to previous existing international standards.[26] However, the TRIPS also explicitly states that nothing in part I-IV shall derogate from existing obligations that Members may have to

[17] Preamble TRIPS.
[18] Irogbe 2014, p. 53.
[19] WTO 2019: *Intellectual property: protection and enforcement.*
[20] Yu 2019.
[21] See art. 1 (1) TRIPS, and WTO 2019.
[22] WTO 2019: *Overview: the TRIPS Agreement.*
[23] WIPO 2020.
[24] WTO 2020: Module I, and Voon & Mitchell 2009.
[25] See art. 68 TRIPS, and Voon & Mitchell 2009.
[26] WTO 2019: *Intellectual property: protection and enforcement.*

each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on IP in Respect of Integrated Circuits.[27] In addition to the minimum standards, it is argued that the TRIPS also provides maximum standards, a so-called ''ceiling''.[28] For example, art. 1(1) TRIPS states: a more extensive protection than the TRIPS may not contravene the TRIPS provisions. This is not a mandatory boundary, but it does provide a doorway to limit IP protection within the TRIPS.[29] However, this research will not elaborate on the maximum standards of the TRIPS.

To this day, after 26 years, there is still disagreement on the TRIPS. People still praise the establishment of international minimum IPRs. But, it is also criticized for providing high ''one size fits all'' standards upon developing countries. The standards mainly benefit IP export countries and their IP industries. For developing countries these standards create a heavy economic burden and it hinders their access to information and essential medicines. The TRIPS also took away their policy space for designing an IP system tailored to their national needs and interests. This harmonization by the TRIPS is continued through FTAs.[30] It is argued that TRIPS is against the interests of developing countries, and that these countries only agreed to the TRIPS to achieve broader trade liberalization, as negotiations had a single undertaking approach.[31] Unsurprisingly, the strongest proponents of the TRIPS have been the US, EU and Japan, who are developed countries.[32] The protection of innovators' profits and technologies is fiercely promoted by the US and the EU in the form of IPRs, almost as fiercely as it is resisted by countries with smaller stocks of IP.[33]

Another critique of the TRIPS, is the access to public health and medicines. One obstacle is patent protection for pharmaceuticals. Members must make this protection available for pharmaceuticals. The patent owners thereof, have the exclusive right to prevent others from making, selling, or importing the relevant products.[34] This monopoly tends to increase the prices of patented medicines which creates difficulties, especially for developing countries seeking to manufacture or import them.[35] This is a considerable concern with FTAs, as the patent term for pharmaceuticals is often extended and data exclusivity is regularly granted. However, there are also flexibilities for patent protection, such as compulsory licensing which is often limited in FTAs.[36] During the Doha round in November 2001, there were trade talks over IP and public health as there was significant

[27] Art. 2(2) TRIPS.
[28] Grosse Ruse-Khan, *TL&D* 2009.
[29] Grosse Ruse-Khan, *TL&D* 2009.
[30] Yu 2019, p. 2-3.
[31] Voon & Mitchell 2009, p. 188.
[32] Voon & Mitchell 2009, p. 187.
[33] Ivus & Paczos 2019, p. 10.
[34] See art. 27 and 28 TRIPS, and Voon & Mitchell 2009, p. 192-193.
[35] Voon & Mitchell 2009, p. 192- 193.
[36] See art. 30 and 31 TRIPS, and Voon & Mitchell 2009, p. 192-193.

disagreement between developed and developing countries.[37] It resulted in the ''Declaration on the TRIPS and public health'', which recognises that the TRIPS does not and should not prevent Members from taking measures to protect public health.[38] The Doha declaration affirms that the TRIPS can and should be interpreted and implemented in a manner supportive of WTO Members' right to public health and, in particular, to promote access to medicines for all.[39] The declaration also shows Members' freedom to determine the grounds for granting compulsory licensing and the acknowledgement that public health crisis can represent a national emergency or other circumstances of extreme urgency. Least developed Members were granted an additional transition period until 1 January 2016 in relation to certain obligations regarding pharmaceutical patents. The declaration also lead to Members agreeing on a waiver of art. 31(f) TRIPS so that least developed Members and other Members lacking sufficient manufacturing capacity, may import pharmaceutical products created under compulsory licensing, subject to certain conditions.[40] It lifts barriers to access affordable pharmaceuticals that were imposed under TRIPS. The decision was taken by the WTO General Council on 30 August 2003. It was largely a developing country initiative and has been incorporated in the TRIPS through a Protocol.[41] It is the first official amendment of the TRIPS. It took 12 years before the amendment took effect, whereas the Members had set themselves to do this within 2 years.[42]

Another critique of the TRIPS is that new developments are unlikely to fall under its protection. Legal standards always lag behind technology and language. International treaties lag behind even further as it takes a considerable amount of time, effort, energy, and resources, to complete a trade agreement. The rate of developing such agreement can hardly keep pace with the rate of technological change.[43] The arrival of new technologies undoubtedly creates challenges to the TRIPS harmonization and efforts to set new international IP norms.[44]

2.3 FTAs

FTAs are broad agreements. They aim to promote global trade, not only by lowering tariffs, but also by addressing so-called non-tariff barriers, in order to boost trade in goods and services. These may be rules around workers' rights, competition policy, public procurement regulations or patent laws.[45]

[37] Yu 2019.
[38] Rimmer 2012, and Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, (Doha Declaration).
[39] Voon & Mitchell 2009, p. 193, and Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, (Doha Declaration).
[40] See art. 31bis TRIPS, and Voon & Mitchell 2009, p. 194.
[41] Daley 2008.
[42] WTO 2019: *Amendment of the TRIPS Agreement*, WTO 2005, and Voon & Mitchell 2009, p. 194.
[43] Yu 2019, p. 31.
[44] Yu 2019, p. 34.
[45] Bilaterals.org 2020.

These agreements allow for deals in which IP provisions are agreed in exchange for trade preferences and other advantages.[46] FTAs include IPRs because they facilitate trade and protect the potential profit of otherwise imitable innovations abroad.[47] A common feature in FTAs are TRIPS-plus provisions.[48] The standstill of the WTO negotiations has led countries to negotiate FTAs to obtain higher standards of IP protection than the TRIPS provides.[49] With the MFN Treatment, the TRIPS-plus protections increase not only IPRs between FTA partners, but also across all the WTO Members as there is no general exemption from the MFN Treatment under TRIPS for FTAs.[50] TRIPS-plus provisions under FTAs therefore ensure that IPRs grow stronger across the globe.[51] The supposed benefit of IP protection is providing creators an incentive to innovate. However, IP protection raises the price of protected products above market levels and limits the access to innovative products and technologies.[52] Every time an IP right gets enhanced, there are costs associated with it. The optimal IP protection would strike a balance between providing sufficient incentives to innovate and preventing prices from escalating leading to exclusivity of these innovations.[53] Countries that are strong producers of IPRs obviously have their best interest to get as much protection as possible.[54] As their technological lead is increasingly challenged by industries in emerging economic powers. A strong IP protection at home and abroad is often perceived as the only way to sustain a competitive advantage for their industries.[55] The corollary is for those countries like Canada that cannot compete and cannot produce to the same extent.[56] Countries who actively negotiate for higher IP protection in FTAs are the US, EU and Japan.[57] This is unsurprising as they are all exporters of IP. These three countries have major power to push other countries to adopt their own standards of IPRs.[58] The US in particular has always guarded the interests of its IP producers, and works to establish strong standards of IPRs and enforcement across the globe, often imposing them as a precondition for increased access to US markets. The North American Free Trade Agreement (NAFTA) was actually the first FTA to include a comprehensive IP chapter. It formed the backbone for what became the TRIPS.[59] The US is known to set the highest standards of IP

[46] Grosse Russe-Khan et al. 2013.
[47] Ivus & Paczos 2019, p. 9.
[48] Ivus & Paczos 2019, p. 9-10.
[49] Strowel 2016, and Ivus & Paczos 2019, p. 1 and 9.
[50] Voon & Mitchell 2009, p. 201-202.
[51] Ivus & Paczos 2019, p. 9-10.
[52] Ivus & Paczos 2019, p. 7.
[53] Ivus & Paczos 2019, p. 7.
[54] Geist 2019.
[55] Grosse Ruse-Khan, *TL&D* 2009, p. 60.
[56] Geist 2019.
[57] Bilaterals.org 2012, Ivus & Paczos 2019, p. 10, Yu 2019, p. 22, and Grosse Ruse-Khan, *TL&D* 2009, p. 60.
[58] Bilaterals.org 2020.
[59] Ivus & Paczos 2019, p. 1.

protection, except for the protection of GIs.[60] Besides, the US is not shy about making demands that are in their national interest. As known, the US had a lot of influence in the TPPs' IP chapter and would mostly benefit from the agreement.[61]

When countries succeed in increasing IP liberalization in FTAs, it has its consequences: the negotiated IP chapters are often not optimal for all Parties. This is because FTAs are complex and involve trade-offs for other benefits that countries hope to obtain.[62] Countries want to increase access to the markets of countries such as the US, EU and Japan, who have substantial markets. In exchange they might need to provide higher IP standards.[63] These countries start to adopt international principles or rules that serve the interests of other countries rather than, first and foremost, their own interests.[64] Thereby, continuously extending IPRs increases the potential for law and policy conflicts with other rules of international law that aim to protect public health, access to knowledge and human rights.[65] For example, parties often have to extent protection for branded drugs, hampering the availability of affordable generic medicines.[66] At the same time, such extension often counters, rather than facilitates, the core IP goal of promoting innovation and creativity.[67] Moreover, flexibilities and policy space left open under the TRIPS are made increasingly meaningless, leading to controversies over undue limitations of national sovereignty in areas such as public health and access to knowledge.[68] Further, the sheer amount of TRIPS-plus agreements, paired with the absence of an MFN exception, continues the process of international harmonization of IPRs.[69] When enough FTAs, containing TRIPS-plus provisions, are negotiated, some of these TRIPS-plus provisions become the relevant international norm. It may become the new minimum standard from which any future WTO round will proceed.[70] Especially in the absence of progress under TRIPS, IP laws will continue to advance outside the WTO. This is already evident in several FTAs, most often in the direction of strengthening IPRs. Many contest TRIPS is fitted for the WTO to begin with. Mainly because the TRIPS entails harmonizing laws (positive integration), rather than removing or prohibiting trade barriers (negative integration), and because it creates trade barriers by granting monopoly rights. Regardless of that, TRIPS should not be a one-sided document in the future.[71]

[60] Moerland 2017, p. 762.
[61] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth report, *The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians*, 2017.
[62] Lexchin & Gagnon 2014.
[63] Ivus & Paczos 2019, p. 1.
[64] Geist 2019.
[65] Grosse Russe-Khan et al. 2013.
[66] Bilaterals.org 2020.
[67] Grosse Russe-Khan et al. 2013.
[68] Grosse Ruse-Khan, *TL&D* 2009, p. 60 -61, and Voon & Mitchell 2009, p. 202.
[69] Grosse Ruse-Khan, *TL&D* 2009, P. 60 -61, and Voon & Mitchell 2009, p. 202.
[70] Grosse Ruse-Khan, *TL&D* 2009, P. 60 -61, and Handler & Mercurio 2015, p. 325.
[71] Voon & Mitchell 2009, p. 205.

