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ABSTRACT

This Article examines the Regional Comprehensive Economic Partnership (RCEP) with a focus on the intellectual property norms that it seeks to develop. The first half of the Article focuses on the RCEP Agreement as a mega-regional agreement. It begins by briefly discussing the historical origins of the RCEP. It then explores three possible scenarios in which the RCEP Agreement will help shape trade and intellectual property norms in the Asia-Pacific region. Specifically, the Article evaluates the scenarios in which the agreement will function as a rival pact, a building block, and an alternative path. The second half of this Article turns to a more specific focus on intellectual property norms that are being established through the RCEP negotiations. It not only discusses the latest leaked draft of the RCEP intellectual property chapter, but it also closely analyzes this chapter in five distinct areas: copyright, trademark, patent, trade secret, and intellectual property enforcement. This Article then tackles the question concerning whether the RCEP Agreement will contain an intellectual property chapter—and, if so, whether such a chapter will look like the intellectual property chapter in the Trans-Pacific Partnership (TPP) Agreement. The Article concludes by exploring whether the RCEP intellectual property chapter will, and should, contain high or low protection and enforcement standards.

 Professor of Law and Co-Director, Center for Law and Intellectual Property, Texas A&M University School of Law. Earlier versions of this Article were delivered as a keynote speech at the 2016 Meeting of the Asian Pacific Copyright Association at the University of Hong Kong Faculty of Law and as the 20th ACIP Intellectual Property Forum Lecture at the Intellectual Property School of South China University of Technology. They were also presented at the Second Annual Intellectual Property Scholars Roundtable at Texas A&M University School of Law and as a public lecture at Peking University—School of Transnational Law. The Author is grateful to the participants of these events for valuable comments and suggestions. This Article draws on the Author's earlier research on the Trans-Pacific Partnership, the Anti-Counterfeiting Trade Agreement, and China's free trade agreements in the *Fordham International Law Journal*, the *SMU Law Review*, and the *U.C. Davis Law Review*.

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I. INTRODUCTION

In the past few years, the Trans-Pacific Partnership[1] (TPP) has garnered considerable media, policy, and scholarly attention. [2] Although the TPP Agreement was signed in Auckland, New Zealand on February 4, 2016, and has been described as the Obama administration's "cardinal priority and a cornerstone of [its] Pivot to

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1. Trans-Pacific Partnership Agreement, Feb. 4, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [https://perma.cc/YW8Y-Z9LQ] (archived Feb. 6, 2017) [hereinafter TPP Agreement].

2. For the Author's discussions of the TPP, see Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829 (2017) [hereinafter Yu, *Investment-Related Aspects*]; Peter K. Yu, *Investor-State Dispute Settlement and the Trans-Pacific Partnership*, *in* INTELLECTUAL PROPERTY AND THE JUDICIARY (Christophe Geiger ed., forthcoming 2017) [hereinafter Yu, *Investor-State Dispute Settlement*]; Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 DRAKE L. REV. DISCOURSE 16, 24–28 (2012); Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014) [hereinafter Yu, *TPP and Trans-Pacific Perplexities*].

Asia,"[3] the agreement received very limited support, if any, from the presidential candidates representing both the Democratic and Republican Parties.

On the campaign trail, Donald Trump made his opposition loud and clear by lambasting the TPP as "another disaster, done and pushed by special interests who want to rape [the] country."[4] After he entered office, he followed through by signing a memorandum directing the United States Trade Representative to "withdraw[] [the United States] as a signatory of the TPP and . . . from the TPP negotiating process."[5] Released on the first day of his first full week in office, the document stated, "it is the intention of [his new] Administration to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals."[6] Not only did the Trump administration abandon the TPP Agreement after six years of exhaustive negotiations, but it also shifted policy emphasis away from regional and plurilateral trade agreements.[7]

While the TPP was catching public attention, another equally important regional pact, the Regional Comprehensive Economic Partnership (RCEP), has slowly emerged in the Asia-Pacific region. This agreement is currently being negotiated between Australia, China, India, Japan, New Zealand, South Korea, and the ten members of the Association of Southeast Asian Nations (ASEAN).[8] Launched in November 2012 under the ASEAN+6 framework, the RCEP

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3. KURT M. CAMPBELL, THE PIVOT: THE FUTURE OF AMERICAN STATECRAFT IN ASIA 268 (2016).

4. Jessica Hopper & Ines de la Cuetara, *Donald Trump Slams Trans-Pacific Partnership as "a Continuing Rape of Our Country,"* ABC NEWS (Jun 29, 2016), http://abcnews.go.com/Politics/donald-trump-slams-trans-pacific-partnership-continuing-rape/story?id=40213090 [https://perma.cc/25DV-RQM7] (archived Feb. 6, 2017).

5. White House, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific [https://perma.cc/QZ7W-ZMYE] (archived Mar. 29, 2017).

6. *Id.*

7. *See* Peter K. Yu, *Trump's Trade Policy Is More Predictable and Less Isolationist Than Critics Think*, MARKETWATCH (Feb. 3, 2017), http://www.marketwatch.com/story/trumps-trade-policy-is-more-predictable-and-less-isolationist-than-critics-think-2017-02-02 (discussing the shift from multilateralism to bilateralism).

