

# Capital Movements, Digital Trade, and Intellectual Property

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## 1 Introduction

The purpose of this chapter is to analyse key features of the European Union (EU)-United Kingdom (UK) Trade and Cooperation Agreement (TCA) relating to capital movements, digital trade, and intellectual property rights (IPRs). It first identifies the relevant legal provisions of the TCA, mapping their structure, to highlight the minimum standard of protection they afford. It also examines the operationalization of selected applicable provisions, taking into account the social, political, and economic realities they are situated in, including limits and opportunities.

As such, the chapter is structured as follows. Section 2 examines the TCA provisions on capital movements, first mapping the legal architecture applicable to the free flow of capital, and then identifying two key principles underlying the objectives of such provisions—regulatory autonomy and non-discrimination. Section 3 is concerned with provisions on digital trade and their resilience in view of rapidly advancing digital future(s). It questions whether the many carve-outs in the TCA are conducive to regulation by exception as a rule, while also considering data flows and personal data. Section 4 focuses on IPRs, discussing first what constitutes the minimum standard for IP protection, the not uncontroversial compromise reached on exhaustion of IPRs, and the application of national treatment as an underlying principle. This section subsequently attempts to explain the operationalization of these IPR-related principles by examining three distinct rights conferred by intellectual property protection: copyright, trademarks, and patents. The final part of this section is devoted to selected IPR provisions under the TCA dealing with

overarching rules for cooperation and their significance within the broader context of EU-UK relations. It also pays attention to the inclusion of voluntary stakeholder initiatives as an additional governance tool, while also considering geographical indications and their continuous shifting regime. Section 5 briefly concludes.

## 2 Capital Movements

### 2.1 Mapping the Legal Architecture of Capital Movements under the TCA

There are five key provisions related to capital movements in Part Two, Heading One, Title IV, Articles 213–17 TCA. The underlying rationale for protection is the free movement of capital and payments, as established under Article 213 TCA.<sup>1</sup> This is a distinct change from the status quo ante in the EU internal market, where the UK enjoyed a significantly higher level of economic integration, with its accompanying freedoms. Under the new regime, payments and transfers related to transactions on current accounts are allowed, under Article 214 TCA, on the proviso that their freely convertible currency complies with the articles of agreement of the International Monetary Fund (IMF),<sup>2</sup> a source of international law dating back to the Bretton Woods Agreement.<sup>3</sup> Reference to international provisions predating the constitution of the EU might lead to the conclusion, at first sight, that a rather shallow integration between the UK and the EU is primarily sought, at least with reference to capital movements. On closer examination, however, it becomes clear that an additional, key objective of the agreed provisions is the liberalization of investment.<sup>4</sup> Moreover, the overarching importance of this objective is further emphasized by the obligation to consult each other in a designated forum, the Trade Specialised Committee on Services, Investment and Digital Trade, with the aim of facilitating capital movements to promote trade and investment.<sup>5</sup> Overall, provisions on capital movements under the TCA are guided by non-discrimination and regulatory

<sup>1</sup> Provided it relates to liberalized transactions under the TCA; see TCA, art 213.

<sup>2</sup> International Monetary Fund, Articles of Agreement, 27 December 1947, UNTS 2, 39.

<sup>3</sup> *ibid.*

<sup>4</sup> TCA, art 215(1).

<sup>5</sup> *ibid* art 215(2).

autonomy imperatives—two of the key principles under the rules of the World Trade Organization (WTO). In doing so, the TCA appears to reject an ‘EU law minus’<sup>6</sup> approach based on mutual recognition, clearly opting instead to favour a ‘WTO plus’ one, and resulting in a loose but in principle sufficient set of rules that ensure international commitments related to trade in services are met.

## 2.2 Key Features: Regulatory Autonomy and Non-discrimination

The rights and obligations derived from Articles 213 to 215 TCA are not intended to encumber the parties’ regulatory autonomy as it relates to a number of key features in capital movement, such as bankruptcy, insolvency, or the protection of the rights of creditors;<sup>7</sup> securities, futures, and options;<sup>8</sup> financial reporting;<sup>9</sup> criminal or penal offences;<sup>10</sup> compliance with orders or judgments in judicial or administrative proceedings;<sup>11</sup> and social security, public retirement, and compulsory savings schemes.<sup>12</sup> Freedom of capital movements, as agreed under the TCA, is also underpinned by the non-discrimination principle,<sup>13</sup> stating in clear terms that the exercise of regulatory autonomy shall not constitute a disguised barrier to this freedom.<sup>14</sup>

In addition, the legal basis for temporary safeguard measures is provided in Article 217 TCA, according to which the EU retains the ability to adopt temporary measures for no longer than six months,<sup>15</sup> and to the extent that they are strictly necessary,<sup>16</sup> clearly signalling that the legal threshold is more stringent for exceptional circumstances. Provisions dealing with restrictions in case of balance of payments and external financial difficulties are specified in Article 218 TCA.