Chapter 3: TRIPS-plus and the Mega-Regional agreements

This chapter displays the identified TRIPS-plus provisions and some TRIPS-minus provisions in the Mega-Regionals that are of interest, and compares them to the TRIPS and each other. The chapter is divided in IP-sections following the specific order of the TRIPS: copyrights and related rights, trademarks, GIs, industrial designs, patents, trade secrets and undisclosed test or other data, and lastly the general provisions of the agreements are covered. Per subsection, there is a table to provide an easy view of the differences.

3.1 Introduction Mega-Regionals

3.1.1 USMCA

The USMCA (in Canada the CUSMA and in Mexico the T-MEC) is an agreement between the US, Mexico and Canada, covering a global GDP of 27,3%.[72] It is also known as ''New NAFTA'' because it replaces the 24-year-old NAFTA. According to the US, the USMCA gives a modernized high-standard IP chapter that provides strong and effective protection and enforcement, critical to driving innovation and creating economic growth.[73] The US even claims that the USMCA sets the highest IP standards of any US trade agreement.[74] While there are elements which the US Industry Trade Advisory Committee on IPRs (ITAC) would prefer to have strengthened, clarified or removed, the FTA does improve IP provisions generally and does improve the IP environment for a broad range of US stakeholders.[75] Moreover, the USMCA incorporates standards already in force in other US trade agreements and builds upon these standards. As will be shown, the USMCA is quite similar to the CPTPP as the USMCA borrows standards from the TPP.[76] The USMCA also reinstated some TPP provisions that were suspended under the CPTPP.[77] The USMCA is widely seen as the precedent of future agreements as this is the first one negotiated by the Trump administration.[78] It is said to not be a health-enhancing template for future trade agreements that governments should emulate.[79] There are also concerns that the IP measures will limit the public health policy space of all three Parties. The agreement was signed on November 30 2018. Parties will now undertake their domestic process towards ratification and implementation of the USCMA.[80]

[72] Labonté et al. 2019, and based on 2018 GDP, retrieved 13 November 2019 at World Bank.
[73] US Trade Representative 2019: *Modernizing NAFTA into a 21st Century Trade Agreement.*
[74] US Trade Representative 2019: *Modernizing NAFTA into a 21st Century Trade Agreement.*
[75] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018.
[76] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 10, 13, 16 and 17.
[77] Labonté et al. 2019.
[78] Jorge May 2019, and Labonté et al. 2019, p.2.
[79] Labonté et al. 2019, p. 1.
[80] Labonté et al. 2019, p. 2.

3.1.2 CETA

Canada and the EU concluded a comprehensive economic trade agreement, CETA. It was signed on 30 October 2016 and entered provisionally into force on 21 September 2017, meaning most of the agreement now applies.[81] Within the agreement, Canada and the EU made specific commitments for copyrights and related rights, trademarks, GI's, patents and data exclusivity. The agreement establishes minimum standards of protection and enforcement of IP rights and represents a global GDP of 23,9%.[82] CETA will only affect IPRs in Canada, not the EU.[83] Canada offers a standard level of IPR protection when assessed at world-wide level but it is lower than that of the EU on several accounts.[84] The EU aimed at similar levels of IPR protection to ones existing within the EU.[85]

3.1.3 EPA

The EPA is an economic partnership agreement between the EU and Japan and was signed on 17 July 2018. It is the biggest trade agreement the EU has ever concluded with a third country.[86] It is also the largest trade zone in the world, covering 600 million people, and has a global GDP of 27,7%.[87] The IP chapter builds on the TRIPS provisions and is based on EU standards for protection and enforcement.[88] The agreement sets out obligations on copyright protection, trademarks, GI's, patents, data exclusivity and trade secrets.[89] The agreement entered into force on 1 February 2019.[90]

3.1.4 CPTPP

The last Mega-Regional agreement, the CPTPP is a comprehensive and progressive partnership between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Before the CPTPP there was the TPP, until the US announced on 30 January 2017 not to ratify the TPP and withdrew from the agreement. Without the US, the TPP could not enter into force as it required ratification of at least six states that together have a GDP of more than 85% of the GDP of all signatories. Following the decision of the US, the remaining countries negotiated for a new agreement, the CPTPP.[91] The CPTPP incorporates the provisions of the TPP with some

[81] Canadian Government 2019, and European Commission: *CETA,* and Ivus & Paczos 2019, p. 2.
[82] Based on 2018 GDP, retrieved 13 November 2019 at World Bank.
[83] Lexchin & Gagnon 2014, p. 2.
[84] Kirkpatrick et al. 2011.
[85] European Commission 2019.
[86] Rijksoverheid 2019, and Binder 2019, p.2
[87] European Commission 2019: *EU-Japan trade agreement enters into force,* EPA Helpdesk: EU-Japan Economic Partnership Agreement, and European Commission 2016, and Based on 2018 GDP, retrieved 13 November 2019 at World Bank.
[88] Ercoli 2019, and European Commission 2018: *The Economic Impact of the EU. Japan Economic Partnership Agreement,* p. 34.
[89] European Commission 2018: *Key Elements of the EU-Japan Economic Partnership Agreement,* and European Commission 2018: *The Economic Impact of the EU. Japan Economic Partnership Agreement*, p. 34.
[90] European Commission 2019: *EU-Japan Economic Partnership,* and Binder 2019, and European Parliament 2019.
[91] Canadian Government 2019: *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – Frequently asked questions,* US Government: *Trans-Pacific Partnership (TPP),* and Ivus & Paczos 2019, p.2.

provisions being suspended.[92] Notably, mainly IP provisions are suspended. The idea behind the suspensions was to let governments continue to develop and put in place policies in line with domestic priorities. And also, to not let the US benefit from the CPTPP without being party to the agreement.[93] On 30 December 2018, the CPTPP entered into force for Canada, Australia, Japan, Mexico, New Zealand and Singapore, and on 14 January 2019, for Vietnam. Once the CPTPP is fully implemented, the eleven countries will form a trading bloc representing 495 million consumers and 12.9% of global GDP.[94]

3.2 Copyrights and related rights

With regards to the term of protection, the USMCA provides a longer term of protection for works, performances, and phonograms than the TRIPS. The USMCA provides a protection of at least 70 years after the author's death. When the term is to be calculated on a basis other than the life of the author, the term shall be at least 75 years from the end of the calendar year of the first authorized publication.[95] When an authorized publication does not appear within 25 years from the creation, the protection shall be at least 70 years from the end of the calendar year of the creation. The TRIPS states a minimum protection of 50 years. That is 20 to 25 years shorter than the USMCA.[96] The CPTPP and CETA do not provide a specific copyright term. In the CPTPP, that provision has been suspended.[97] With CETA, the EU was not able to change Canadas term of life plus 50 years.[98] A protection of life plus 50 years is consistent with multilateral standards and it is the current term of protection under Canadian national law.[99] In the leaked 2009 draft of CETA, it was noticeable that the EU wanted to impose its copyright approach on Canada.[100] However, under the USMCA, Canada is bound to increase the term of protection by 20 years which is actually becoming the international norm.[101] This is significant for Canada as they strongly maintained the view to follow the minimum term of the TRIPS.[102] The issue of extending copyright terms was raised in Canada on several occasions and was consistently rejected by governments and trade negotiators, e.g. it was discussed

[92] Canadian Government 2018, and Ivus & Paczos 2019, p. 2
[93] See art. XXIV GATT, and Canadian Government 2019: *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – Frequently asked questions.*
[94] Canadian Government 2019: *What is the CPTPP?*, and Corr et al. 2019.
Based on 2018 GDP, retrieved 13 November 2019 at World Bank.
[95] US Trade Representative 2019: *Modernizing NAFTA into a 21st Century Trade Agreement*.
[96] See art. 20.63 USMCA jo. art. 14(5) TRIPS and art. 20.63 USMCA jo. art. 9(1) TRIPS jo. art. 7 of the Berne Convention, and Handler & Mercurio 2015, p. 326.
[97] See art. 2 jo. Annex(7)(g) CPTPP, and Canadian Government 2018, and Ivus & Paczos 2019, p. 6.
[98] European Commission 2016, p. 81.
[99] Canadian Government 2020, and Kirkpatrick et al. 2011, p. 321.
[100] Geist 2014.
[101] Canadian Government 2019: *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – Frequently asked questions*, Geist 2019, Geist 2018: *Bryan Adams Warns Canadian Heritage Committee on Copyright Term Extension: Enriches Large Intermediaries, Not Creators,* Adams & Bouchard: *IT'S ABOUT TIME!,* p. 1 and 9, and Ivus & Paczos 2019, p. 6.
[102] Geist 2019.

during the 2009 national copyright consultation, and the government decided against it. The EU wanted to extend the term of protection in CETA, which did not happen, and under the CPTPP the provision was suspended.[103]

Furthermore, the EPA provides a longer term of protection for authors of literary works than the TRIPS. The protection shall be a minimum of 70 years after the author's death. When the term is to be calculated on a basis other than the life of a natural person, the term shall be no less than 70 years after the work is lawfully made available to the public. That is 20 years longer than is agreed in the TRIPS.[104] The term of protection for performers in the EPA is the same as stated in the TRIPS.[105] However, the EPA counts from the first of January of the year following the year in which the performance took place.[106] The TRIPS counts from the end of the calendar year in which the performance took place.[107] The EPA therefore gives protection one day longer than the TRIPS. With regards to the term of protection for producers of phonograms, the EPA provides a minimum protection of 70 years after the phonogram is published. Failing such publication within at least 50 years from the fixation of the phonogram, the term of protection shall be no less than 50 years after the fixation was made.[108] As mentioned the TRIPS gives producers of phonograms a protection of 50 years, again a 20-year difference.[109] Also broadcastings enjoy a longer protection under the EPA than provided by the TRIPS.[110] The EPA namely gives a minimum protection of 50 years after the first transmission of the broadcast. The TRIPS gives a minimum protection of 20 years from the end of the calendar year in which the broadcast took place.[111] In contrast to CETA, the EU was able to change Japans copyright terms in the EPA. In Japan, the term of protection was life plus 50 years or 50 years after publication.[112]

The most remarkable is the use of the national treatment for performers and producers in the USMCA and the CPTPP. Parties only need to provide performers and producers of phonograms the national treatment protection, if the performances or phonograms are first published or fixed in the territory of another party. It is considered to be first published if the publication is done within 30 days of its original publication. Only then performances or phonograms fall under the scope of the national treatment. If the 30 days have passed there will be no need for a Party to apply the national

[103] Geist 2016: *The Trouble with the TPP, Day 3: Copyright Term Extension*.
[104] See art. 9 TRIPS jo. art. 7 of the Berne Convention and art. 14.13(1) EPA.
[105] See art. 14(5) TRIPS and art. 14.13(2) EPA.
[106] See art. 14.13(5) EPA.
[107] See art. 14(5) TRIPS.
[108] See art. 14.13(3) EPA.
[109] See art. 14(5) TRIPS.
[110] See art. 14(5) TRIPS.
[111] See art. 14.13(4) EPA jo. art. 14(5) TRIPS.
[112] European Commission 2016, p. 81.

treatment. This is an obvious TRIPS-minus provision as it is a stricter approach of the TRIPS.[113] Even more remarkable, according to the US, the USMCA provides a full national treatment for copyright and related rights. Consequently, US creators are not deprived of the same protections that domestic creators receive in a foreign market.[114] With a 30-day timeframe, that is not entirely true. On the other hand, it does give legal certainty and sets a clear boundary, but that does not make it any less TRIPS-minus.