8. ASEAN is negotiating the RCEP as a bloc. Its ten current members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *ASEAN Member Countries*, ASS'N SOUTHEAST ASIAN NATIONS, http://asean.org/asean/asean-member-states/ (last visited Oct. 13, 2016) [https://perma.cc/RN2Q-CNKJ] (archived Feb. 6, 2017).

negotiations built on past trade and non-trade discussions between ASEAN and its six major Asia-Pacific neighbors.[9]

Although the RCEP is rarely analyzed and only occasionally mentioned, its negotiations deserve greater media, policy, and scholarly attention for at least three reasons. First, this partnership is important globally. The sixteen RCEP negotiating parties "account for almost half of the world's population, almost 30 per cent of global GDP [gross domestic product] and over a quarter of world exports."[10] These figures compare favorably with those relating to the TPP, which covers "40% of global GDP and some 30% of worldwide trade in both goods and services."[11]

Second, the RCEP is highly important within the Asia-Pacific region. Once established, this partnership will cover not only China and India, two of the most economically powerful BRICS countries (Brazil, Russia, India, China, and South Africa),[12] but it will also include two high-income Asian economies (Japan and South Korea) and six other TPP partners (Australia, Brunei Darussalam, Malaysia, New Zealand, Singapore, and Vietnam).

Third, the RCEP could serve as a viable alternative to the TPP[13] and has become quite important following the United States' withdrawal. Given the Trump administration's position and the other TPP partners' inability to resuscitate the agreement,[14] the TPP has

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9. *See* Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership (Nov. 20, 2012), http://dfat.gov.au/trade/agreements/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership.pdf [https://perma.cc/N35W-XVHS] (archived Feb. 6, 2017) [hereinafter Joint Declaration] (launching the RCEP negotiations).

10. *Regional Comprehensive Economic Partnership*, DEP'T FOREIGN AFF. & TRADE (Austl.), http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx (last visited July 6, 2016) [https://perma.cc/XT7B-NUGT] (archived Feb. 7, 2017).

11. David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 59 (2016).

12. For discussions of the BRICS countries, see generally ANDREW F. COOPER, THE BRICS: A VERY SHORT INTRODUCTION (2016); JIM O'NEILL, THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND (2011); Peter K. Yu, *Intellectual Property Negotiations, the BRICS Factor and the Changing North–South Debate*, *in* A BRICS-LAWYERS' GUIDE TO GLOBAL COOPERATION (Rostam Neuwirth et al. eds., forthcoming 2017); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345 (2008) [hereinafter Yu, *Access to Medicines*].

13. *See infra* Part III (discussing the potential for the RCEP to serve as a rival pact, a building block, and an alternative path).

14. Shortly after the United States' withdrawal, Australia, Japan, Singapore, and New Zealand explored ways to resuscitate the agreement. *See* Bhavan Jaipragas, *Can the Trans-Pacific Partnership Be Salvaged? Forget Trump—Malaysia, Australia, New Zealand Think So*, S. CHINA MORNING POST (Jan. 24, 2017), http://www.scmp.com/week-asia/geopolitics/article/2065021/trans-pacific-partnership-salvageable-forget-trump-malaysia ("Australian Prime Minister Malcolm Turnbull said he had held . . . talks with his Japanese, New Zealand and Singaporean counterparts [in regard to options following

now been put on life support.[15] It will likely meet the same fate as the widely-criticized Anti-Counterfeiting Trade Agreement [16] (ACTA). Despite its adoption in April 2011, ACTA has thus far been ratified by only one country—Japan, the country of depository.[17]

This Article examines the RCEP with a focus on the intellectual property norms that it seeks to develop. Part II briefly discusses the partnership's historical origins. Part III explores three possible scenarios in which the RCEP Agreement will help shape trade and intellectual property norms in the Asia-Pacific region. This Part evaluates the scenarios in which the agreement will function as a rival pact, a building block, and an alternative path. Part IV focuses specifically on the latest leaked draft of the RCEP intellectual property chapter. [18] It closely analyzes this chapter in five distinct areas: copyright, trademark, patent, trade secret, and intellectual property enforcement.

Part V tackles the question concerning whether the RCEP Agreement will contain an intellectual property chapter—and, if so, whether such a chapter will look like the intellectual property chapter in the TPP Agreement. Part VI turns to a much harder question concerning whether the RCEP intellectual property chapter will, and should, contain high or low protection and enforcement standards. This Part explores the pros and cons of high intellectual property standards in the Asia-Pacific region. Taken together, these two Parts seek to highlight the complexities of intellectual property norm setting in the region and the challenging policy dilemmas confronting the RCEP negotiating parties.

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the United States' withdrawal]."); *see also id.* ("Australia, New Zealand and Malaysia were among the nations that signalled enthusiasm to continue with an 11-member partnership in the absence of the United States."). These efforts, however, did not bear fruit. At the time of writing, no country is actively pursuing any effort to ratify the agreement.

15. *See* Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-regional Agreement on Life Support)*, 21 SMU SCI. & TECH. L. REV. (forthcoming 2017) (discussing the United States' withdrawal from the TPP and its significance).

16. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011) [hereinafter ACTA].