<sup>6</sup> Catherine Barnard and Emilija Leinarte, ‘Movement of Goods under the TCA’ (2022) 13 *Global Policy* 105.

<sup>7</sup> TCA, art 216(1)(a).

<sup>8</sup> *ibid* art 216(1)(b).

<sup>9</sup> *ibid* art 216(1)(c).

<sup>10</sup> *ibid* art 216(1)(d).

<sup>11</sup> *ibid* art 216(1)(e).

<sup>12</sup> *ibid* art 216(1)(f).

<sup>13</sup> Among others see Nicholas DiMascio and Joost Pauwelyn, ‘Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102(1) *The American Journal of International Law* 48; Nicolas Diebold, ‘Standards of Non-Discrimination in International Economic Law’ (2011) 60 *International and Comparative Law Quarterly* 831.

<sup>14</sup> TCA, art 216(2).

<sup>15</sup> *ibid* art 217(1).

<sup>16</sup> *ibid* art 217(2).

### 3 Digital Trade

Title III, Chapter I of the TCA is dedicated to digital trade. This area has received considerable scholarly attention in recent years, evidencing the significance of its increasing importance for international trade.<sup>17</sup> The TCA is no exception. Here, the choice of shallow economic integration is once again evidenced by the rather sparse number of provisions—Articles 196 to 212—addressing an area of increasing strategic geopolitical and socio-economic relevance.

#### 3.1 Designing an Effective Regulatory Framework for Digital Futures: Protection by Exception?

Under Article 196, there are three main objectives connected to digital trade: the facilitation of digital trade, the mitigation of unjustified trade barriers originating in electronic means, and the creation of an online environment that is open, secure, and trustworthy for businesses and consumers. These three purposes, while seemingly disparate, align well with similar considerations seen in other titles of the TCA. In particular, it makes explicit reference to the importance of avoiding digital non-tariff barriers, while being attentive to online safety and the trustworthiness of systems. The latter two are a relative novelty in free trade agreements, and a particularly welcome inclusion in view of rapid developments in generative artificial intelligence (AI).<sup>18</sup>

A caveat is found in the scope of application under Article 197, whereby audio-visual services are excluded. This carve-out is not surprising given the considerable cultural and economic importance of this sector, as well as the litigation legacy that preceded the TCA—even if primarily under WTO rules.<sup>19</sup> As with the previous section, a dedicated provision on the right to regulate ensures

<sup>17</sup> See eg Elaine Fahey, *The EU as a Global Digital Actor* (Hart Publishing 2022); Joshua P Meltzer, 'Governing Digital Trade' (2019) 18(S1) World Trade Review 23; Mira Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51 UC Davis Law Review 65.

<sup>18</sup> For example, issues of trustworthiness are frequently debated in the context of autonomous systems, like uncrewed terrestrial and aerial vehicles, less so within the context of digital trade. See eg Georg Borges, 'A Legal Framework for Autonomous Systems' in Georg Borges and Christoph Sorge (eds), *Law and Technology in a Global Digital Society* (Springer 2022) 3–26.

<sup>19</sup> See WTO Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (adopted 19 January 2010) WT/DS363/AB/R.

that both parties prioritize the adoption of measures as deemed appropriate to achieve legitimate public policy objectives, and provides a non-exhaustive list: the protection of public health, social services, public education, privacy and data protection, and the promotion and protection of cultural diversity. While it is not surprising to see exceptions agreed on public health, the remaining grounds are not features usually encountered in free trade agreements to date—although there is evidence of an increasing preference to include such considerations in the latest generation of free trade agreements entered into by the EU, in particular.<sup>20</sup>

### 3.2 On Data Flows and Personal Data Protection

Special attention is paid to data flows and personal data protection in Articles 201 and 202 TCA, respectively.<sup>21</sup> Here, the emphasis is on ensuring the free flow of data across borders and mitigating any arising future incompatibilities.<sup>22</sup> It is notable that the TCA imposes on the parties a notification duty in case of regulatory modifications to the existing corresponding regimes for the protection of personal data and privacy, a provision with potential human rights implications, too.