Moreover, the USMCA and the CPTPP specify certain copyright terms. Among others, they provide definitions for performers, broadcastings, and phonograms.[115] The TRIPS does not cover these definitions and therefore leaves room for Members' interpretation. The scope for copyright owners is being tightened, but it does give more clarity and legal certainty.

Next, the USMCA, EPA, and the CPTPP expand the given exclusive rights of authors, performers and producers of phonograms, as they may decide when and where their works will be available for the public to access.[116] Producers of phonograms are also given the right to authorize the broadcasting or any communication to the public of their phonograms, which is a right the TRIPS does not provide.[117] In addition, authors, performers, and producers of phonograms not only have the exclusive right over their original works, but also over the copies of their works with regards to distribution.[118] The TRIPS and the Berne Convention only cover original works.[119]

In CETA, the Parties agreed to comply with art. 2 through 20 of the Berne Convention while the TRIPS demands complying with art. 1 through 21 of the Berne Convention and the appendix thereto. This is TRIPS-minus. However, it does not mean the Parties do not need to comply with art. 1 and 21 of the Berne Convention.[120]

As seen, the US goes for a higher copyright protection than provided by the TRIPS. This is only logical as the US is the largest producer and exporter of copyrighted materials in the world. It loses more revenue of inadequate copyright protection than any other country. The higher the copyright protection, the more revenue and more high-paying jobs, which benefits all Americans. An

[113] See art. 20.62(1) USMCA jo. art. 3 TRIPS and see art. 18.62(1) CPTPP jo. art. 3 TRIPS.
[114] US Trade Representative 2019: *Modernizing NAFTA into a 21st Century Trade Agreement*.
[115] See art. 20.57 USMCA, and see art. 18.57 CPTPP.
[116] See art. 20.59 and 20.62(a) USMCA, see art. 14.8(c), art. 14.9(d) and art. 14.10(c) EPA, and see art. 18.62(3)(a) CPTPP.
[117] See art. 14(2) TRIPS.
[118] See art. 20.60 USMCA, see art. 14.8(b), art. 14.9(c) and art. 14.10(b) EPA, and see art. 18.60 CPTPP.
[119] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 10 and p. 18.
[120] See art. 20.7 (1)(a) CETA jo. art. 9 (1) TRIPS.

illustration: in 2015, the copyright industries accounted for 6.88% of US GDP and employed over 5.5 million workers, who on average earned 38% higher wages than other US employees.[121]

The US made sure via the USMCA, that the Mexican law protects the exclusive right to make works available to the public. The USMCA also expressively protects the reproductions of electronic copies of works as the Mexican law does not provide so.[122] Also, the US made sure Canada follows the growing global consensus on copyright terms of life plus 70 or more years.[123] The term will be closer to what the US provides (life plus 70 years and 95 years from the date of publication) which helps ensure reciprocity for creative works.[124] A consensus term of protection for copyrighted works has a direct benefit to the creators of works, as well as consumers. The global consensus minimum term creates entrepreneurial opportunities, encouraging investment in new creative works, as well as the preservation, restoration and reissuing of older works in exciting new formats. This provides consumers more choice and preserves cultural heritage, according to the US.[125] Approximately 90 countries already provide a protection that is life plus 70 or more years because these countries agree that copyright terms at or above the global minimum standard are necessary and appropriate in today's highly inter-connected world with simultaneous distribution of a wide variety of copyright-based products.[126] Extending the term increases the value of the financial instrument, which can be leverage to invest.[127] Another argument to increase the term of protection is that people are living longer. Life plus 50 years originates from the late 19th to early 20th century. It represented the life of the author plus two generations that could claim the copyright. It is logical to lengthen the term as life-expectancy has increased. Besides, it is easier to amend provisions with FTAs than it is to amend the TRIPS.[128] The TRIPS has been amended once since its existence and it took 12 years before the

[121] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 5.
[122] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 8.
[123] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 10.
[124] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 18.
[125] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p.10, and Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, *The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians*, 2017.
[126] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 10, and Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, *The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians*, 2017.
[127] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, *The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians*, 2017.
[128] Geist 2019.

amendment took effect.[129] The Members had set themselves to do this within 2 years.[130] Also, by increasing IP rights globally Canadian creators will realise that they are disadvantaged and that the Canadian market is disadvantaged because there is no harmonization of the copyright terms. This pressures Canada to meet the internationally standard: life plus 70 years.[131]

Opponents of lengthening copyright terms argue that increasing the term harms people's ability to access and work with cultural literature.[132] For the next generation of artists and creators it is also more difficult to create new works.[133] One practical example: a Theatre in Stratford Ontario, may play *the lion, the witch and the wardrobe* by C.S. Lewis. The author of the book died in 1963, and so it entered the public domain in Canada in 2014. Hence, it can be performed on stage in Canada without any fear of legal action from Disney. In contrast, American copyright will protect this book until 2034. This is a major difference.[134] The opponents argue that the term of protection should be of such length that the copyright holder has reasonable time to benefit from his work commercially. After this time, the public should be able to engage with those works.[135] Besides, every time you enhance IPRs and give more rights to the right holder, there are costs associated with it.[136] An additional 20-year copyright protection results in financial loses for consumers and educational institutions. The costs are estimated to be in the hundreds of millions of dollars.[137] Foreign publishers, film and music producers are the primary beneficiaries, not Canadian creators, as Canada is a net importer if IP content.[138] Obviously countries that are strong producers of IPRs have a strong interests in obtaining as much protection for as long as possible. The drawback is for those countries like Canada that cannot compete and cannot produce to the same extent.[139]

[129] WTO: *Amendment of the TRIPS Agreement,* and Voon & Mitchell 2009, p. 194.
[130] WTO 2005.
[131] Geist 2019.
[132] Geist 2019.
[133] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, *The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians*, 2017.
[134] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017.
[135] Geist 2019.
[136] Geist 2019.
[137] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017, and Geist 2016: *The Trouble with the TPP, Day 3: Copyright Term Extension*.
[138] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017.
[139] Geist 2019.

	TRIPS	USMCA	CETA	EPA	CPTPP
Term of protection for authors of literary works	Min. of 50 years	Min. of 70 - 75 years	-	Min. of 70 years	-
for performers	Min. of 50 years	Min. of 70 - 75 years	-	Min. of 50 years + one day	-
for producers of phonograms	Min. of 50 years	Min. of 70 - 75 years	-	Min. of 70 years	-
for broadcastings	Min. of 20 years	-	-	Min. of 50 years	-
National Treatment for performers and producers of phonograms	Full national treatment as in art. 3 TRIPS	(TRIPS-minus) Only need to provide national treatment if the performances or phonograms are first published or fixed (when the publication is done within 30 days of its original publication) in the territory of another party	-	-	(TRIPS-minus) Only need to provide national treatment if the performances or phonograms are first published or fixed (when the publication is done within 30 days of its original publication) in the territory of another party
Definitions of	-	Performer, broadcasting, communication to the public, fixations, phonogram, producer of phonogram and publication	-	-	Broadcasting, communication to the public, fixation, performers, phonogram, producer of a phonogram and publication
Exclusive rights for authors, performers and producers of phonograms	Provides exclusive rights	Provides additional exclusive rights regarding rights of distribution and communication to the public	-	Provides additional exclusive rights regarding rights of distribution and communication to the public	Provides additional exclusive rights regarding rights of distribution and communication to the public
Integration international agreements	Comply with art. 2 - 21 of the Berne Convention and the appendix thereto	-	(TRIPS-minus) Comply with art. 2 - 21 of the Berne Convention	-	-

Table 1 Comparison of copyrights and related rights in TRIPS and the Mega-Regionals

3.3 Trademarks

For trademarks the USMCA and the CPTPP both provide a minimum protection of 10 years.[140] In comparison with the TRIPS this protection is 3 years longer.[141]

With regards to registering a trademark, the TRIPS gives discretion to whether or not a sign needs to be visually perceptible as a condition of registration.[142] The Parties of the USMCA and the Parties of the CPTPP decided that a sign does not need to be visually perceptible as a condition of registration.[143] This indicates that Parties cannot deny a registration of a trademark solely on the ground that the proposed mark is a sound.[144] It limits the grounds for denying registration.[145] This provision is TRIPS-plus as the scope of trademarks is being broadened. The US went deliberately for a broad scope as this benefits trademark owners. Their objective is to promote the same level of protection as in the US. [146] The US even prefers scent marks to be mandated as protectable in order to fully benefit from what may be used as a protected trademark.[147] Nevertheless, the US finds protecting sound marks a step forward.[148] Canada has to change its national law as trademark registration can no longer be restricted to ''visually perceptible'' signs.[149]

That is not all, the USMCA and the CPTPP also broadened the scope of protection on the use of identical or similar signs. In both agreements it is namely prohibited to use similar or identical trademarks, including subsequent GIs, without consent from the owner for goods or services that are ''*related*'' to those goods and services in respect of which the owner's trademark is registered.[150] The TRIPS on the other hand, uses the term *''identical and similar''*, which is a tighter definition than *''related''*.[151] For example, an apple and a banana are not identical nor similar. However, they can be seen as related as they are both fruits. This provision in the USMCA and the CPTPP therefore gives a stronger right to the owner of a registered trademark than the TRIPS. Also noteworthy, the

[140] See art. 20.25 USMCA, and see art. art. 18.26 CPTPP.
[141] See art. 18 TRIPS.
[142] See art. 15(5) TRIPS.
[143] See art. 20.17 USMCA, and see art. 18.18 CPTPP.
[144] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 14, and Abbott et al. 2019, p. 490.
[145] Ivus & Paczos 2019, p. 5.
[146] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 3.
[147] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 3 and . 14.
[148] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p.14.
[149] Ivus & Paczos 2019, p. 5
[150] See art. 20.19 USMCA, and see art. 18.20 CPTPP.
[151] See art. 16(1) TRIPS.

prohibition applies to subsequent GIs as well. This gives GI producers a weaker position and trademark owners a stronger position. This is because the US is an advocate for trademarks and considers GIs a barrier to trade.[152]

Moreover, the EPA sets a minimum definition of *''using''*, which the TRIPS does not do.[153] This a TRIPS-plus provision even though the scope gets tightened, because it does give more clarity and legal certainty.

In respect to trademarks, CETA does not provide much higher protection than the TRIPS. What only stands out is that the exclusive right of a trademark holder is being limited. It is namely agreed that a trademark can be used by someone other than the owner on the basis *of ''fair use''*. [154] This is TRIPS-plus even though it tightens the protection for trademark owners. The TRIPS namely gives its Members discretion to provide limited exceptions to the rights conferred by a trademark, such as the fair use of descriptive terms.[155] The EPA also uses this discretion by demanding that Parties need to provide limited exceptions to the rights conferred by a trademark. [156]

[152] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 4-5.
[153] See art. 14.18 EPA jo. art. 16(1) TRIPS.
[154] Canadian Government 2017.
[155] See art. 20.15 CETA and art. 17 TRIPS.
[156] See art. 14.19 EPA and art. 17(1) TRIPS.

