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THE NAFTA NEGOTIATIONS – AND CANADA'S PRIORITY WATCH LIST DESIGNATION: IT'S ALL ABOUT THE LEVERAGE*

Hugh Stephens

SUMMARY

Negotiating tactics can often appear harsh, but when the United States Trade Representative (USTR) placed Canada on its Priority Watch List (PWL), the move went beyond the standard give-and-take of renegotiating the North American Free Trade Agreement.

Canada – a nation that believes in the rule of law – joins China, Algeria, Kuwait and Venezuela, to name just a few, on the PWL list for its alleged “worst” record in intellectual property standards. Granted, Canada has room for improvement in this area, but for the USTR's annual Special 301 report to place it on the PWL is hardly credible. It is no coincidence that Canada, the only G7 country—and virtually the only western country—to make either the PWL and the USTR's lesser Watch List (WL), is also in the midst of renegotiating NAFTA with the United States and Mexico.

The 301 process has always been political to some degree, but using it as a negotiating hammer with which to hit Canada over the head risks devaluing its importance in identifying genuine shortcomings in the IP realm that affect U.S. and Canadian businesses.

The report is on target in identifying several IP areas requiring more rigorous attention from Canada, including counterfeit goods in transit and copyright issues. However, the U.S. is also unhappy with changes to Canadian pharmaceutical patent regulations and protectionist matters arising from the Canada-EU Trade Agreement that have to do with European geographical indications. Still, although Canada is not alone in the latter area, no European country is on the WL.

Ironically, the U.S. Chamber of Commerce's own ranking of 50 world economies on their IP standards shows that Canada improved in four out of

* This research was financially supported by the Government of Canada via a partnership with Western Economic Diversification.

six categories, coming in 18th among the 50. Venezuela, with whom Canada shares the notoriety of being on the PWL, was 50th out of 50.

Clearly, Canada's new ranking does not reflect reality and is a blatant negotiating tool, but the USTR appears less interested in the collateral damage it may cause as long as the U.S. can get the concessions it wants at the table. This is a game that two can play, however, and Canada's turn at hardball may come if the U.S. decides one day that it wants to rejoin the latest incarnation of the Trans-Pacific Partnership, from which it so hastily withdrew when Donald Trump was elected president.

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NÉGOCIATIONS DE L'ALENA ET AJOUT DU CANADA À LA LISTE DE SURVEILLANCE PRIORITAIRE : TOUT EST QUESTION D'INFLUENCE*

Hugh Stephens

RÉSUMÉ

Les tactiques de négociation peuvent parfois paraître très dures, mais quand le représentant américain au Commerce a inscrit le Canada sur la liste de surveillance prioritaire, la mesure est allée bien au-delà du jeu des concessions habituelles dans une renégociation comme celle qui touche l'Accord de libre-échange nord-américain.

Le Canada – un pays qui croit à l'État de droit – rejoint ainsi les rangs de la Chine, de l'Algérie, du Koweït et du Venezuela, pour n'en nommer que quelques-uns, sur la liste de surveillance prioritaire en raison d'un soi-disant « pire bilan » quant aux normes de propriété intellectuelle. Certes, il y a de la place pour l'amélioration dans ce domaine au Canada, mais il n'est guère crédible d'inscrire le pays sur la liste de surveillance comme le fait le rapport annuel spécial 301 du représentant américain au Commerce. Ce n'est pas une coïncidence que le Canada, le seul pays du G7 – et virtuellement le seul pays occidental –, apparaisse sur la liste de surveillance prioritaire ou même la liste de surveillance inférieure du représentant américain, alors qu'il est en plein processus de renégociation de l'ALENA avec les États-Unis et le Mexique.

Jusqu'à un certain degré, le processus lié aux « rapports spéciaux 301 » a toujours comporté un aspect politique, mais s'en servir comme d'un marteau dans la négociation pour tenter d'intimider le Canada risque de diminuer son importance par la suite lors de l'identification de véritables problèmes en propriété intellectuelle à même d'affecter les entreprises américaines et canadiennes.

Le rapport identifie correctement plusieurs points en propriété intellectuelle requérant une attention plus rigoureuse du Canada, notamment le transit de produits de contrefaçon et les questions de droits d'auteur. Par contre,

* Cette recherche a été soutenue financièrement en partie par le gouvernement du Canada via Diversification de l'économie de l'Ouest Canada.

les États-Unis se montrent également insatisfaits des changements aux règlements sur les brevets pharmaceutiques et des aspects protectionnistes découlant de l'Accord commercial entre le Canada et l'Union européenne en lien avec l'indication géographique européenne. Bien que le Canada ne soit pas seul concerné à ce sujet, aucun pays européen ne figure sur la liste de surveillance.