17. *See id.* art. 45 ("The Government of Japan shall be the Depositary of this Agreement."); *see also* Maira Sutton, *Japan Was the First to Ratify ACTA. Will They Join TPP Next?*, ELEC. FRONTIER FOUND. (Oct. 26, 2012), https://www.eff.org/deeplinks/2012/10/japan-ratify-acta-will-they-join-tpp-next [https://perma.cc/X7HF-GAZL] (archived Feb. 7, 2017) (reporting Japan's ratification).

18. Regional Comprehensive Economic Partnership Intellectual Property Chapter (Oct. 15 draft), http://keionline.org/sites/default/files/RCEP-IP-Chapter-15October2015.docx [https://perma.cc/D3RK-BDBE] (archived Feb. 7, 2017) [hereinafter October 15 Draft].

II. HISTORICAL ORIGINS

Although the RCEP negotiations were launched in November 2012 [19]—more than two years after the beginning of the TPP negotiations—they were not established solely as a reactive response to the latter. Instead, the RCEP negotiations built on prior negotiations at various fora in the Asia-Pacific region: ASEAN+3 (ASEAN, China, Japan, and South Korea), ASEAN+6, and the Asia-Pacific Economic Cooperation (APEC) Forum.[20]

Within ASEAN+3 and ASEAN+6, countries in the Asia-Pacific region have actively explored ways to facilitate greater regional economic integration and cooperation. In October 2001, in a report to ASEAN+3 leaders, the East Asian Vision Group, which was charged with "develop[ing] a road map to guide future regional cooperation,"[21] recommended the establishment of the East Asia Free Trade Area.[22] Although China strongly supported this proposal, Japan and other Asian countries had serious reservations about China's potential dominance in this pact.[23]

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19. Joint Declaration, *supra* note 9.

20. *See generally* MARK BEESON, INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC AND BEYOND 17–55, 74–101 (2009) [hereinafter BEESON, INSTITUTIONS OF THE ASIA-PACIFIC] (discussing ASEAN, APEC, and ASEAN+3); MARK BEESON, REGIONALISM AND GLOBALIZATION IN EAST ASIA: POLITICS, SECURITY AND ECONOMIC DEVELOPMENT 216–37 (2007) [hereinafter BEESON, REGIONALISM AND GLOBALIZATION] (discussing APEC and ASEAN+3).

21. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 20, at 78; *see also* BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 20, at 233 ("Following an APEC precedent, at the instigation of South Korean President Kim Dae-Jung, an East Asian Vision Group . . . was established in 1998 to develop a blueprint for further cooperation under ASEAN+3 auspices.").

22. *See* Shujiro Urata, *Japan's FTA Strategy and a Free Trade Area of the Asia-Pacific* [hereinafter Urata, *Japan's FTA Strategy*], *in* AN APEC TRADE AGENDA? THE POLITICAL ECONOMY OF A FREE TRADE AREA OF THE ASIA-PACIFIC 99, 106 (Charles E. Morrison & Eduardo Pedrosa eds., 2007) [hereinafter AN APEC TRADE AGENDA?] ("At the Leaders' summit meeting of ASEAN+3 in 1998 it was decided that an East Asia Vision Group be set up to study the long-term vision for economic cooperation. The group has presented the leaders with its recommendations, which include the establishment of an East Asia FTA.").

23. As Mark Beeson recounted:

> [O]ther East Asian nations thought India's inclusion [in ASEAN+6] would actually be desirable, precisely because it might provide a "hedge" against Chinese dominance. Japan, predictably enough, was not keen to see its principal rival for regional leadership honors gaining a dominant position in the [ASEAN+3] grouping and was thus keen to dissipate Chinese influence. Likewise, some of the smaller Southeast Asian countries[,] like Singapore, were also keen to balance Chinese influence by bringing in new members like Australia.

BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 20, at 88 (footnotes omitted); Meredith Kolsky Lewis, *Achieving a Free Trade Area of the Asia-Pacific: Does the TPP*

In August 2006, Japan advanced an alternative proposal concerning the Comprehensive Economic Partnership in East Asia.[24] Covering not only ASEAN+3 members but also the three remaining ASEAN+6 members (Australia, India, and New Zealand), this partnership would dilute China's influence in the regional pact while adding to the mix a major source of natural resources—namely, Australia.[25]

Around that time, APEC members also actively explored regional integration and cooperation efforts. In November 2006, APEC began studying the concept of a Free Trade Area of the Asia-Pacific (FTAAP).[26] Three years later, APEC leaders pledged to create an agreement to realize this conceptual vision. As Fred Bergsten observed at that time, the proposed pact could

- catalyse a substantively successful Doha Round [Doha Development Round of Trade Negotiations];
- offer an alternative "Plan B" to restore the momentum of liberalization if Doha does falter badly;
- prevent a further, possibly explosive, proliferation of bilateral and sub-regional [preferential trade agreements] that create substantial new discrimination and discord within the Asia-Pacific region;
- avoid renewed risk of "drawing a line down the middle of the Pacific" as East Asian, and perhaps Western Hemisphere, regional initiatives produce disintegration of the Asia-Pacific rather than the integration that APEC was created to foster;