	TRIPS	USMCA	CETA	EPA	CPTPP
Term of protection	Min. of 7 years	Min. of 10 years	-	-	Min. of 10 years
Definition of	-	-	-	Using	-
Registration conditions Must signs be visually perceptible?	Leaves discretion	No discretion. Sign does not need to be visually perceptible	-	-	No discretion. Sign does not need to be visually perceptible
Prohibition	Prohibited to use identical or similar signs that are *identical* or *similar* to the trademarked goods/services	Prohibited to use identical or similar signs that are *identical* or *related* to the trademarked goods/services	-	-	Prohibited to use identical or similar signs that are *identical* or *related* to the trademarked goods/services
Limiting exclusive rights conferred by a trademarks	Leaves discretion to provide limited exceptions to the rights conferred by a trademark, such as the fair use of descriptive terms	-	A trademark can be used by someone other than the owner on the basis of ''fair use''	Parties shall provide limited exceptions to the rights conferred by a trademark, such as the fair use of descriptive terms	-

Table 2 Comparison of trademarks in TRIPS and the Mega-Regionals

3.4 Geographical indications

The section of GIs in the EPA applies to wines, spirits and other alcoholic beverages as well as agricultural products which originate in the EU and Japan.[157] The Parties agreed to protect certain GIs of each other.[158] For example, Feta, Champagne, Ouzo, and Tiroler Speck, which are GIs originally protected in the EU, and Yubari Melon, Kobe Beef, and Shimonoseki Fuku, which are GIs originally protected in Japan.[159] As a result of the EPA, the agreed GIs from the EU enjoy the same level of protection in Japan as within the EU.[160]

The first contrast with the TRIPS is that the EPA also protects agricultural products and other alcoholic beverages, other than wines and spirits, against the use of GIs identifying a good for a like good not meeting the applicable requirement of specification of the GI even if: the true origin of the good is indicated; the GI is used in translation or transliteration; or if the GI is accompanied by

[157] See art. 14.22(1) EPA.
[158] See art. 14.22(3) jo. art. 14.24 EPA and see Annex 14-B and 14-A EPA.
[159] See Annex 14-B EPA, European Commission 2018: *Key Elements of the EU-Japan Economic Partnership Agreement*, and European Commission 2018: *The Economic Impact of the EU. Japan Economic Partnership Agreement* p. 35.
[160] European Commission 2018: *Key Elements of the EU-Japan Economic Partnership Agreement,* and European Commission 2018: *The Economic Impact of the EU. Japan Economic Partnership Agreement* p. 35.

expressions such as ''kind'', ''type'', ''style'', ''imitation'' or the like.[161] As a result, Japan and the EU need to provide the legal means to prevent such conduct in their territory. E.g., the use of ''New Zealand Roquefort'',[162] or ''Feta-Style'', needs to be prevented.[163] The TRIPS only gives this protection to spirits and wines.[164] The EPA thus guarantees the same level of protection for agricultural products and other alcoholic beverages as the TRIPS provides for spirits and wines.[165] This is a high level of protection for GIs.[166] However, the Parties are not required to protect GIs if the name conflicts with a plant variety or an animal breed and as a result could mislead consumers, or/and if the name is customary in common language as the common name for the good concerned.[167]

The CETA only covers a GI protection for agricultural products or foodstuff.[168] Wines and spirits are not covered in this section as they are dealt with in the Trade and Commerce in Alcoholic Beverages agreement and the Trade in Wines and Spirit Drinks agreement. However, both agreements are incorporated into the CETA.[169] These agreements will not be discussed any further in this research.

Canada and the EU agreed to protect certain agricultural products or foodstuff GIs of each other,[170] such as Gouda, Roquefort, and Feta, which are GIs originating from the EU.[171] The list of GIs from Canada was empty at the time of writing.[172]

CETA also protects agricultural products and foodstuff against the use of GIs identifying a good for a like good not meeting the applicable requirement of specification of the GI even if: the true origin of the good is indicated, the GI is used in translation or transliteration, or the GI is accompanied by expressions such as ''kind'', ''type'', ''style'', ''imitation'' or the like.[173] This right is limited to goods in the same category.[174] Notwithstanding, Canada is not required to prevent the use of terms listed in Part A of Annex 20-A and identified by one asterisk, when the use of such term is accompanied by expression such as ''kind'' and ''style'' in combination with a legible and visible indication of the geographical origin of the product concerned.[175] There is flexibility to use certain GIs. E.g., Feta may

[161] See art. 14.25 jo. 14.22(1) EPA.
[162] Roquefort (a blue cheese) is a GI from France (EU).
[163] EPA Helpdesk: *EU-Japan EPA Factsheet.*
[164] See art. 23(1) TRIPS.
[165] See art. 23(1) TRIPS and EPA Helpdesk: *EU-Japan EPA Factsheet.*
[166] European Commission 2018: *The Economic Impact of the EU. Japan Economic Partnership Agreement*, p. 35.
[167] See art. 14.25(4) EPA.
[168] See art. 20.16 CETA, and Ivus & Paczos 2019, p. 5.
[169] See art. 30.8(5) CETA, and European Commission 2016, p. 80.
[170] See art. 20.19 jo. art. 20.18 CETA, and Ivus & Paczos 2019, p.5.
[171] See art. 20.19 jo. art. 20.18 jo. Annex 20-A part A CETA.
[172] See Annex 20-A part B CETA for the list of GIs originating from Canada, and European Commission 2016, p. 80.
[173] See art. 20.19(3) jo. art. 20.19(2)(a) CETA, and Canadian Government 2017.
[174] European Union 2019, p. 4.
[175] See art. 20.21(1) CETA, Abbott et al. 2019, p. 492, and European Union 2019, p. 3.

be used with a term such as Feta-style-cheese. In some cases, because of transitional arrangement, Canadians are even allowed to use GIs without terms such as ''style''. This only applies if the indication is used in relation to any commercial activity before 18 October 2013, and it only applies to products in the classes of: ''cheeses'', ''fresh, frozen and processed meats'', and ''dry-cured meats''.[176] As an overall result, Canada expanded its GI protection.[177]

In respect to trademarks, the EPA refuses trademarks which contain or consist of a GI and which would be likely to mislead as to the ''*quality of the good*''.[178] The TRIPS uses the wording: as to mislead the public as to the ''*true place of origin*''.[179] The latter is easier to prove than the wording of the EPA. However, the wording of the EPA is broader. The EPA on the one hand, gives less protection than the TRIPS as it is harder to prove, but on the other hand, provides more protection than the TRIPS because of the broader scope.

Moreover, in CETA if a trademark, which contains or consists of a GI listed in Annex 20-A, and that does not originate in the place of origin specified in Annex 20-A for that GI, shall be refused or invalidated.[180] This without the need of misleading the public.[181] However, registering a trademark that consist of a term listed in Annex 20-B Part A is possible, unless it does mislead the public as to the geographical origin of the goods.[182] The former part is TRIPS-plus and the latter part is the same as TRIPS. Lastly, GIs cannot be added if there is an identical trademark registered in one of the Parties, or when a trademark has been acquired through good faith in one of the Parties. A GI can also not be added when having an identical name to the customary name of a plant variety or an animal breed, or when identical with a term customary in common language as the common name for such a product in the other Party.[183] This provision is an extension of the TRIPS.[184] The first part might not be advantageous for GIs, but it does provide protection for existing trademarks.

The USMCA and the CPTPP refuse GIs when it is likely to cause confusion with a trademark that is subject of a pre-existing good faith pending application or registration, likely to cause confusion with a pre-existing trademark, and a term customary in common language as the common name for the relevant good in the territory of the Party.[185] This provision is an extension of the TRIPS.[186] It might

[176] See art. 20.21(2), (3), and (4) CETA, Canadian Government 2017, Abbott et al. 2019, p. 492, and European Union 2019, p. 10-11.
[177] European Union 2019, p. 2.
[178] See art. 14.27 EPA.
[179] See art. 22(3) TRIPS.
[180] See art. 20.19(6) CETA.
[181] See art. 20.19(6) CETA jo. 22(3) TRIPS.
[182] See art. 20.21(11) CETA.
[183] See art. 20.22(3)(a), (b) and (c) CETA, and European Union 2019, p.3.
[184] See art. 24(5) and (6) TRIPS.
[185] See art. 20.31 USMCA, and see art. 18.32 CPTPP.
[186] See art. 24(5) and (6) TRIPS.

not be advantageous for GIs, but it does provide protection for existing trademarks and it also lets producers use common names.[187] Moreover, the USMCA and the CPTPP provide guidelines for determining whether a term is customary in common language.[188] This is TRIPS-plus as it is not regulated in the TRIPS, and because it gives more certainty for producers which use terms customary in common language.

Lastly, the USMCA and the CPTPP make it harder for Parties to conclude new GIs through other international agreements. There are certain requirements that need to be fulfilled.[189] The aim is to establish a mechanism for consultation between the Parties on future GIs pursuant to international agreements.[190] The most outstanding requirement in the USMCA and the CPTPP is that the other Parties must have an opportunity to comment and in the USMCA also to oppose.[191] This not regulated in the TRIPS.

As might be noticed, the text of the CPTPP is again similar to the one of the USMCA. The US also states that the GI part draws strongly upon the text negotiated under the TPP.[192] This is not strange as the text of the TPP on GIs was seen as the starting point to negotiate and preserve US market access opportunities for common name products and the integrity of US trademark rights.[193] As seen, the US does not favour GIs. They consider GIs to undermine the scope of trademarks and to impose barriers on market access for US-made goods and services that rely on the use of common names. Some of those firms have largely built markets for those products. They are using names the EU seeks to confiscate.[194] Contrary, the EU has the aim of strengthening GI protection as a means of promoting the production and exportation of high quality and high value-added products. It provides important wealth creation and employment in what are often less developed rural areas.[195] Besides, GIs can be easily misused by producers with no link to the designated place of origin who try to

[187] US Trade Representative 2019: *Strengthening North American Trade in Agriculture.*
[188] See art. 20.32 USMCA, see art. 18.33 CPTPP, and Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 16, and Abbott et al. 2019, p. 490.
[189] See art. 20.35 USMCA, and see art. 18.36 CPTPP.
[190] US Trade Representative 2019: *Strengthening North American Trade in Agriculture,* US Trade Representative 2019: *Modernizing NAFTA into a 21st Century Trade Agreement.*
[191] See art. 20.35(1)(d) and (2)(c) USMCA, and see art.18.36 CPTPP.
[192] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 16.
[193] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 5.
[194] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 4-5.
[195] European Commission 2016, p. 80.

profit from the reputation of the original goods.[196] The abuses limit access to certain markets and undermine consumer loyalty.[197] Therefore, GI protection ensures fair competition for producers and reassures buyers that they are buying a genuine EU product.[198] GI protection is also an incentive for investment in innovation to protect and enhance the high quality of protected products, while maintaining competitiveness.[199] The aim of the EU is to extend GI protection to the same level as it is within the EU.[200] In multilateral negotiations, the EU has not been able to achieve this.[201] The US and many other countries believe that existing trademark laws are adequate to protect GIs, but from an EU perspective, this is not considered sufficient.[202] In the CETA and EPA, the EU appears to have satisfied its negotiating aims as Canada and Japan both agreed to provide protection for GIs equivalent to the protection within the EU.[203]

[196] European Commission 2018, and European Commission: *Geographical indications for non-agricultural products*
[197] O'Conner and Company European Lawyer 2007, p. 12.
[198] European Commission 2018, and European Commission: *Geographical indications for non-agricultural products*
[199] European Commission: *Geographical indications for non-agricultural products.*
[200] The Center for International Environmental Law 2007, p. 4.
[201] European Commission 2016, p.80.
[202] European Commission 2016, p.80.
[203] European Commission 2016, p.80.