The remainder of the title addresses specific provisions as they relate to customs duties on electronic transmissions (or lack thereof as they are considered services),<sup>23</sup> the no-prior authorization requirement—including measures having an equivalent effect,<sup>24</sup> electronic contract formation,<sup>25</sup> electronic authentication and electronic trust services,<sup>26</sup> transfer of or access to source code,<sup>27</sup> online consumer trust,<sup>28</sup> unsolicited direct marketing

<sup>20</sup> For example, the EU approach to address tensions between cultural diversity and trade has evolved in recent years. See Lilian Richieri Hanania, 'Trade, Culture and the European Union Cultural Exception' (2019) 25(5) *International Journal of Cultural Policy* 568. For a discussion on data privacy and free trade agreements see Svetlana Yakovleva and Kristina Irion, 'Pitching Trade against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade' (2020) 10(3) *International Data Privacy Law* 201.

<sup>21</sup> See also Edoardo Celeste, 'Data Protection' in Federico Fabbrini, *The Law & Politics of Brexit*, Vol. III (OUP 2021) 197–216.

<sup>22</sup> For a detailed discussion on EU data protection after 2020 see Anastasia Choromidou, 'EU Data Protection under the TCA: The UK Adequacy Decision and the Twin GDPRs' (2021) 11(4) *International Data Privacy Law* 388.

<sup>23</sup> TCA, art 203.

<sup>24</sup> *ibid* art 204.

<sup>25</sup> *ibid* art 205.

<sup>26</sup> *ibid* art 206.

<sup>27</sup> *ibid* art 207.

<sup>28</sup> *ibid* art 208.

communications,<sup>29</sup> open government data,<sup>30</sup> regulatory cooperation (excluding personal data and privacy),<sup>31</sup> and computer services.<sup>32</sup>

In providing a selected set of specific rules addressing some of the most salient challenges in digital trade—including digitally enabled trading of goods and services as well as data-based services like social media platforms—the TCA is attentive to the borderless nature in new ways of trading and the jurisdictional limitations faced by new technologies. Unlike in other chapters, the TCA shows a limited ambition in this increasingly important area, largely reflecting the EU’s digital trade policy.

## 4 Intellectual Property under the TCA

### 4.1 Minimum Standard of Protection, Exhaustion, and National Treatment

Title V of Heading One of Part II addresses the protection of intellectual property. The objectives of such protection are twofold. First, the TCA aims at facilitating innovation and creativity in goods and services, while reducing their trade distortions and contributing to a sustainable and inclusive economy.<sup>33</sup> Secondly, it aims at establishing a minimum standard of protection and enforcement of IPRs between the parties.<sup>34</sup>

This mix of objectives is not unusual in international intellectual property agreements, and yet some elements display a forward-looking character. While the promotion of innovation and creativity through the granting of exclusive rights has been at the core of intellectual property protection since its inception—for example, in the Paris Convention for the Protection of Industrial Property (Paris Convention)<sup>35</sup> or the Berne Convention<sup>36</sup>—the reduction of commercial barriers (tariff and non-tariff barriers) is arguably a result of the adoption of the WTO Agreement on Trade-related Aspects of

<sup>29</sup> *ibid* art 209.

<sup>30</sup> *ibid* art 210.

<sup>31</sup> *ibid* art 211.

<sup>32</sup> *ibid* art 212.

<sup>33</sup> *ibid* art 219 (a).

<sup>34</sup> *ibid* art 219 (b).

<sup>35</sup> Paris Convention on the Protection of Industrial Property, UNTS 828, 305 (20 March 1883) (Paris Convention).

<sup>36</sup> Berne Convention for the Protection of Literary and Artistic Works, UNTS 828, 221 (9 September 1886) (Berne Convention).