Present the Most Attractive Path? [hereinafter Lewis, *Achieving a FTAAP*], *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT 223, 227 (C.L. Lim et al. eds., 2012) [hereinafter TRANS-PACIFIC PARTNERSHIP] ("The [East Asian FTA] model has been viewed with some caution by Japan, which is concerned that such an agreement would be imbalanced, with China being by far the largest economy."); Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27, 50–51 (2011) ("Japan prefers ASEAN+6 because it would include more economies to counterbalance China, and would still exclude the United States."); Shintaro Hamanaka, *Trans-Pacific Partnership Versus Regional Comprehensive Economic Partnership: Control of Membership and Agenda Setting* 10 (Asian Development Bank, Working Paper Series on Regional Economic Integration No. 146, 2014), https://aric.adb.org/pdf/workingpaper/WP146_Hamanaka_Trans-Pacific_Partnership.pdf [https://perma.cc/84CD-CDJL] (archived Feb. 7, 2017) ("Japan considered adding Australia and India as being necessary to dilute the PRC's influence, which is a necessary condition for its leadership of the group.").

24. *See* Lewis, *Achieving a FTAAP*, *supra* note 23, at 228 (discussing the Comprehensive Economic Partnership proposed by Japan); Urata, *Japan's FTA Strategy*, *supra* note 22, at 106–07 (discussing Japan's efforts to formulate and implement an economic partnership agreement under the ASEAN+6 framework).

25. *See* BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 20, at 224 (noting "Australia's rapidly expanding resource exports to industrializing Asia"); Urata, *Japan's FTA Strategy*, *supra* note 22, at 111 ("[O]ne of the motivations for a possible Japan-Australia FTA is to secure food and mineral supplies. Securing natural resources is of critical importance for Japan because it is poorly endowed with natural resources.").

26. *See* Lewis, *Achieving a FTAAP*, *supra* note 23, at 223.

- channel the China-U.S. economic conflict into a more constructive and less confrontational context that could defuse at least some of its attendant tension and risk; and
- revitalize APEC itself, which is now of enhanced importance because of the risks of Asia-Pacific and especially China-U.S. fissures.27

Since then, APEC leaders have endorsed various declarations laying down the incremental steps needed to realize the FTAAP. These documents include the *Pathways to FTAAP*,[28] which was adopted in November 2010, and the *Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP*[29] (*Beijing Roadmap*), which was released four years later.

In November 2011, ASEAN, with the support of both China and Japan, proposed to merge the initiatives concerning the East Asia Free Trade Area and the Comprehensive Economic Partnership in East Asia to form the RCEP.[30] At the Nineteenth ASEAN Summit in Bali, Indonesia, ASEAN leaders adopted the *Framework for Regional Comprehensive Economic Partnership*[31] (*RCEP Framework*). The negotiations were finally launched in November 2012 at the Twenty-first ASEAN Summit in Phnom Penh, Cambodia. As ASEAN+6 leaders declared at that time, the RCEP negotiations were established to

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27. C. Fred Bergsten, *A Free Trade Area of the Asia-Pacific in the Wake of the Faltering Doha Round: Trade Policy Alternatives for APEC*, *in* AN APEC TRADE AGENDA?, *supra* note 22, at 15, 32–33.

28. *Pathways to FTAAP*, ASIA-PAC. ECON. COOPERATION (Nov. 13, 2010), http://www.apec.org/meeting-papers/leaders-declarations/2010/2010_aelm/pathways-to-ftaap.aspx [https://perma.cc/A3G5-NBKV] (archived Feb. 7, 2017).

29. *The Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP*, ASIA-PAC. ECON. COOPERATION (Nov. 11, 2014), http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm/2014_aelm_annexa.aspx [https://perma.cc/9BUA-AVWY] (archived Feb. 7, 2017) [hereinafter *Beijing Roadmap*].

30. *See* Hamanaka, *supra* note 23, at 11 (discussing the joint proposal from China and Japan to facilitate East Asian economic cooperation); Ganeshan Wignaraja, *The Regional Comprehensive Economic Partnership: An Initial Assessment*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION 93, 94 (Tang Guoqiang & Peter A. Petri eds., 2014) [hereinafter NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION] ("The RCEP neatly bridges the two proposals [of the East Asian Free Trade Agreement and the Comprehensive Economic Agreement] by adopting an open accession scheme so that any party that meets the template can join. Furthermore, ASEAN is accorded the coordinating role for the RCEP process, which means better inclusion of the interests of smaller ASEAN economies.").

31. *ASEAN Framework for Regional Comprehensive Economic Partnership*, ASS'N SOUTHEAST ASIAN NATIONS (June 12, 2012), http://asean.org/?static_post=asean-framework-for-regional-comprehensive-economic-partnership [https://perma.cc/H83J-C2PT] (archived Feb. 7 2017); *see also "ASEAN Community in a Global Community of Nations": Chair's Statement of the 19th ASEAN Summit, Bali*, ASS'N SOUTHEAST ASIAN NATIONS ¶¶ 45–46 (Nov. 17, 2011), http://www.asean.org/wp-content/uploads/archive/documents/19th%20summit/CS.pdf [https://perma.cc/DQT3-JZTP] (archived Feb. 7, 2017) (welcoming the ASEAN Framework for Regional Comprehensive Economic Partnership).