	TRIPS	USMCA	CETA	EPA	CPTPP
Protection as mentioned in art. 23(1) TRIPS for	Wines and spirits	-	Agricultural products or foodstuff	Wines, spirits, other alcoholic beverages and agricultural products	-
Exception for protecting GIs	-	-	Not required to prevent the use of terms identified in Annex 20-A part A by one asterisk, accompanied by expressions such as ''kind'' and ''style'' in combination with a legible and visible indication of the GI of the product concerned. May use GI indications (accompanied by one, two or three asterisks in Annex-20A Part A), for products classed in ''cheeses'', ''fresh, frozen and processed meats'' or in ''dry-cured meats'' No GIs can have an identical name to the customary name of a plant variety or an animal breed. And GI cannot be identical with a term customary in common language as the common name for such product in the other Party	No need to protect GIs if the name conflicts with a plant variety or animal breed and as a result could mislead consumers, or/and if the name is customary in common language as the common name for the good concerned	-

Relation with trademarks	Refuses or invalidates the registration of trademarks which contain or consist of a GI and which is of such nature as to mislead the public as to *the true place or origin*	Refuses GIs when it is likely to cause confusion with a pre-existing good faith pending application or registration trademark, a pre-existing trademark, or a term customary in common language	Refuses or invalidates a trademark when it does not originate in the place or origin specified in Annex 20-A Refuses trademark consisting of a term listed in Annex-20B Part A when it misleads the public as to *the GI origin of the goods* GIs cannot be added to the agreed list (Annex 20-A) if there is an identical trademark registered in one of the Parties, or when a trademark has been acquired through good faith in one of the Parties	Refuses trademarks which contain or consist of a GI and which would be likely to mislead as to the quality of the good	Refuses GIs when it is likely to cause confusion with a pre-existing good faith pending application or registration trademark, a pre-existing trademark, or a term customary in common language
Customary in common language	-	Provides guidelines	-	-	Provides guidelines
Concluding new GI's	-	Parties must have an opportunity to oppose and/or comment		-	Parties must have an opportunity to comment

Table 3 Comparison of GIs in TRIPS and the Mega-Regionals

3.5 Industrial Designs

For industrial designs, the USMCA gives a protection of at least 15 years, 5 years longer than the TRIPS.[204] The EPA goes even further by providing a minimum protection of 20 years, which is not odd as the EPA between Japan and Switzerland also provides a 20 year protection, and the FTA between

[204] See art. 20.56 USMCA, see art. 26(3) TRIPS, European Commission 2016, p. 82, and US Government 2019.

the EU and South-Korea provides a 15 year protection.[205] In extension of the TRIPS, the protection of the USMCA and the EPA also apply to designs embodied in a part of an article.[206] This broadens the scope of protection. The CPTPP also provides the latter protection, but does not state a minimum term of protection.[207]

Another TRIPS-plus provisions in the USMCA has to do with determining if an industrial design is new or original. When determining, the Parties have to disregard at least information contained in public disclosures, if the public disclosure was made by the design applicant or by a person that obtained the information directly or indirectly from the design applicant, and this occurred within 12 months prior to the filling date in the territory of the Party.[208] Without this provision, getting protection for a design might become difficult because the disclosure of information to the public indicates that the design is not new or original. Advantages of such grace period, are that it prevents inadvertent disclosures and allows quick circulation and disclosure to open science. A disadvantage is that it delays the moment the invention falls under public domain.[209]

The TRIPS leaves discretion to its Members to determine when a design is new or original. [210] The EPA uses the following discretion. A design applied to or incorporated in a product which constitutes a component part of a complex product, shall be considered to be new and original, if the component part, once it has been incorporated into the complex product, remains invisible during normal use of the latter, and to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and originality.[211] This broadens the scope of industrial designs. Furthermore, in the EPA industrial designs are not only protected against ''copies'' and ''substantial copies'' as meant in the TRIPS. Under the EPA industrial designs are also protected when the design is ''similar''.[212] ''Similarity'' has a broader meaning than ''copies'' or ''substantial copies''. Therefore, it gives more protection and constitutes a TRIPS-plus provision.

[205] See art. 14.31(7) EPA, art. 26(3) TRIPS, and European Commission 2016 p. 82.
[206] See art. 20.53(2) USMCA jo. art. 25(1) TRIPS, and see art. 14.31(1) EPA jo. art. 25(1) TRIPS.
[207] See art. 18.55 CPTPP.
[208] See art. 20.54 USMCA.
[209] Franzoni & Scellato 2010, p. 203.
[210] See art. 25(1) TRIPS.
[211] See art. 14.31(2) EPA.
[212] See art. 26(1) TRIPS, and art. 14.31(5) EPA.

	TRIPS	USMCA	CETA	EPA	CPTPP
Term of protection	Min. of 10 years	Min. of 15 years (including designs embodied in a part of an article)	-	Min. of 20 years (including designs embodied in a part of an article)	-
Registration conditions	New or original designs	New or original designs including designs embodied in a part of an article	-	New or original designs including designs embodied in a part of an article	New or original designs including designs embodied in a part of an article
Determining whether design is new/original	-	Disregards public information given by the design applicant within 12 months prior to the filling date	-	When design applied or incorporated in a product constitutes a component part and the component part remains invisible during normal use of the complex product, and if the visible features fulfil in themselves the requirements as to novelty and originality	-
Protection for the owner	Against copies and substantial copies	-	-	Against copies, substantial copies and similar designs	-
Integration international agreements	-	-	All reasonable efforts to accede the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs	-	-

Table 4 Comparison of industrial designs in TRIPS and the Mega-Regionals

3.6 Patents

One criterion for patent protection under the TRIPS is that the invention needs to involve an inventive step. The TRIPS does not address the meaning thereof. The USMCA and CPTPP give guidance to determine what an inventive step is. Each Party needs to consider whether the claimed invention would have been obvious to a person skilled, or having ordinary skill in the art, having

regard to the prior art.[213] This tightens the scope for patent protection, and gives more clarity and legal certainty.

Furthermore, to determine whether an invention is novel or has an inventive step, each Party of the USMCA and CPTPP shall disregard at least information contained in public disclosures, if the public disclosure was made by the patent applicant or by a person that obtained the information directly or indirectly from the patent applicant, and occurred within 12 months prior to the filling date in the territory of the Party.[214] This provision is similar to the one discussed under industrial designs and has the same advantages and disadvantages mentioned there. The provision ensures that the public disclosure of an invention made by the patent applicant is not considered for patentability.[215] Without this grace period, getting patent protection might become difficult because the disclosure indicates that the invention is not novel or does not involve an inventive step.[216] This grace period is consistent with US law.[217]

The CETA is the only Mega-regional that provides a definition for a basic patent and a product, as the TRIPS leaves discretion hereon.[218]

Moreover, the Parties of the USMCA agreed that patents are available for ''new uses, new methods, or processes, of a known product''.[219] The TRIPS leaves policy space.[220] Under Mexican law, patents cannot be granted for new uses, which is fully consistent with the TRIPS.[221] With this provision, many drugs can have patent protection beyond the 20-year minimum as companies are able to stack up multiple patents over the same drug granted to new uses over time.[222] The patent protection could be longer if the concerning country has a higher standard than the TRIPS.[223] Proponents of the provision argue it encourages follow-on-innovation.[224] However, the provision is criticized to facilitate evergreening: slightly modifying patented drugs and patenting them as new drugs to have a longer monopoly. This provision lets pharmaceuticals and agricultural companies extend their

[213] See art. 20.36(1) footnote 29 USMCA, and see art. 18.37(1) footnote 30 CPTPP.
[214] See art. 20.37 USMCA, and see art. 18.38 CPTPP.
[215] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 22.
[216] Franzoni & Scellato 2010, p. 200.
[217] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p.22, and Franzoni & Scellato 2010, p. 200.
[218] See art. 20.27 CETA.
[219] See art. 20.36(2) USMCA, and Ivus & Paczos 2019, p. 2-3.
[220] Khor 2017, p. 2.
[221] Jorge July 2019, p. 2.
[222] Jorge July 2019, p. 2.
[223] Jorge July 2019, p. 2.
[224] Ivus & Paczos 2019 p. 2-3.

monopoly for at least another 20 years, if not more.[225] The Pharmaceutical Sector Inquiry of the European Union DG Competition identified evergreening as one of the tactics used by originator companies to delay the entry of competitors in the market.[226] Instead of that drug companies are focused on developing new cures, they are spending millions tweaking the way existing drugs are administered or on changing their ingredients. Those moves have the effect of extending a drug's patent and upping the amount of time it can be sold at monopoly prices.[227] One example: the antiretroviral zidovudine (known as AZT) was invented as a possible anticancer treatment in 1964 at the US National Cancer institute. After it was found to be effective against HIV/AIDS Burroughs Welcome (now GlaxoSmithKline) filed for patents for this new use in 1985 in the US and elsewhere. Accelerated marketing approval was received in 1987.[228] The provision broadens the patentability standards, and the broader the scope, the harder it is to bring competition to the market.[229] This provision will leave Mexican patients in a much more vulnerable position and will be very costly for the government, private healthcare insurance and consumers.[230] Under the CPTPP, this provision was suspended.[231]

Furthermore, what countries often do, is agreeing on patent term extension provisions. These serve to extend the effective term of a patent. Under the TRIPS Agreement, a patent expires 20 years after the initial filing date, but the effective term may be curtailed by initial delays by the patent-granting authority or regulatory approval processes. This loss of time is addressed in two ways: patent term adjustment (PTA) provisions, which provide that unreasonable delays by a granting authority should not count against the patent's term, and patent term restoration (PTR) provisions, which provides the same relief but specifically for delays in the marketing authorization.[232] As shown below, the EPA provides a PTR provision.[233] The CETA and the USMCA provide both. The reason behind patent term extension is that a country has an incentive to slow down the approval process without such provision.[234]

The CETA provides a sui generis protection for pharmaceutical products protected by a basic patent and which have been granted the first marketing approval.[235] The date of protection takes effect at

[225] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017, Khor 2017, p. 2, and Ivus & Paczos 2019 p. 2-3.
[226] Jorge May 2019, p.6.
[227] Khor 2017, p. 3.
[228] Clift 2007, p. 24.
[229] Jorge May 2019, p.6.
[230] Jorge July 2019, p. 2.
[231] See art. 2 jo. Annex(7)(b)(i) CPTPP, Ivus & Paczos 2019 p. 2-3, and Labonté et al. 2019, p. 2.
[232] Ivus & Paczos 2019 p. 3.
[233] The Law Library of Congress 2016, p. 5.
[234] Lexchin & Gagnon 2014, p. 2.
[235] See art. 20.27(2) CETA, Ledwell 2016, and Lexchin & Gagnon 2014, p. 2.