Ironiquement, dans son classement de 50 économies mondiales en fonction de leurs normes de propriété intellectuelle, la Chambre de commerce des États-Unis estime que le Canada s'est amélioré dans quatre des six catégories et se classe 18^e sur 50. Le Venezuela, avec lequel le Canada partage la mauvaise réputation d'être inscrit sur la liste de surveillance prioritaire, figure au tout dernier rang de ce classement.

Il apparaît clair que le nouveau classement du Canada ne reflète pas la réalité et qu'il ne s'agit que d'un outil de négociation. Le représentant américain au Commerce semble moins intéressé par les dommages collatéraux que cela pourrait causer que par les concessions qu'il entend obtenir à la table de négociation. C'est cependant un jeu qui se joue à deux, et ce pourrait être au tour du Canada de jouer dur si les États-Unis décidaient un jour de vouloir joindre la dernière mouture du Partenariat transpacifique, duquel ils se sont si rapidement retirés après l'élection de Donald Trump à la présidence.

If you are a trade negotiator, an important objective is to get maximum leverage (a/k/a negotiating “coinage”) in order to extract concessions from the other side or as a trade-off against concessions that you don’t want to make. The NAFTA negotiations are no different, even though at one moment they seem to be close to completion, and the next to be going backwards as new demands are piled on or seemingly settled issues resurface.

One tactic that U.S. Trade Representative Robert Lighthizer uses to increase pressure is to add new demands and threats as the end game nears, in order to gain a negotiating advantage and keep the other side off balance. As an example, the U.S. announced that threatened special steel and aluminum tariffs – ostensibly applied for national security reasons because imports of foreign steel are alleged to be undermining U.S. national security – will be applied to both Canada and Mexico if NAFTA is not concluded soon. No matter that Canada is a NATO and NORAD defence partner and has been part of the North American defence production base for decades, and that the announced tariffs are unrelated to NAFTA; the tariffs were still announced, and then suspended for 30 days while the NAFTA negotiations continued. With the negotiations ongoing, the tariff exemption for Canada and Mexico has been extended for another 30 days. These “emergency” tariffs have nothing to do with NAFTA, but by linking them to the negotiations the U.S. has just put a couple of more bullets into its chamber. It’s a smart negotiating move. So why not throw some other issues into the NAFTA mix as well?

It was thus no coincidence that on April 27, in its annual Special 301 report on global intellectual property standards, the USTR downgraded Canada from “bad” to “worst”, putting it on the Priority Watch List (PWL) along with countries such as China, Indonesia, Algeria, Russia, Venezuela, India, Kuwait, Ukraine, Colombia, Argentina and Chile. (For a more detailed description of the annual 301 process, see this [post](#) that I wrote a couple of years ago). Canada, the only G7 country—and virtually the only western country—to make either the PWL and the USTR’s lesser Watch List (WL), is also in the midst of renegotiating NAFTA with the United States and Mexico. While Canada’s IP record has blemishes and could be improved, does any reasonable and fair-minded person actually believe that IP protection and enforcement in Canada is as bad as in the other 11 countries on the PWL and worse than in Pakistan or Egypt (some of the countries on the lesser-transgressor WL?) To claim that a rule-of-law country like Canada, with a long and proven track record in IP legislation and regulation, has a worse IP regime than the countries named above, or than any other developed country, is clearly a case of classic over-reach and exaggeration, done primarily if not exclusively for NAFTA negotiating purposes.

Even though the 301 process has always had a degree of politicization, in so overtly using 301 to add another card to its trade-negotiating hand, the USTR risks undermining a useful exercise in identifying IP shortcomings affecting both U.S. and domestic businesses and creators. To this observer, putting Canada on the PWL at this time strains credulity and is unhelpful in terms of moving IP issues, especially copyright, in the right direction.

Of course copyright is not the only IP itch that the USTR wants scratched. The report criticizes Canada (rightly, in my view) for a failure to take more concerted action against counterfeit goods in transit. In the patent area, the U.S. pharmaceutical lobby is not happy with proposed changes to patent term restoration or to the Patent Medicine Prices Review Board. But Big Pharma is never happy with countries (like Canada) that have national

health plans that lead them to establish price control mechanisms. The USTR is also not happy with [Canada's agreement to protect](#) a number of European geographical indications (GIs) as a result of the Canada-EU Trade Agreement (CETA). U.S. agriculture doesn't like the GI system which Europe has perfected, because of its long history with these kinds of marks (think Champagne, feta cheese and Parma ham). However, is any European country on the Watch List as a result of its attachment to GIs? No.