- [a]chieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement establishing an open trade and investment environment in the region to facilitate the expansion of regional trade and investment and contribute to global economic growth and development; [and]
- [b]oost economic growth and equitable economic development, advance economic cooperation and broaden and deepen integration in the region through the RCEP, which will build upon our existing economic linkages.[32]

Although the ASEAN+6 leaders' joint declaration did not specifically mention the TPP, there is no denying that the development of this United States–led partnership has greatly accelerated the RCEP negotiations.[33] The latter negotiations were particularly urgent when two major ASEAN+6 economies, China and India, were intentionally excluded from the TPP.[34] Also excluded were other key ASEAN+6 members, such as Indonesia, the Philippines, South Korea, and Thailand. While some of these countries had been invited to the TPP negotiations but declined to participate,[35] others were simply ignored or left out.

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32. Joint Declaration, *supra* note 9.

33. *See* Du Ming, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT'L ECON. L. 407, 424 (2015) ("After the USA introduced the TPP and several ASEAN members joined the TPP negotiations, ASEAN has been concerned that the USA might take away its leadership of Asian economic integration and marginalize the Association. ASEAN's proposal for forming the RCEP in 2012 was at least partially motivated by this concern."); Hamanaka, *supra* note 23, at 13 (stating that, while China's dominant strategy "is to establish a regional framework that does not include the United States so it can hold a dominant position," Japan seems to have been "using the 'PRC card' to improve its TPP negotiation position vis-à-vis the United States"); Michael Wesley, *Who Calls the Tune? Asia Has to Dance to Duelling Trade Agendas*, THE CONVERSATION (Oct. 19, 2014), https://theconversation.com/who-calls-the-tune-asia-has-to-dance-to-duelling-trade-agendas-32813 [https://perma.cc/43MR-CV9F] (archived Feb. 7, 2017) ("For Beijing, RCEP is a defensive measure against the TPP. It is calculating that the lure of the size and dynamism of the Chinese economy will convince the region to opt for a more 'Asianist' grouping, rather than the TPP's Pacific model, which threatens to divide Asia's economic regionalism.").

34. *See* Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1132–63 (discussing the exclusion of China and India from the TPP negotiations).

35. *See* Yoo Choonsik, *South Korea Moves Closer to Joining TPP Trade Talks*, REUTERS (Nov. 29, 2013), http://www.reuters.com/article/2013/11/29/us-korea-trade-tpp-idUSBRE9AS06M20131129 [https://perma.cc/QLC6-QD9R] (archived Feb. 6, 2017) [hereinafter *South Korea Moves Closer to TPP Talks*] (reporting that the South Korean government "said it would make a final decision on whether to formally join the [TPP] based on the outcome of talks with the member countries"); Alan Raybould, *Thailand Says to Join Trans-Pacific Partnership Trade Talks*, REUTERS (Nov. 18, 2012), http://www.reuters.com/article/2012/11/18/us-asia-obama-trade-idUSBRE8AH06R20121118 [https://perma.cc/P6LD-J3FE] [hereinafter *Thailand Says to Join TPP Talks*] (reporting Thai Prime Minister Yingluck Shinawatra stating that Thailand would join the TPP negotiations).

Undoubtedly, there were both economic and non-economic reasons for not inviting these countries to the TPP negotiations.[36] Yet, the outcome was the same: while the excluded countries could still join the TPP once it had been established, they would no longer be able to shape the standards involved. Instead, they could only accept the final terms as agreed upon by the original negotiating parties.[37] Such an outcome

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36. *See* Olivier Cattaneo, *The Political Economy of PTAs*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 28, 42–50 (Simon Lester & Bryan Mercurio eds., 2009) (discussing how bilateral and regional agreements are instruments of foreign policy that are primarily driven by political considerations); Chad Damro, *The Political Economy of Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 23, 39 (Lorand Bartels & Federico Ortino eds., 2006) [hereinafter REGIONAL TRADE AGREEMENTS AND WTO] ("[M]any states enter into RTAs [regional trade agreements] for important political, rather than exclusively economic, considerations. In short, states are using economic means for political ends."). Indeed, there were many strategic reasons for negotiating the TPP. As Paul Buchanan observed:

> [F]or the US, the [TPP Agreement] has strategic implications beyond trade *per se*. The [Agreement] would provide the US with a trade-based counterbalance to Chinese ambitions as well as a means by which to redress the current soft power imbalance that favours the Chinese in the South Western Pacific. Beyond any material benefits that accrued, the establishment of a US-led eight-country [now twelve-country] trading bloc across the Pacific Rim, with potential to expand to other APEC members, would help offset Chinese "chequebook diplomacy" as a form of influence and leverage in that part of the world.

Paul G. Buchanan, *Security Implications of the TPPA*, *in* NO ORDINARY DEAL: UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT 82, 89 (Jane Kelsey ed., 2010) [hereinafter NO ORDINARY DEAL]; *see also* Avery Goldstein, *U.S.-China Interactions in Asia*, *in* TANGLED TITANS: THE UNITED STATES AND CHINA 263, 281 (David Shambaugh ed., 2012) ("[W]hen American support for realizing the TPP was given a high priority two years later in conjunction with the November 2011 [APEC] meetings in Honolulu, the prominence accorded the initiative was widely viewed as having a new political significance related to the turbulence in U.S.-China relations during the years following Obama's 2009 trip to China."); Lewis, *Achieving a FTAAP*, *supra* note 23, at 226 (recalling the speech made by the chair of the House Ways and Means Trade Subcommittee that "the TPP 'at least begins the process of positioning the US as a counterweight to China in the Asia-Pacific Region'"); Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1146 ("[S]ome negotiating parties simply do not see the TPP solely as a trade pact. Instead, they consider it as an important alliance that helps foster regional security"); Jagdish Bhagwati, *Deadlock in Durban*, PROJECT-SYNDICATE (Nov. 30, 2011), http://www.project-syndicate.org/ commentary/deadlock-in-durban [https://perma.cc/JL4T-XMAN] (archived Feb. 20, 2017) (stating that TPP "will principally aid countries that are worried about an aggressive China and seek political security rather than increased trade").