the end of the lawful term of the patent.[236] The period of protection is equal to the period which elapsed between the date on which the application for the basic patent was filled and the date of the first marketing authorization, reduced by a period of 5 years.[237] The duration of the protection may not exceed a period of 2 to 5 years, to be established by each Party.[238] In other words, the patent term of a new pharmaceutical product will be extended if the patent-granting or regulatory approval process delay the entry of the product into the market by more than five years.[239] According to two articles, the additional time is also available if the applicant is responsible for the delay in the approval process.[240] However, both articles do not state why this might be. It seems rather unlikely as the CETA does not address applicants delay and the Parties thus may decide hereon themselves. Normally, authorities do not go along with such practices. At the time of CETA negotiations, Canada did not provide any form of PTR to address lost marketing opportunities in situations of delayed regulatory approvals. But under CETA, Canada has agreed to provide up to two years of sui generis protection for eligible pharmaceutical patents. In the European Union, the period of sui generis protection is five years.[241] The Federal Government of Canada has acknowledged that health costs could rise due to this provision.[242]

Under the USMCA the term of patent protection shall be adjusted to compensate for unreasonable delays in the issuance of a patent.[243] An unreasonable delay includes at least a delay in the issuance of a patent of more than five years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application has been made, whichever is later.[244] Additionally, the patent term with respect to a pharmaceutical product needs to be adjusted for unreasonable curtailment as a result of the marketing approval process. This is to compensate the patent owner for not having an effective patent term as a result of the marketing approval process.[245] This PTR provision leaves open huge policy space as it is not specified, when, how and how much compensation needs to be given for the unreasonable curtailment. The countries may decide hereon themselves. This is a small contrast to the aforementioned USMCA PTA provision, where a minimum rule of what a delay should be at least, is agreed upon, leaving less policy space for the Parties. However, that provision also does not specify how long the minimum or maximum

[236] See art. 20.74(4) CETA.
[237] See art. 20.27(5) CETA, and Ivus & Paczos 2019, p. 3.
[238] See art. 20.27(6) CETA, and Geist 2016: *The Trouble with the TPP, Day 7: Patent Term Extension*, Ivus & Paczos 2019, p. 3, and Lexchin & Gagnon 2014, p. 2.
[239] Ivus & Paczos 2019, p. 3.
[240] Lexchin & Gagnon 2014, p. 2, and Grootendorst & Hollis 2011,p. 84.
[241] Ivus & Paczos 2019, p. 3-4, and Geist 2016: *The Trouble with the TPP, Day 7: Patent Term Extension.*
[242] Beltrame 2013, and Geist 2016: *The Trouble with the TPP, Day 7: Patent Term Extension.*
[243] See art. 20.44(3)USMCA, and US Government 2019.
[244] See art. 20.44(4)USMCA, and Ivus & Paczos 2019, p. 4.
[245] See art. 20.46(2) USMCA.

compensation needs to be, only when a compensation needs to be granted.[246] The TPP provided the same two provisions as the USMCA.[247] Under the CPTPP, both these provisions are suspended.[248] According to the Canadian government, this is to make the CPTPP more aligned with the international standards of the TRIPS.[249]

With respect to patents granted to inventions related to pharmaceutical or agricultural chemical products, Japan and the EU agreed to provide a compensatory term of protection. However, only for the period during which a patented invention cannot be worked due to the marketing approval process. The maximum compensatory term is 5 years.[250] An additional extension of 6 months is possible in the EU in the case of medicinal products for which paediatric studies have been carried out, and the results of those studies are reflected in the product information.[251] This again leaves policy space open for the Parties.

The US opted for a patent protection regime that reflects US standards, thus harmonizing the patent system between Canada, Mexico and the US.[252] One of the provisions consistent with US law is the PTA provision. It helps to ensure that unreasonable delays in the issuance of patents do not function to diminish the effective duration of patent exclusivity and to ensure consistency by the Parties.[253] The US also went for this provision as it promotes innovation.[254] Even though there was no agreement on the patent term itself, provisions of unreasonable delays extend patent protection as well. Such provisions raise health costs and hampers access to cheap generic medicines, and restrict future policy options for governments.[255]

In Canada e.g., the sui generis protection in CETA results in increased drug costs as it is not part of current Canadian law, according to the Canadian Generic Pharmaceutical Associations.[256] The drug price itself will not necessarily go up, but will longer stay at the monopoly price, thereby increasing

[246] Ivus & Paczos 2019, p. 4.
[247] See ex. art. 18.48 TPP.
[248] See art. 2 jo. Annex (7)(c) and (d) CPTPP, Ivus & Paczos 2019, p. 4, Canadian Government 2018, and Labonté et al. 2019, p. 2.
[249] Canadian Government 2018.
[250] See art. 14.35 EPA.
[251] See art. 14.35 footnote 3 EPA.
[252] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p. 21.
[253] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p.23.
[254] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p. 21.
[255] Geist 2016, Rimmer 2015, Rimmer, Gleeson & Fitzgerald 2015, and Beltrame 2013.
[256] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017, Beltrame 2013, and Jorge July 2019, p. 2.

total healthcare costs.[257] The Canadian Nurses Association commented that through extending patents and thus delaying the availability of less expensive generic medicines, by 2023 Canada would see an annual cost increase of up to $636 million, or 5% of the annual cost of patented drugs in Canada. Other organizations, including the Canadian Centre for Policy Alternatives, the Alberta Federation of Labour and the Canadian Health Coalition, shared similar concerns.[258] The same goes for Mexico as the Mexican law currently does not provide patent term extensions.[259]

Thankfully, the CPTPP suspended the PTA and PTR provisions. Among data exclusivity provisions, and measures to make it easier to obtain patents, these patent extension provisions would have extended pharmaceutical monopolies and delay generic medicines in several low- and middle-income countries participating in the CPTPP. A study on the impact of the TPP IP measures, showed the different outcome for high- and low-income countries: the low-income countries would have suffered as they would not be able to provide cheaper generic medications to their people. The high-income countries, would have experienced little change regarding access to medicines as most of those countries already implemented the measure, and would not have to make much legislative changes, or even no changes at all. But, the high-income countries would become locked into the provision, making it difficult for future governments to amend their domestic laws as it restricts future policy options.[260]

Patent measures for pharmaceutical drugs hamper access to affordable and essential medicines.[261] This is in contrast to the Doha declaration, as the declaration aims at interpreting and implementing the TRIPS in a manner that is supportive of the right to public health and which promotes access to medicines for all.[262]

[257] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017.
[258] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017.
[259] Jorge July 2019, p. 2
[260] Townsend et al. 2017, and Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017.
[261] Rimmer 2015.
[262] Report of the Standing Committee on International Trade Canada, 42nd Parliament, 1st session, Sixth Report, The Trans-Pacific Partnership Agreement: Benefits and Challenges for Canadians, 2017.

	TRIPS	USMCA	CETA	EPA	CPTPP
Definition of	-	-	Basic patent, and a product	-	-
Patent extension terms	-	The term of protection shall be adjusted to compensate for unreasonable delays in the issuance of patents The patent term of a pharmaceutical product shall be adjusted for unreasonable curtailment as a result of the marketing approval process	Sui generis protection for pharmaceuticals protected by a basic patent and which have been granted the first marketing approval. The period of protection may not exceed 2 – 5 years.	The term of protection related to pharmaceutical or agricultural chemical products shall be adjusted to compensate for the period during which a patented invention cannot be worked due to the marketing approval process	-
Determining whether invention is novel or has an inventive step	-	Provides guidelines on what is an inventive step Disregards public information given by the patent applicant within 12 months prior to the filling date	-	-	Provides guidelines on what is an inventive step Disregards public information given by the patent applicant within 12 months prior to the filling date
Patent for new uses	-	Patents available for new uses, new methods, or processes, of a known product	-	-	-

Table 4 Comparison of patents in TRIPS and the Mega-Regionals

3.7 Trade Secrets and undisclosed test or other data

3.7.1 Trade Secrets

In the TRIPS, to receive protection for undisclosed information, the information needs to have, amongst other things, commercial value.[263] In the USMCA potential commercial value is sufficient.[264] A broader scope is thus being used.[265] The aim is to ensure the Parties provide clear protection for any trade secrets or confidential business information. The broadened scope was recommended by the ITAC because companies provide a wide variety of business data to governments to fully comply with local law. But some information is highly sensitive and the business' competiveness would be impaired if the information was leaked to a competitor. Broadening the scope provides confidence that their data is protected.[266]

Moreover, the TRIPS gives a minimum definition of *''a manner contrary to honest practices''*.[267] The EPA expands hereon by providing three other conducts that are considered contrary to honest commercial practices.[268] The EPA and the USMCA also provide examples when a manner is not contrary to honest commercial practices. In the USMCA, this includes situations in which a person: reverse engineered an item lawfully obtained; independently discovered information claimed as a trade secret; or acquired the subject information from another person in a legitimate manner without obligation of confidentiality or knowledge that the information was a trade secret.[269] The EPA provides three similar situations and gives two more examples: use by employees of their experience and skills honestly acquired in the normal course of their employment; and disclosure of information in the exercise of the right to freedom of expression and information.[270] It provides stronger clarity and legal certainty on what is meant by a manner contrary to honest practices.[271] Adding these explicit examples provides confidence to companies that their data is protected.[272] The

[263] See art. 39(2) TRIPS.
[264] See art. 20.73(b) USMCA.
[265] See art. 20.73(b) USMCA jo. art. 39(2) TRIPS.
[266] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p. 11.
[267] See footnote 10 TRIPS.
[268] See art. 14.36(3) EPA jo. art. 39(2) TRIPS.
[269] Addendum to Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p 6.
[270] See art. 14.36(4) EPA.
[271] Addendum to Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p 6.
[272] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p. 11.

US again tried to make sure that the provisions of the USMCA reflect a protection similar to US law.[273]

	TRIPS	USMCA	CETA	EPA	CPTPP
Scope of protection	The information needs to have commercial value	The information needs to have actual or potential commercial value	-	-	-
Conduct contrary to honest commercial practices	Provides a few examples under footnote 10	-	-	Adds 3 examples to the examples of the TRIPS	-
Not conduct contrary to honest commercial practices	-	Provides 3 examples	-	Provides 5 examples	-

Table 5 Comparison of trade secrets in TRIPS and the Mega-Regionals

3.7.2 Undisclosed test or other data

The TRIPS demands, when requiring market approval, protection of undisclosed data or other data of pharmaceutical or agricultural chemical products which utilize new chemical entities, from unfair commercial use and disclosure. Provided that the data required considerable effort to generate when gaining market approval.[274] TRIPS does not explicitly demand how the protection should occur, or for how long, or what unfair commercial use is. The TRIPS leaves policy space and Members are more than happy to make use of it in their national laws or FTAs. In practice, Members use this space to provide data exclusivity for specific agricultural and pharmaceutical categories when getting market approval. This prevents others from using the data of the original market approval applicant for gaining market approval.[275] The same practice is seen in the Mega-Regionals as detailed below. The policy space given varies between the agreements and the categories.