Intellectual Property Rights (TRIPs Agreement).<sup>37</sup> Importantly, the TCA makes explicit reference to the link between intellectual property protection and a sustainable and inclusive economy—a provision not often seen in intellectual property chapters.<sup>38</sup> As a result, the TCA can be seen as a pioneer in its attentiveness to the United Nations (UN) 2030 Agenda for Sustainable Development (Sustainable Development Goals)<sup>39</sup> and the role intellectual property can play in creating and maintaining an inclusive economy.<sup>40</sup>

The scope of application is primarily delimited by the rights and obligations as provided for by the TRIPs Agreement and other relevant intellectual property treaties to which the EU and the UK are parties,<sup>41</sup> providing in turn a robust and familiar legal basis for intellectual property. Notably, it is understood that such sources provide a minimum standard of protection for IPRs.<sup>42</sup> Similar to the operation of the TRIPs Agreement, under the TCA both parties are entitled to adopt higher levels of protection and enforcement to the extent that they do not contravene other provisions under the same title.<sup>43</sup>

The provision related to exhaustion of IPRs as established under Article 223 TCA is significant, as it maintains the right of the parties to determine whether and under what conditions the exhaustion of IPRs applies. The doctrine of exhaustion is a distinct feature of intellectual property law, according to which an IP owner is prevented from exercising some of his or her exclusive IP rights if certain conditions are met.<sup>44</sup> It plays a predominant role in selected IPRs, such as patents<sup>45</sup> and copyright,<sup>46</sup> within the context of parallel trade,<sup>47</sup> and its

<sup>37</sup> Agreement on Trade-related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 (15 April 1994) (TRIPs Agreement).

<sup>38</sup> Ahmed Abdel-Latif and Pedro Roffe, 'The Interface between Intellectual Property and Sustainable Development' in Irene Calboli and Maria Lilla Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (OUP 2021) 615–39.

<sup>39</sup> UN General Assembly, 'Transforming our World: the 2030 Agenda for Sustainable Development, A/RES/70/1 (21 October 2015) <https://www.refworld.org/docid/57b6e3e44.html> (accessed 15 September 2023).

<sup>40</sup> See also Mariela de Amstalden, 'Seafood Without the Sea: Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, the 'Justifiability Test' and Innovative Technologies in a Sustainable Blue Economy' (2022) 23(1) *The Journal of World Investment & Trade* 68.

<sup>41</sup> TCA, art 220(1) in conjunction with art 222.

<sup>42</sup> *ibid* art 220(2).

<sup>43</sup> *ibid*.

<sup>44</sup> cf Shubha Ghosh and Irene Calboli, *Exhausting Intellectual Property Rights A Comparative Law and Policy Analysis* (CUP 2018).

<sup>45</sup> cf Santanu Mukherjee, *Patent Exhaustion and International Trade Regulation* (Brill 2023).

<sup>46</sup> cf Poonna Mysoor, 'Exhaustion, Non-exhaustion and Implied Licence' (2018) 49 *International Review of Intellectual Property and Competition Law* 656.

<sup>47</sup> See among others Irene Calboli, 'Intellectual Property Exhaustion and Parallel Imports of Pharmaceuticals: A Comparative and Critical Review' in Carlos Correa and Reto Hilty (eds), *Access to Medicines and Vaccines Implementing Flexibilities Under Intellectual Property Law* (Springer 2022) 31–71; Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar Publishing 2016).

interpretation is far from settled, with continuing debates across jurisdictional divides.<sup>48</sup>

National treatment is another pillar of IP protection under the TCA. According to its Article 224, parties are obliged mutually to accord no less favourable treatment than that accorded to their own nationals, under the proviso of exceptions already provided for in the Paris Convention, the Berne Convention, the Rome Convention,<sup>49</sup> and the Washington Treaty.<sup>50</sup> The application of exceptions to national treatment for IP protection will need to meet a two-prong test, namely: (1) the exception is necessary to secure compliance with domestic law that is consistent with the provisions of the TCA;<sup>51</sup> and (2) the exception is applied in a manner that does not constitute a disguised restriction to trade.<sup>52</sup>

## 4.2 Operationalizing IPRs under the TCA

This section examines core IPRs under the TCA, with a particular focus on copyright, trademarks, and patents. While a detailed analysis is beyond the scope of this section, it will primarily study the objectives, scope of application, and exceptions of IPRs under the TCA, being mindful of the numerous international treaties from which the TCA derives and establishes a legal basis for IP protection, as well as of the various UK statutory instruments<sup>53</sup> enacted to operationalize these legal commitments. At the onset, IP provisions under the TCA ‘complement and further specify’<sup>54</sup> provisions under the TRIPS Agreement and other international IP international treaties.