37. As Shintaro Hamanaka explained:

> Latecomers can be put in a disadvantageous position in two ways. While both types of policies outlined below are usually implemented in the form of accession conditionality, the two are different in nature. The first one is *de facto* discrimination while the second is *de jure* discrimination:
>
> Latecomers should accept the agenda and rules set by incumbents. Even if the agenda and rules are equally applied to all parties, they are not always neutral.

was highly unattractive, if not unacceptable, to large Asian economies such as China and India. It is therefore unsurprising that these countries have turned their time, attention, and energy toward the RCEP to develop regional standards based on their own preferences and experiences.[38]

At the time of writing, ASEAN+6 members have already entered into seventeen rounds of negotiations. Since the first round in May 2013 in Bandar Seri Begawan, Brunei Darussalam, negotiations have been held around the Asia-Pacific region—in Brisbane, Kuala Lumpur, Nanning, Singapore, Greater Noida, Kyoto, Bangkok, Nay Pyi Taw, Busan, Perth, Auckland, Ho Chi Minh City, Tianjin, Tangerang, and Kobe. [39] Six ministerial meetings, including both regular and intersessional, have also been held in Bandar Seri Begawan, Nay Pyi Taw, Kuala Lumpur, Kuala Lumpur, Vientiane, and Cebu, respectively.[40]

Although none of the draft negotiating texts have been officially released, the leaked texts of some chapters have been made available online by Knowledge Ecology International. Among these leaked drafts are the October 15, 2015 version of the proposed RCEP intellectual property chapter, [41] the original proposed intellectual property

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> Incumbents can set agenda and rules convenient to them, but not necessarily to others.
>
> Latecomers should satisfy additional requirements that were not required from incumbents. They should endure disadvantageous conditions in order to be accepted. Incumbents use additional requirements to tame newcomers and reduce the rival's capability to assume leadership. Additional requirements may include items outside the scope of the agreement.

Hamanaka, *supra* note 23, at 4 (footnote omitted).

38. *See id.* at 12–15 (analyzing the strategies of the key players in the TPP and RCEP negotiations).

39. *See Regional Comprehensive Economic Partnership: News*, DEP'T FOREIGN AFF. & TRADE (Austl.), http://dfat.gov.au/trade/agreements/rcep/news/Pages/news.aspx (last visited July 6, 2016) [https://perma.cc/T7UF-W2A7] (archived Feb. 7, 2017) [hereinafter *RCEP News*].

40. *See id.*

41. October 15 Draft, *supra* note 18; *see also 2015 Oct 15 Version: RCEP IP Chapter*, KNOWLEDGE ECOLOGY INT'L (Apr. 19, 2016), http://keionline.org/node/2472 [https://perma.cc/C52G-PXSW] (archived Feb. 7, 2017) [hereinafter *2015 Oct 15 Version*] (providing the leaked October 15 text of the proposed RCEP intellectual property chapter).

chapters from ASEAN,[42] India,[43] Japan,[44] and South Korea,[45] as well as the proposed RCEP investment chapter.[46] Even though this investment chapter does not focus specifically on intellectual property issues, the investor–state dispute settlement mechanism it seeks to establish will have serious ramifications for regional intellectual property developments.[47]

Once the RCEP Agreement is completed, the final text is anticipated to cover a wide range of areas, including "trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition [and] dispute settlement."[48] Beyond these areas, working or sub-working groups have also been established

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42. ASEAN SECRETARIAT, CHAPTER ON INTELLECTUAL PROPERTY, REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) FREE TRADE AGREEMENT (Oct. 10, 2014), http://keionline.org/sites/default/files/RCEP-TNC6-WGIP3-ASEAN-Draft%20IP%20Text-10Oct2014.pdf [https://perma.cc/72GK-ZWKY] (archived Feb. 7, 2017) [hereinafter ASEAN's Draft]; *see also 2014 Oct 10: ASEAN Proposals for RECP IP Chapter, Also India*, KNOWLEDGE ECOLOGY INT'L (June 8, 2015), http://keionline.org/node/2241 [https://perma.cc/CK56-X74L] (archived Feb. 7, 2017) [hereinafter *ASEAN Proposals for RECP IP Chapter*] (providing the leaked October 10 text of ASEAN's proposal).

43. GOV'T OF INDIA, WORKING DRAFT OF IPR CHAPTER FROM INDIA (Oct. 2014), http://keionline.org/sites/default/files/06-RCEP-TNC6-WGIP3-IN-IP-Draft.pdf [https://perma.cc/2VMJ-KDXE] (archived Feb. 7, 2017) [hereinafter INDIA'S DRAFT]; *see also ASEAN Proposals for RECP IP Chapter*, *supra* note 42 (providing the leaked proposal from India).