In the USMCA, it is agreed to provide data exclusivity for granting marketing approval for new agricultural chemical products that contain a chemical entity for at least 10 years from the date of marketing approval.[276] And for new pharmaceutical products for at least 5 years from the date of marketing approval.[277] Only data concerning the safety and efficacy of the product is being

[273] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative, *Trade Agreement With Mexico and potentially Canada*, 2018, p. 11.
[274] See art. 39(3) TRIPS, and Handler & Mercurio 2015, p. 349.
[275] Handler & Mercurio 2015, p. 349.
[276] See art. 20.45 USMCA, and US Government 2019.
[277] See art. 20.45 USMCA.

protected, and the protection is against same and similar products.[278] In addition to the 5-year data exclusivity of new pharmaceutical products, the USMCA also demands data exclusivity of at least 3 years for ''new clinical information''.[279] Thus, additionally enhancing the period of protection.[280] In the USMCA, a new pharmaceutical product does not contain a chemical entity that has been previously approved in that Party.[281] The USMCA also provides a minimum data exclusivity of 5 years to new pharmaceutical products that do contain a chemical entity not previously approved.[282] Moreover, the USMCA provides data exclusivity for new biologics, such as vaccines, for at least 10 years.[283] In the USMCA, biologics are new pharmaceutical products that are or contain a biologic. This all requires no changes to US law, however Mexico and Canada will need to come closer in alignment with current US law.[284] Lastly, the mentioned periods of data exclusivity cannot be altered in the event that there is also patent protection which terminates on an earlier date.[285]

The Parties of the CETA agreed to provide data exclusivity for the marketing approval of pharmaceutical products that utilise new chemical entities, but only if the origination of the data involved a considerable effort.[286] The minimum term of protection is 8 years, and is only for data concerning the safety and efficacy of the product.[287] An exception is when the disclosure is necessary to protect the public, or when steps are taken to ensure that the data is protected against unfair commercial use.[288] The Parties also agreed to provide data exclusivity for a test or study report relating to plant protection products to obtain market approval. This period of data exclusivity shall be at least 10 years.[289]

Furthermore, in the EPA the Parties agreed to provide data exclusivity for granting marketing approval for pharmaceutical products which utilise new active pharmaceutical ingredients. This protection may be no less than 6 years.[290] The Parties also grant data exclusivity for the marketing approval of agricultural chemical products which utilise new chemical entities, but only if developing the data involved a considerable effort. The protection shall be for at least 10 years.[291]

[278] See art. 20.45 USMCA.
[279] See art. 20.48(2)(a), and US Government 2019.
[280] El Said 2010, and Jorge July 2019, p. 3.
[281] See art. 20.50 USMCA.
[282] See art. 20.48(2)(b) USMCA.
[283] See art. 20.49(1) and (2) USMCA, and see US Government 2019.
[284] US Government 2019.
[285] See art. 20.52 USMCA.
[286] See art. 20.29(1) CETA.
[287] See art. 20.29 CETA, and Canadian Government 2017.
[288] See art. 20.29(1) CETA.
[289] See art. 20.30 CETA.
[290] See art. 14.37(1) EPA.
[291] See art. 14.37(2) EPA.

Next, the Parties of the CPTPP agreed to provide data exclusivity for granting marketing approval for new agricultural chemical products that contain a chemical entity not previously approved. The protection is for at least 10 years from the date of marketing approval. Only data concerning the safety and efficacy of the product is being protected. The protection is only against same and similar products.[292] Moreover, the Parties may treat ''contain'' as meaning ''utilise'', and the Parties may treat ''utilise'' as requiring the new chemical entity to be primarily responsible for the product's intended effect.[293] Lastly, the data exclusivity cannot be altered in the event that there is also patent protection which terminates on an earlier date.[294]

Before a drug can be placed on the market for sale, the manufacturer must get market approval at a national drug regulatory authority to ensure that the drug is safe, effective, and of sufficient quality. The authority does not undertake clinical trials or test the drugs, it relies on the clinical trials and other data submitted by the applicant. Normally, when another later applicant (generic manufacturer) seeks registration of the same or a similar drug, it can use the same trials and data, and only needs to prove that the drug is equivalent to the previously approved drug. The generic manufacturer thus does not need to put in the time and money to do the same research beforehand. This process facilitates the introduction of generic drugs to the market at a reduced price.[295] However, with data exclusivity, this process is being set on hold until the term of protection has passed. Or, the generic manufacturer must do its own trials and research, but the effect thereof is that the generic drugs cannot be put on the market at a reduced rate.[296] Another solution would be getting permission of the original applicant to use the same trials and data. However, the original applicant is not likely to sell the trial data cheaply. Data exclusivities therefore delay and prevent generic competition, which increases the final costs of the marketed product and reduces access to medicines.[297]

Of important notice, the period of data exclusivity is independent from the patent process and applies regardless of whether the drug is patented.[298] Even though there is no patent, data exclusivity has the same effect. There is an artificial barrier to enter the marketplace and there are

[292] See art. 18.47 CPTPP.
[293] See footnote 44 of the CPTPP.
[294] See art. 18.54 CPTPP.
[295] Handler & Mercurio 2015, p. 348.
[296] Handler & Mercurio 2015, p. 348.
[297] Jorge May 2019, p. 5, and Yu 2019.
[298] Handler & Mercurio 2015, p. 352.

higher prices for consumers.[299] Data exclusivity can thus act as *de facto patent* as it ensures a minimum period of monopoly for pharmaceutical companies, preventing competition.[300]

Next, as mentioned in the beginning of this paragraph, the TRIPS requires data protection only when getting the data involved considerable effort. Some of the Mega-Regionals eliminate the last mentioned requirement of the TRIPS, which broadens the scope for pharmaceuticals and agricultural companies immensely as all data is being protected. Also, the USMCA and the CPTPP do not require a product to contain a *new* chemical entity. A chemical entity *not previously approved,* is sufficient. The effect is to allow a first applicant of a pharmaceutical or agricultural product, to obtain protection, even in the case of old and well-known products.[301] Also, both agreements only protect data concerning the safety and efficiency of a product and this protection is only against same and similar products. This broadens the scope of protection majorly and can seriously hamper access to medicines.[302] By including data exclusivity for similar products, an entire therapeutic may be excluded for marketing approval.[303]

In the case of biologics, a longer monopoly might have even more economical and health consequences. Biologics sometimes are the only treatment option for rare but life-threatening diseases, such as Pompe's disease and different forms of cancer.[304] Biologics are also the most expensive drug in the market.[305] Like generic drugs, generic biologics, so-called biosimilars, are designed to be interchangeable with the biologics they seek to replace. But, unlike generic drugs, biosimilars are often only similar, not identical, to their competition. Therefore, biosimilars require lengthy and expensive trials of their own to make sure they are effective and safe.[306] Any delay of market entry of biosimilars comes with high costs.[307] The lifesaving power of biologics and biosimilars will be limited if costs make them inaccessible to the people who need them.[308]

The US opted for a data protection regime that reflects US standards and so harmonizes the system between Canada, Mexico and themselves.[309] The US stated to be a proponent for measures which

[299] Handler & Mercurio 2015, p. 353.
[300] Handler & Mercurio 2015, p. 352.
[301] Handler & Mercurio 2015, p. 352.
[302] Jorge May 2019, p. 5.
[303] Jorge July 2019, p. 2-3.
[304] Jorge July 2019, p. 3, and Gleeson 2015.
[305] Jorge July 2019, p. 3.
[306] Hayden 2017.
[307] Labonté et al. 2019, Canadian Government 2018, and Velásquez 2018.
[308] Hayden 2017.
[309] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 21.

facilitate market entry for generic drugs and biosimilars.[310] Even president Trump has repeatedly promised that his administration would lower US pharmaceutical prices.[311] However, considering the findings in the USMCA, the US delays the market entry of generic drugs and biosimilars granting broader and longer monopolies for pharmaceuticals and biologics.[312] For biologics, data exclusivity is not necessary, given that the original biologic keeps most of the market price and market share, even after patent expiration.[313] The real objective of including such a long period of exclusivity for biologics in the USMCA, is to lock the US market. FTAs are namely considered international law, which supersedes national law.[314]

The USMCA is the only Mega-Regional that provides data exclusivity for biologics.[315] The TPP previously provided data protection for biologics as well.[316] Under the CPTPP, this provision is suspended.[317] According to the Canadian government it is suspended to make the CPTPP more aligned with the international standards of the TRIPS.[318] But, the CPTPP did keep the data exclusivity for new agricultural chemical products.[319] For the CPTPP, the suspension is positive. As mentioned in paragraph 3.6, higher patent and data exclusivity protection have different outcomes for high- and low income countries. Concluding data exclusivities in FTAs ties the hands of the national governments.[320] This limits the public health policy space of the Parties.[321]

Last of all, while the provisions unambiguously state a minimum term of data protection, some Parties may face longer monopolies. Companies launch their products in the most profitable markets first, such as the US or EU. It may take years before companies start to request market approval in other markets, lengthening the monopoly period.[322] One solution hereto would be a grace period, requiring applicants to register in another party within e.g. a year, in order to benefit from the exclusivity protection.[323]

[310] Advisory Committee Report of The Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-13) to the President, the Congress, and the US Trade Representative*, Trade Agreement With Mexico and potentially Canada*, 2018, p. 21.
[311] Jorge May 2019, p. 1.
[312] Jorge May 2019, p.2 and p. 2.
[313] Jorge July 2019, p. 3.
[314] Jorge July 2019, p. 3.
[315] Jorge July 2019, p. 2.
[316] See ex art. 18.51 TPP, art. 2 jo. Annex(7)(f) CPTPP, and Canadian Government 2018.
[317] See art. 2 jo. Annex(7)(f) CPTPP, and Labonté et al. 2019.
[318] Canadian Government 2018.
[319] Ivus & Paczos 2019, p. 6, and Yu 2019, p. 26.
[320] Jorge May 2019, p. 2.
[321] Labonté et al. 2019.
[322] Jorge July 2019, p.3
[323] Jorge May 2019, p. 3.

	TRIPS	USMCA	CETA	EPA	CPTPP
Minimum term of protection for data exclusivity for granting marketing approval for					
Pharmaceutical chemical products which utilize new chemical entities	No term	-	-	-	-
Agricultural chemical products which utilize new chemical entities	No term	-	-	-	-
New pharmaceutical products *(a pharmaceutical product not containing a chemical entity, previously approved in that Party)*	-	Min. of 5 years and additional min. of 3 years for new clinical information	-	-	-
New pharmaceutical products *that utilise new chemical entities*	-	-	Min. of 8 years, if getting the data involved considerable effort	-	-
Pharmaceutical products *which utilise new active pharmaceutical ingredients*	-	-	-	Min. of 6 years	-
New pharmaceutical products *containing a chemical entity, not previously approved*	-	Min. of 5 years	-	-	-
New agricultural *chemical products that contain a chemical entity, not previously approved*	-	Min. of 10 years	-	-	Min. of 10 years
New agricultural *products which utilise new chemical entities*	-	-	-	Min. of 10 years, if getting the data involved considerable effort	-
New biologics	-	10 years	-	-	-
Test or study report relating to plant protection products	-	-	Min. of 10 years	-	-

Table 6 Comparison of undisclosed test or other data in TRIPS and the Mega-Regionals

3.8 General Provisions

Under the section of general IP provisions the USMCA defines some terms. Such as what a performance is, and what a GI is.[324] The CETA defines the term ''pharmaceutical product''.[325] As mentioned before the TRIPS mostly does not provide definitions and gives discretion to its Members hereon.