### 4.2.1 Copyright

Substantive copyright protection is provided for in Articles 225 to 235 TCA. These provisions largely implement existing copyright law prior to

<sup>48</sup> For common law approaches see eg Shuji Sumi, ‘A Common Law Doctrine of Exhaustion Based on an Implied Licence: A Canadian Perspective’ (2021) 16(7) *Journal of Intellectual Property Law & Practice* 712. For civil law approaches to exhaustion see eg Reto Hilty, ‘Legal Concept of “Exhaustion”: Exhausted? From A—Intellectual “Property” and Its Limits’ in Niklas Bruun and others (eds), *Transition and Coherence in Intellectual Property Law* (CUP 2020) 272.

<sup>49</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, UNTS 496, 43 (26 October 1961) (Rome Convention).

<sup>50</sup> WIPO, Washington Treaty on Intellectual Property in Respect of Integrated Circuits, TRT/WASHINGTON/001 (26 May 1989).

<sup>51</sup> TCA, art 235(3)(a).

<sup>52</sup> *ibid* art 235(3)(b).

<sup>53</sup> Notably, the numerous guidance documents from the UK Intellectual Property Office (IPO).

<sup>54</sup> TCA, art 220(1).



the adoption of the TCA, setting minimum standards of protection and, in selected cases, mutual recognition. Rules relating to cross-border copyright arrangements, such as clearance for satellite broadcast, reciprocal protection for sui generis database rights<sup>55</sup> and orphan works exceptions, are not part of the TCA. Instead, they have been addressed in the UK through a number of statutory instruments and guidance notes published by the UK Intellectual Property Office (IPO).<sup>56</sup>

Copyright under the TCA lasts for the life of the author and seventy years after the author's death, irrespective of the date the work has been lawfully made available to the public.<sup>57</sup> This is a *de minimis* clause, as both parties may provide longer terms of protection than those provided under the TCA.<sup>58</sup> Exceptions and limitations to copyright are confined to 'certain special cases' that meet a double criteria, namely, that they do not conflict with the normal exploitation of the work and that they do not unreasonably prejudice the legitimate interests of the copyright holders.<sup>59</sup> Notably, the TCA provides for the legal protection of technological measures used to prevent the copyright infringement, with a specific provision dedicated to the protection of computer programs.<sup>60</sup> Parties have the right to adopt measures as deemed necessary to ensure adequate legal copyright protection, to the extent that beneficiaries of exceptions or limitations are not prevented from the enjoyment of their legal rights, as provided for in Article 233 TCA.<sup>61</sup>

#### 4.2.2 Trademarks

As with copyright protection, a large section of the TCA's substantive trademark provisions reflects those in the EU Trade Marks Directive.<sup>62</sup> Trademark capability under Article 237 TCA can be constituted by any sign that displays distinctiveness and can be represented graphically on the parties' trademark

<sup>55</sup> For example, UK copyright law has been amended to provide a new specific database right for UK citizens and residents. See Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019/605).

<sup>56</sup> UK Intellectual Property Office (IPO), Guidance: Copyright Clearance for UK Satellite Broadcasting (30 January 2020) <https://www.gov.uk/guidance/copyright-clearance-for-uk-satellite-broadcasting> (last accessed 15 September 2023); UK IPO, 'Guidance: Sui Generis Database Rights' (30 January 2020) <https://www.gov.uk/guidance/sui-generis-database-rights> (last accessed 15 September 2023); UK IPO, 'Guidance: Copyright—Orphan Works' (11 September 2023) <https://www.gov.uk/guidance/copyright-orphan-works> (last accessed 15 September 2023).

<sup>57</sup> TCA, art 230(1).

<sup>58</sup> *ibid* art 230(8).

<sup>59</sup> *ibid* art 233.

<sup>60</sup> *ibid* art 234 (1).

<sup>61</sup> *ibid* art 234 (4).

<sup>62</sup> Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1, 23 December 2015.

registers. Rights conferred by registered trademarks are exclusive and negative in nature. They entitle the trademark holder to prevent third parties from using identical<sup>63</sup> or similar<sup>64</sup> signs in the course of trade. Protection of well-known trademarks under the TCA<sup>65</sup> is provided for with reference to the Paris Convention and the TRIPs Agreement, as well as the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.<sup>66</sup> This is in stark contrast to previous rules about trademark dilution,<sup>67</sup> for those signs with a reputation.