44. GOV'T OF JAPAN, DRAFT TEXT ON AREAS NOT COVERED IN THE POSSIBLE COMMON ELEMENTS FROM THE 2ND WGIP (Oct. 3, 2014), http://keionline.org/sites/default/files/RCEP_WGIP_JP_Revised_Draft_Text_3Oct2014.pdf [https://perma.cc/WD4G-FXUR] (archived Feb. 7, 2017) [hereinafter JAPAN'S DRAFT]; *see also 2014 Oct 3 Version: Regional Comprehensive Economic Partnership, Japan IPR Proposals, RCEP*, KNOWLEDGE ECOLOGY INT'L (Feb. 9, 2015), http://keionline.org/node/2173 [https://perma.cc/THG9-9RDT] (archived Feb. 7, 2017) (providing the leaked October 3 text of Japan's proposal).

45. GOV'T OF S. KOREA, REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) FREE TRADE AGREEMENT, DRAFT TEXT OF THE INTELLECTUAL PROPERTY CHAPTER (Oct. 3, 2014), http://keionline.org/sites/default/files/RECP-IP-Chapter-2014Oct3.doc [https://perma.cc/8BWZ-TN5N] (archived Feb. 7, 2017) [hereinafter SOUTH KOREA'S DRAFT]; *see also 2014 Oct 3 Version: Korea Proposal for RECP IP Chapter (Regional Comprehensive Economic Partnership)*, KNOWLEDGE ECOLOGY INT'L (June 3, 2015), http://keionline.org/node/2239 [https://perma.cc/ZG6Z-4EMM] (archived Feb. 7, 2017) (providing the leaked October 3 text of South Korea's proposal).

46. RCEP DRAFT INVESTMENT TEXT (Oct. 16 draft), http://www.bilaterals.org/IMG/docx/03-rcep-wgi10-draftconsolidated-investmenttext.docx [https://perma.cc/772F-XDWM] (archived Feb. 15, 2017); *see also 2015 Oct 16 Version: RCEP Draft Text for Investment Chapter*, KNOWLEDGE ECOLOGY INT'L (Apr. 21, 2016), http://keionline.org/node/2474 [https://perma.cc/NS2R-CRC5] (archived Feb. 20, 2017) (providing the leaked October 16 text of the draft RCEP investment chapter).

47. For the Author's discussions of investor–state dispute settlement, see generally Yu, *Investment-Related Aspects*, *supra* note 2; Yu, *Investor-State Dispute Settlement*, *supra* note 2.

48. Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership pmbl. (Aug. 30, 2012), http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf [https://perma.cc/TLP5-BZST] (archived Feb. 7, 2017) [hereinafter Guiding Principles].

to address rules of origin; customs procedures and trade facilitation; legal and institutional issues; sanitary and phytosanitary measures; standards, technical regulations, and conformity assessment procedures; electronic commerce; financial services; and telecommunications.[49]

Given this large number of working and sub-working groups, it remains to be seen whether the establishment of these groups will result in the creation of standalone chapters in each specific area. Regardless of the structural arrangement, the final agreement is likely to be as ambitious as the TPP Agreement, whose final text contains thirty different chapters. In light of this expansive and comprehensive coverage, questions have already been raised about the potential rivalry, compatibility, and complementarity between these two mega-regional agreements.

III. THREE POSSIBLE SCENARIOS

Although there are many reasons why mega-regional agreements are being negotiated, a close study of the ongoing RCEP negotiations and their contextual backgrounds suggests three possible scenarios in which the agreement will help shape the trade and intellectual property norms in the Asia-Pacific region. The first scenario occurs when the RCEP becomes a rival pact to the TPP. The second scenario takes place when the RCEP functions as a building block for the TPP, the FTAAP, or other high-standards initiatives within the Asia-Pacific region. The final scenario involves the RCEP serving as an alternative path to the TPP. This path will not only rival the TPP-based path but will also be quite different.

A. *Rival Pact*

When the TPP negotiations were first explored between the United States and the four original members of the Trans-Pacific Strategic Economic Partnership Agreement [50] —namely, Brunei Darussalam, Chile, New Zealand, and Singapore—it was unclear which other countries would be invited to the negotiations.[51] At a later

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49. *See RCEP News*, *supra* note 39 (reporting the formation of working and sub-working groups).

50. Trans-Pacific Strategic Economic Partnership Agreement, Brunei–Chile–N.Z.–Sing., Aug, 2, 2005, https://www.mfat.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/P4/Full-text-of-P4-agreement.pdf [https://perma.cc/ERS9-EMQV] (archived Feb. 7, 2017).

51. As stated in President Obama's *2010 Trade Policy Agenda*: "U.S. participation in the TPP agreement is predicated on the shared objective of expanding this initial group to include additional countries throughout the Asia-Pacific region. Several additional countries already have expressed initial interest in participating in

stage, it was also intriguing to observe the terms under which the late-arriving negotiating parties—namely, Canada, Mexico, and Japan—would be allowed to negotiate the agreement. When these countries requested to join the negotiations in the early 2010s, they had to agree not to renegotiate chapters that had already achieved consensus among the preexisting negotiating parties.[52]

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the agreement." OFFICE OF THE U.S. TRADE REP., 2010 TRADE POLICY AGENDA AND 2009 ANNUAL REPORT 146 (2010); *see also* Hamanaka, *supra* note 23, at 6 (noting that the United States "wants the current negotiations to lead to a new agreement, rather than [the Trans-Pacific Strategic Economic Partnership Agreement] accepting the United States as a latecomer").