Moreover, TRIPS-plus is also achieved by requiring Parties to become part to other international treaties, which are not incorporated in TRIPS.[326] In the USMCA and the CPTPP Members are obligated to ratify or accede quite some international agreements.[327] Members of the USMCA need to ratify or accede 11 different international agreements.[328] The Members of the CPTPP have to ratify or accede 9 different international agreements.[329] Amongst both are the Paris Convention and the Berne Convention. In the TRIPS, the Members only need to comply with articles 1 through 12 and 19 of the Paris Convention, and with articles 1 through 21 of the Berne Convention.[330] There is no obligation to ratify or accede the agreements. Different from the USMCA and the CPTPP, in the EPA and the CETA, Members have to make reasonable efforts to ratify, accede or comply, or shall comply with international agreements.[331] In the EPA, there are also 9 other international agreements where the Members only need to comply with the obligations thereof. A reasonable effort to ratify or accede is sufficient and in some cases there is no need to ratify or accede all the agreement. Complying or a reasonable effort to comply with the agreements is sufficient.[332] Amongst the latter agreements are the TRIPS and again the Paris Convention and the Berne Convention. The CETA does not provide these obligations under the general provisions chapter. It does however under the sections of copyright, trademarks, industrial designs and patents. The overall consequence, is that parties, who had not ratified or were not Parties to those agreements, now do have to comply with these agreements, which contain most likely TRIPS-plus provisions and obligations. A complex web of international IP agreements is being created for Members.[333] It does however create global uniform IP standards.

[324] See art. 20.1 USMCA.
[325] See art. 20.6 CETA.
[326] Voon & Mitchell 2009, p. 202.
[327] Ivus & Paczos 2019, p. 6-7.
[328] See art. 20.7 USMCA. + Ivus & Paczos 2019, p. 7.
[329] See art. 18.7 CPTPP+ Ivus & Paczos 2019, p. 6.
[330] See art. 2(1) TRIPS, see art. 9(1) TRIPS, and Ivus & Paczos 2019, p. 6-7.
[331] See art. 14.3(3) EPA, see art. 20.7, art. 20.13, art. 20.24 and art. 20.26 CETA, Ivus & Paczos 2019, p. 6, and Canadian Government 2019.
[332] See art. 14.3(2) EPA.
[333] El Said 2010, p. 178.

The USMCA, EPA and the CPTPP all agreed that a more extensive protection is allowed than is given by the Mega-Regional agreement, as long as it does not contravene with the agreed provisions.[334] It is the same minimum rule as in the TRIPS. This is not TRIPS-plus or TRIPS-minus. However, it must be noted that all Mega-Regionals set higher minimum standards than the TRIPS does, and almost all Mega-Regionals explicitly state that an even higher protection than agreed, is allowed. The tone is set on getting higher and higher protections than is given by the TRIPS.

Lastly, the CPTPP has an exception to the national treatment: with respect to secondary uses of phonograms by means of analog communication and free over-the-air broadcasting, a Party may limit the rights of the performers and producers of another Party to the rights its persons are accorded within the jurisdiction of that other Party.[335] This exception is not provided by the TRIPS agreement, and is a TRIPS-minus provisions as it gives a lesser national treatment protection to those performers and procedures.

[334] See art. 20.5(2) USMCA, see art. 14.1(2) EPA, and see art. 18.5 CPTPP.
[335] See art. 18.8(2) CPTPP.

	TRIPS	USMCA	CETA	EPA	CPTPP
Definitions of	-	Performance and GI	Pharmaceutical product	-	-
Integration international agreements	Comply with art. 1 – 12 and art. 19 of the Paris Convention Comply with art. 1 – 21 of the Berne Convention and the appendix thereto	Ratify or accede: - Patent Cooperation Treaty; - Paris Convention; - Berne Convention; -WCT; -WPPT; -Madrid Protocol; - Budapest Treaty; - UPOV 1991; - Hague Agreement; - Brussels Convention;	Comply with: - art. 2 – 20 of the Berne Convention - art. 1 – 14 WIPO Copyright Treaty - art. 1 – 23 WIPO Performances and Phonograms Treaty -art. 1 – 22 Rome Convention Reasonable efforts to comply with: - art. 1 – 22 Singapore Treaty - art. 1 – 14 and 22 Patent Law Treaty Reasonable efforts to accede: - Madrid Protocol - Hague agreement	Make considerable efforts to ratify or accede: - Patent Law Treaty; - Trademark Law treaty; - Singapore Treaty; - Hague Agreement; Complying with the obligations of: - TRIPS - Paris Convention - Rome Convention - Berne Convention -WIPO copyright Treaty -Budapest Treaty; - UPOV 1991	Ratify or accede: - Patent Cooperation Treaty; - Paris Convention; - Berne Convention; -Madrid Protocol; - Budapest Treaty; -Singapore Treaty; - UPOV 1991; - WCT; - WPPT;
National treatment For performers and producers of phonograms	Full national treatment as in art. 3 TRIPS	-	-	-	(TRIPS-minus) Limited national treatment: may limit the rights of producers and performers of another Party to the rights its persons are accorded within the jurisdiction of that other Party, with regards to secondary uses of phonograms

Table 7 Comparison of general provisions in TRIPS and the Mega-Regionals

Chapter 4: Conclusion

Initially, TRIPS was an attempt to standardize IP protection and enforcement. Over time however, FTAs are rendering the TRIPS obsolete, as the FTAs contain TRIPS-plus provisions. This research investigated to what extent IP liberalization is present in four recent and significant Mega-Regional agreements, compared to TRIPS, and which implications this might have for the TRIPS.

The Mega-Regionals provide TRIP-plus provision to quite some extent. The USMCA and CPTPP also provide TRIPS-minus provisions as they use a tighter scope of the national treatment, which disadvantages performers and producers. Remarkably, a lot of TRIPS-plus provisions were exactly the same or very similar across the Mega-Regionals. Mainly the USMCA and the CPTPP are much alike, with the USMCA providing a few more TRIPS-plus provisions. This is unsurprising as the CPTPP is very similar to its predecessor, the TPP. On the other hand, the TRIPS-plus provisions were sometimes very different because of national interests.

The Mega-Regional agreements brought a strong increase of protection for authors, performers and producers of phonograms. Existing exclusive rights were expanded. The term of protection is considerably increased in the USMCA and the EPA. The average increase is approximately 20 years. The international norm is becoming life of the author plus 70 years, instead of 50, as the countries who are strong exporters of entertainment opt for higher copyright protection. With regards to trademarks, the USMCA and the CPTPP provide the most TRIPS-plus protection. They broadened the scope of trademark protection by allowing signs not to be visually perceptible. Furthermore, they broadened trademark protection to a great extent by prohibiting the use of similar or identical trademarks for goods or services that are related. The CETA and EPA do not provide considerable TRIPS-plus provision under this section. However, they do provide strong protection for GIs. Both give the high level of protection stated in art. 23 TRIPS to more product groups. However, there are some cases when it is not required to protect each other's GIs, especially in CETA as it has more flexibilities integrated. It is noticeable that the national interests of the US and the EU with regards to trademarks and GIs differ. The USMCA and CPTPP focus more on the protection of trademarks, and the CETA and EPA focus more on the protection of GIs. However, all Mega-Regionals refuse GI protection if the GI is identical or likely to cause confusion with a prior existing trademark, and they all refuse a term used in common language to make sure producers can use common names. In respect to industrial designs, not much TRIPS-plus protection is given. The CETA again does not provide much TRIPS-plus provisions, and for once the CPTPP does not either. The USMCA and the EPA do provide some TRIPS-plus protection, such as extending the minimum term of protection with 5 to 10 years, and broadening the scope by protecting designs embodied in part of an article. With regards to trade secrets, there were not many TRIPS-plus provisions. Mainly the USMCA went for a

stronger protection by broadening the protectionist scope of trade secrets and by providing more clarity of the scope. The EPA only provided more clarity of the scope. Moreover, all Mega-Regionals provide TRIPS-plus patent provisions and data exclusivity for pharmaceuticals, consequently hampering access to affordable drugs. Only the CPTPP does not provide data exclusivity for pharmaceuticals. These drug hampering provisions are substantially different. Nevertheless, the effect is the same. Pharmaceuticals get a stronger position as their monopoly position is being lengthened. Additionally, the Parties are all obligated to follow certain international IP treaties. When enough countries are following the same international treaties, these treaties are becoming the international norm and create global uniform IP standards. Furthermore, under many IP-sections the term of protection was increased, especially by the USMCA. The Parties also appreciated the open policy space under the TRIPS: often the scope of an IPR was tightened by providing definitions and guidelines, or limited exceptions. And the scope often got broadened by providing a whole new protection, e.g. new uses of patents or data exclusivity.

Overall, the Mega-Regionals provide IP protection more extensive than TRIPS, rendering the TRIPS increasingly irrelevant. The analysed TRIPS-plus provisions are on the one hand very similar, and on the other hand very different from each other. The similar or even identical provisions stem from the common interests of the IP exporting countries: increasing IP liberalization. The remaining Parties do not necessarily agree with these interest. But, they do want more and easier access to the strong markets of the exporting countries. Thus, they often agree with these interests with a trade-off. The similar provisions are likely becoming the new international norm because of the negotiating power of the IP exporting countries and the trend of concluding FTAs. The CPTPP showed that much influence is left behind when a predominating negotiating partner leaves an FTA after negotiations and before ratification. The USMCA showed that newly concluded FTAs are often the precedents for future FTAs negotiations. It is therefore quite easy for IP exporting countries to liberalize IP protection. Even when a Party does not want to agree with a certain provision in one FTA, it might do so in another, as seen with Canada and the copyright term of protection. In addition, the MFN Treatment increases IP standards globally through the Mega-Regionals' TRIPS-plus provisions. In total, fifteen countries need to apply higher IP standards than the TRIPS, across all WTO Members. Thus, the similar TRIPS-plus provisions combined with the MFN Treatment extend the TRIPS' framework, rendering TRIPS increasingly irrelevant. Revising and updating the contents of TRIPS therefore, seems urgent. However, this is unlikely to happen, as negotiations on TRIPS remain stagnant.

FTAs usually benefit the more developed countries that export IP. In some cases, the benefit is strictly economical. For example, longer patent terms for technological inventions of at home

devices. Increasing IP protection in these cases is justified as it encourages innovation. Nevertheless, when the benefit encompasses other domains such as education and medicine, extensive IP coverage potentially has detrimental effects that should raise humane and ethical concerns. Wealthy and IP exporting Parties should keep these ethical aspects in mind, e.g. by actually adhering the intentions stated in the Doha Declaration. For developing and IP importing countries, a sensible strategy would be to collectively state limits to IP provisions they are willing to provide. Continental bodies like the African Union, for example, could play a leading role in challenging otherwise predominating negotiation partners.

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