Trademark exceptions under the TCA largely mirror those under the Article 17 of the TRIPs Agreement, with one notable difference: the inclusion of geographical indications (GIs) as an example of fair use of descriptive terms. Historically, 'limited exceptions' to rights conferred on trademark owners under international agreements has been an open-ended concept, with fair use of descriptive terms often referred to as only one of the possible exceptions.<sup>68</sup> While the reconceptualization of GIs as fair use is far from uncontroversial,<sup>69</sup> Article 241 (3) TCA might shed some light on the matter. This provision establishes that rights conferred to registered trademark owners do not include the ability to prevent third parties from using an earlier right applicable to a specific locality in the course of trade, to the extent that the earlier right is recognized by law and used within its territorial limits.

Grounds for revocation -particularly due to non-use- and invalidation of trademarks are also provided under Articles 242 and 245 TCA respectively, albeit with a distinct lack of specificity.<sup>70</sup>

<sup>63</sup> TCA, art 238(1)(a).

<sup>64</sup> *ibid* art 238(1)(b).

<sup>65</sup> *ibid* art 240.

<sup>66</sup> See also Frederick Mostert, 'The Protection of Well-Known Marks under International Intellectual Property Law' in Irene Calboli and Jane Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 84–102.

<sup>67</sup> See eg Anselm Kamperman Sanders, 'Dilution and Damage beyond Confusion in the European Union' in Irene Calboli and Jane Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 499–510.

<sup>68</sup> Mariela de Amstalden, 'Article 17 TRIPs: Exceptions' in Peter-Tobias Stoll and Holger Hestermeyer (eds), *Commentaries on World Trade Law: Agreement on Trade-Related Aspects of Intellectual Property Rights* (Brill Nijhoff 2023) [http://dx.doi.org/10.1163/2666-4941\\_WTCO\\_COM\\_6022](http://dx.doi.org/10.1163/2666-4941_WTCO_COM_6022) (accessed 15 September 2023).

<sup>69</sup> Xinzhe Song and Xiaoyan Wang, 'Fair Use of Geographical Indications: Another Look at the Spirited Debate on the Level of Protection' (2022) 21(5) *World Trade Review* 597; Alberto Ribeiro de Almeida and Suelen Carls, 'The Criteria to Qualify a Geographical Term as Generic: Are We Moving from a European to a US Perspective?' (2021) 52 *International Review of Intellectual Property and Competition Law* 444.

<sup>70</sup> For example, there is no established differentiation between relative and absolute grounds for revocation.

### 4.2.3 Patents

It is noteworthy that the section dedicated to patent protection under the TCA starts with reference to the nexus between patents and public health.<sup>71</sup> The emphasis is on medicinal and plant protection products and their patents.<sup>72</sup> In particular, the TCA explicitly refers to the Declaration on the TRIPS Agreement and Public Health (Doha Declaration),<sup>73</sup> and the need to ensure consistency in the interpretation and implementation of patent rights.<sup>74</sup> While this inclusion may be attributed to the mere passage of time, its rationale could also be found in the desire of the parties to maintain recourse to so-called ‘TRIPS flexibilities’,<sup>75</sup> ie regulatory autonomy and/or policy space left to WTO members to adopt measures as deemed necessary to protect its population, without infringing in their international obligations under the WTO Agreements.

As mentioned above, treaty text under the TCA acknowledges the peculiarities faced by medicinal products and plant protection patents, in particular.<sup>76</sup> It does so by recognizing a potential shorter period of effective patent protection due to time lapsed between the filling of an application for a patent and the market authorization. In this spirit, and akin to the provisions under Article 33 of the TRIPs Agreement,<sup>77</sup> the TCA allows the parties to compensate the patent holder by providing them with further protections in accordance to the holder’s own laws and regulations.

## 4.3 Cooperation, Voluntary Stakeholder Initiatives, and Geographical Indications

In times where international cooperation is no longer taken for granted,<sup>78</sup> the TCA makes explicit provision, under its Article 273, for cooperation—instead

<sup>71</sup> TCA, art 250.

<sup>72</sup> On health cooperation under the TCA see the chapter by Elaine Fahey in this volume.

<sup>73</sup> WTO Ministerial Declaration on the TRIPS Agreement and Public Health, 14 November 2001, WT/MIN(01)/DEC/2 (Doha Declaration).

<sup>74</sup> For a study on the juridification process of the Doha Declaration see Andrew Law, *Patents and Public Health: Legalising the Policy Thoughts in the Doha TRIPS Declaration of 14 November 2001* (Nomos 2008).