Finally, copyright in Canada comes in for examination in the USTR report. Again, rightly in my view, concern is expressed about the overly broad educational exception that was introduced in 2012 that affects both U.S. and Canadian publishers. Indeed, this is one of the issues currently under review as part of the *Copyright Modernization Act* update. The parliamentary committee responsible for the review (the Standing Committee on Science, Industry and Technology) has begun hearings and has just completed a cross-country road show to hear from witnesses. The committee will hear from those who argue that the educational exception should be narrowed because of the economic damage it is causing to copyright holders. The committee will also hear from anti-copyright groups who want to weaken the regime by further broadening existing exemptions and by rolling back some of the protective measures introduced five years ago, such as criminalizing the hacking of technological protection measures.

The issues facing U.S. and Canadian copyright holders are often the same, although not always. Thus it is not surprising to find many of the concerns voiced by Canadian stakeholders such as the [Writers' Union of Canada](#), the [Association of Canadian Publishers](#) and [l'Union des écrivaines et des écrivains québécois \(UNEQ\)](#) echoed in submissions to the USTR by U.S. copyright stakeholders, such as the International Intellectual Property Alliance (IIPA), a copyright industry group based in Washington. The education fair-dealing exception is a legitimate issue for U.S. copyright holders to raise and to be included in any external evaluation of Canada's copyright regime. But do these issues merit lumping Canada in with Algeria, Ukraine and Venezuela, among others, on the PWL? I think not, unless trade leverage is the name of the game.

U.S. organizations make recommendations to the USTR regarding the designation they would like to see applied to various countries on the Special 301 lists. It is worth noting that the IIPA recommended that Canada stay on the WL, and not be placed on the higher-profile PWL. Similarly, the Global Innovation Policy Center (GIPC) of the U.S. Chamber of Commerce has just published its own [global rankings](#) on the intellectual property performance of 50 world economies, comparing them across a range of indicators from copyright to patent protection to trade secrets, and so on, as well as measuring progress year-over-year.

According to the Chamber's study, Canada improved in four of the six categories measured and scored the same in the other two. Canada ranked 18/50 – not great and it should do better, but let's look at the 11 other countries that the USTR grouped with Canada on the PWL. How do they stack up? China is the closest at 25/50. Others range from Colombia at no. 27 to Venezuela, dead last at 50/50. And as for Pakistan and Egypt – countries that the USTR has placed in the lesser transgressor category – according to the U.S. Chamber of Commerce, they ranked 47th and 48th respectively. Recall that Canada, a “worse transgressor” according to the USTR's 301 report, was ranked no. 18.

The U.S. Chamber does take Canada to task for leading the charge on suspending a number of IP provisions in the newly negotiated Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the regional trade agreement originally led by the U.S. but from which it withdrew when Donald Trump assumed office. Canada (and the other 11 countries) had agreed to these IP provisions in the original TPP (when the U.S. was a member) but suspended them after the U.S. withdrew. Why? Was it because Canada wanted to undermine IP standards in the region, or because any good negotiator will reserve some of the best cards for the finale?

If the U.S. re-evaluates its rash decision to leave the TPP (a possibility raised recently in Trump's [musings](#)), it will be useful for Canadian negotiators to have something in hand that the U.S. wants. In fact, if the U.S. has been skilful in adding to its negotiating leverage by throwing steel and aluminum into the NAFTA mix, Canada and Mexico could also have a [card to play](#) if and when the U.S. asks to get back into the TPP, since all current members have to agree on potential new entrants.

The NAFTA renegotiations are now entering what may be their final phase. (If agreement is not reached by the end of this week, an alternative may be a declaration of agreement in principle, with the details to be worked out after the summer Mexican presidential election and the U.S. mid-terms in November, and legislation not submitted to Congress until 2019). This is a critical time and the annual release of the Section 301 Intellectual Property Report has provided the U.S. with another opportunity to lean on Canada through designating it a "very bad actor" under the 301 process. Objectively, putting Canada in this category is hard to square with reality, but as with love and war, when it comes to negotiating trade agreements, the end is often deemed to justify the means.

About the Author

Hugh Stephens has more than 35 years of government and business experience in the Asia-Pacific region. Living in Victoria, BC, Canada, he is an Executive Fellow with The School of Public Policy, University of Calgary, and Distinguished Fellow at the Asia Pacific Foundation of Canada. He is also Vice Chair of the Canadian National Committee on Pacific Economic Cooperation (PECC) and a Fellow at the Canadian Global Affairs Institute. He previously served for 10 years as SVP (Public Policy) for Asia-Pacific for Time Warner, based in Hong Kong, after a career of 30 years in the Canadian Foreign Service. While with the Department of Foreign Affairs and International Trade, Mr. Stephens served as Assistant Deputy Minister for Policy and Communications as well as in a number of other positions in at Headquarters in Ottawa, and at six Canadian missions abroad (Beirut, Hong Kong, Beijing, Islamabad, Seoul), including as Canadian Representative in Taiwan as Executive Director of the Canadian Trade Office in Taipei. He has written and commented extensively on Asia Pacific issues and Canada's role in Asia.

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