<sup>75</sup> See Carlos Correa, ‘Interpreting the Flexibilities under the TRIPS Agreement’ in Carlos Correa and Reto Hilty (eds), *Access to Medicines and Vaccines* (Springer 2022) 1–30; see also Andrew Mitchell, ‘The Right to Regulate and the Interpretation of the WTO Agreement’ (2023) 26(3) *Journal of International Economic Law* 1.

<sup>76</sup> TCA, art 251.

<sup>77</sup> For an analysis of these provisions see Mariela de Amstalden, Andreas Naef, and Katrin Arend, ‘Article 33 TRIPS: Terms of Protection (Patents)’ in Peter-Tobias Stoll and Holger Hestermeyer (eds), *Commentaries on World Trade Law, Agreement on Trade-Related Aspects of Intellectual Property Rights* [http://dx.doi.org/10.1163/2666-4941\\_WTCO\\_COM\\_6045](http://dx.doi.org/10.1163/2666-4941_WTCO_COM_6045) (accessed 15 September 2023).

<sup>78</sup> See eg Ian Hurd, ‘The Case Against International Cooperation’ (2022) 14(2) *International Theory* 263.

of equivalence or harmonization<sup>79</sup>—in support of the implementation of IP rights and obligations. It further provides a non-exhaustive list of activities that fall under the umbrella of ‘cooperation’,<sup>80</sup> including information exchange on IP legal frameworks, experience exchange on legislative progress as it pertains to IPRs and their domestic enforcement, coordinated efforts to prevent the exports of counterfeit goods, and a range of activities geared towards public awareness and engagement.

Voluntary stakeholder initiatives to reduce IPRs infringement also have a legal basis under Article 274 TCA. While a continuation of already established practice,<sup>81</sup> there is evidence supporting that these initiatives are effective in reducing the severity of IPR infringements.<sup>82</sup> As such, Article 274 TCA recognizes the importance of alternative, supplementary, and forward-looking ways to prevent IPR infringement that are commensurate with technological advances,<sup>83</sup> arguably elevating the role played by non-state actors in complying with treaty law.

GIs are seemingly a contentious matter. The TCA remains silent on substantive provisions for the protection of geographical indications as collective marks, which is telling of the sensitivity in the matter as it relates to international trade. Crucially, the only provision under the TCA with reference to GIs makes reference to a ‘review’ only. Article 275 TCA acknowledges previous agreements in place between the parties, and imposes a ‘soft’ obligation (as implied by the use of ‘may’) jointly to use reasonable efforts to reach agreement on rules for the protection and enforcement of GIs. While this provision is welcome in that it recognizes the importance of agreed rules for GIs, it also

<sup>79</sup> These terms carry distinct functionalities and yet are often disputed in scholarship due to a lack conceptual clarity. See in particular Jasper Bongers, Lynn Hillary, and Guus Wieman, ‘Aligning Rulebooks: Understanding Cooperation in the European Union’ (2021) 3(1) Political Research Exchange 1.

<sup>80</sup> TCA, art 273(2).

<sup>81</sup> The European Commission has engaged in a series of initiatives, including the facilitation and signature of memoranda of understanding (MoUs) with key stakeholders to limit IPRs infringements. See eg Memorandum of Understanding on Online Advertising and IPR (20 June 2018) <https://ec.europa.eu/docsroom/documents/30226>; Memorandum of Understanding on the Sale of Counterfeit Goods on the Internet (21 June 2016) [https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-sale-counterfeit-goods-internet\\_en](https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-sale-counterfeit-goods-internet_en) (accessed 15 September 2023).

<sup>82</sup> See eg WIPO Advisory Committee on Enforcement, ‘The Role of Intermediaries in IP Enforcement: Contributions prepared by the United Kingdom, AIM—the European Brands Association, the International Federation of the Phonographic Industry, DHL Express and Mastercard’ WIPO/ACE/15/8 (3 August 2022).

<sup>83</sup> Relatedly, the role of voluntary agreements and stakeholders in the context of IPRs has recently been brought forward by the UK at the WTO. See WTO Council for Trade-Related Aspects of Intellectual Property Rights, ‘Intellectual Property, Voluntary Licensing and Technology Transfer: Communication from the United Kingdom’, 14 July 2023, IP/C/W/74.

demonstrates the level of complexity inherently encountered in the design of effective legal protection for rights with a strong territoriality component and considerable significance for international trade.<sup>84</sup> The UK has introduced its own GI scheme for the protection of geographical names of food, drink, and agricultural products in England, Scotland, and Wales,<sup>85</sup> to ensure protection after the end of the transition period on 31 December 2020. Likewise, those GIs protected under the UK scheme will benefit from continuity in protection with those jurisdictions with which the UK has signed free trade agreements, provided they are explicitly mentioned in the treaty text.

Very recent developments on the EU protection for non-agricultural GIs (the NAGI scheme)<sup>86</sup> may have wide implications for the operation of the TCA and the Windsor Framework,<sup>87</sup> as the EU entertains the idea of applying the new EU GI scheme to goods sold in Northern Ireland.<sup>88</sup> Crucially, under the NAGI scheme, manufactured goods that are similar to those protected with reference to a geographical origin (ie Murano glass), but that lack a geographic connection, would be prevented from using or ‘evoking’ that geography when marketing within the EU. If the EU indeed intends to extend the NAGI scheme to Northern Ireland, which is based on new law, it would need formally to place a request with the UK to that effect.<sup>89</sup> More generally, an extension of the NAGI scheme would potentially also benefit UK manufacturers of non-agricultural products beyond Northern Ireland, as they could also secure protection—provided their products have a quality, reputation, or other characteristic linked to a particular geographical origin (like Harris Tweed,<sup>90</sup> for example). In the absence of a formal request from the EU to the UK at the time of writing, it is plausible yet unclear whether its legal operationalization would result in legal tensions arising out of the TCA.

<sup>84</sup> The lack of agreement as to the form of protection for GIs under the TCA is arguably due to a need for regulatory flexibility as the UK negotiates new trade agreements with other potential partners with a preference for trademark law as a means to protect GIs, as is the case with the United States (US). See eg Craig Prescott, Manuela Pilato, and Claudia Bellia, ‘Geographical Indications in the UK after Brexit: An Uncertain Future?’ (2020) *Food Policy* 90 <https://doi.org/10.1016/j.foodpol.2019.101808>.

<sup>85</sup> UK Department for the Environment, Food and Rural Affairs (Defra), ‘Guidance: Protected Geographical Food and Drink Names’ UK GI Schemes, 4 January 2021 <https://www.gov.uk/guidance/protected-geographical-food-and-drink-names-uk-gi-schemes> (accessed 15 September 2023).

<sup>86</sup> European Parliament press release, ‘Deal on Geographical Protection for Local Craft and Industrial Products’, 5 May 2023 <https://www.europarl.europa.eu/news/en/press-room/20230502IPR84003/deal-on-geographical-protection-for-local-craft-and-industrial-products> (accessed 15 September 2023).

<sup>87</sup> UK House of Commons, European Scrutiny Committee, 22nd Report of Session 2022–23, 6 September 2023 <https://committees.parliament.uk/publications/41359/documents/203350/default/> (accessed 15 September 2023).

<sup>88</sup> On the Windsor Framework see the chapter by Billy Melo Araujo in this volume.

<sup>89</sup> The formal request under art 13(4) of the Windsor Framework continues to be outstanding at the time of writing (15 September 2023).

<sup>90</sup> UK Harris Tweed Act 1993, c xi.

## 5 Conclusion

This chapter has examined key features in the TCA applicable to capital movements, digital trade, and IPR protection. It did so by identifying relevant legal provisions, mapping their structure, and highlighting the minimum standard of protection they afford. This examination highlighted specific aspects applicable to the free flow of capital, digital trade, and the legal protections available for innovation and creativity. The analysis showed that regulatory autonomy, coupled with greater deference to rules under the WTO system and its underlying principles of non-discrimination and national treatment are consistently infusing the text of the TCA, suggesting that a rules-based approach to international cooperation continues to be relevant, in spite of growing pressures towards geopolitical and economic fragmentation.

Relatedly, digital trade provisions seem to be primarily concerned with establishing a minimum level of protection to ensure data flows and electronic commerce, emphasizing the right to regulate with a non-exhaustive list of numerous exceptions. In the same vein, cooperation—particularly as it relates to novel forms of public-private governance in IPRs—suggests a willingness to conserve iterative engagement between the EU and the UK, even if in less integrated ways than was previously the case. Relatedly, we have also seen that the legal regime applicable to GIs under the TCA, as a special category of IPRs, may well provide a testing ground for the operationalization of the Windsor Framework. It remains to be seen whether this particular example will prove robust enough to display the dynamism needed to take account of the social, political, and economic realities in which the TCA is situated.