52. As *Inside U.S. Trade* reported, Mexico had to accept the following conditions in order to join the TPP negotiations:

> First, Mexico agreed to accept all text on which the nine current TPP partners have already reached consensus. That consensus text cannot be reopened unless the nine current TPP partners agreed to revisit it, one official explained.
>
> In addition, Mexico agreed to accept all future text on which the nine partners reach consensus during the forthcoming 90-day window. This appears to reflect the idea forwarded by some TPP observers earlier this week that new entrants like Mexico will not have "veto authority" over the closing of some future TPP chapters.
>
> Mexico did not have a chance to review the past consensus text that it agreed to accept as a condition of entry. Its current understanding is that it also will not have access to any texts until it formally enters the talks, meaning that it will also have to agree to text to which TPP partners agree during the 90-day period without getting to review it first.

Mexico Stresses It Will Be a Full TPP Partner, Despite Terms of Entry, INSIDE U.S. TRADE, June 22, 2012. In regard to Canada, Michael Geist wrote:

> 1. According to *Inside US Trade*, the U.S. established two conditions for Canadian entry. First, Canada will not be able to reopen any chapters where agreement has already been reached among the current nine TPP partners. The problem with this is that Canada has agreed to this condition without actually gaining access to the current TPP text. Has Canada agreed to be bound by terms it has not even read? Can it disclose what it has effectively agreed to simply by accepting the offer to enter the negotiations?
>
> 2. *Inside US Trade* also reports that Canada has second tier status in the negotiations as the U.S. has stipulated that Canada would not have "veto authority" over any chapter. This means that should the other nine countries agree on terms, Canada would be required to accept them. Has Canada agreed to this condition? How will it deal with the prospect that the other nine countries agree to terms that are disadvantageous to Canada?

Michael Geist, *2nd Tier Status for Canada?: 5 Questions on Canada's Entry to the Trans Pacific Partnership Talks* (June 19, 2012), http://www.michaelgeist.ca/2012/06/tpp-entry/ [https://perma.cc/JPH7-G87R] (archived Feb. 6, 2017); *accord* Deborah Kay Elms, *The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 380 (2013) [hereinafter Elms, *TPP Trade Negotiations*] ("Getting approval to participate did not mean . . . that Japan automatically became eligible to see all the negotiating texts or to sit in on bargaining at the next round of discussions. Instead, Japan was forced to wait for the domestic procedures in each TPP member country to be completed before it was allowed to commence discussions with any of them."); *see also* Ann Capling & John Ravenhill, *The*

Notwithstanding the commentators' usual focus on insiders in the TPP negotiations, outsiders are equally important.[53] Indeed, a recent article of the Author has focused on the TPP outsiders.[54] To be certain, there are legitimate reasons why these outsiders were intentionally excluded from the negotiations. In the case of China, for example, the United States and other TPP partners might have been concerned that including it would slow down the negotiations—or worse, would lead to an impasse similar to what the World Trade Organization (WTO) talks had experienced in the Doha Round.[55] Those countries that sought to use the TPP to isolate China, or to protect themselves against China's growing economic and military might,[56] also did not want China to be part of the negotiations.[57]

TPP: Multilateralizing Regionalism or the Securitization of Trade Policy, *in* TRANS-PACIFIC PARTNERSHIP, *supra* note 23, at 279, 290 ("US Trade Representative declared that 'potential new entrants must be prepared to address a range of US priorities and issues'.").

53. *See* Hamanaka, *supra* note 23, at 1 ("[I]t is important to observe not only which economies are included in a regional framework, but also which economies are excluded from it. The distinct feature of TPP is that the PRC is excluded, and that of RCEP is that the United States is excluded. While economists tend to emphasize membership, namely who is in the group, what is politically more important in understanding group formation is exclusion. This is because the exclusion of rival states is necessary for countries seeking to assume leadership.").

54. Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2.

55. *See* Du, *supra* note 33, at 417 ("From the US perspective, the only effect to include China in the current negotiations is that the discussions will slow down and the envisaged 'high standard' diluted to reflect less of US interests."); Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1140 ("[I]f including China in the TPP negotiations would slow down the discussions or create deadlocks similar to what the Doha Round now experiences, it makes great strategic sense to exclude China from the negotiations—or, at least, from the initial stages of these negotiations."); *see also* Tu Xinquan, *China's Position and Role in the Doha Round Negotiations*, *in* CHINA AND GLOBAL TRADE GOVERNANCE: CHINA'S FIRST DECADE IN THE WORLD TRADE ORGANIZATION 167, 167 (Zeng Ka & Liang Wei eds., 2013) [hereinafter CHINA AND GLOBAL TRADE GOVERNANCE] (noting that "some Members and observers claim that China is the root cause of the WTO's Doha fiasco").

56. For discussions of the so-called China threat, see generally CHINA'S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT (Ted Galen Carpenter & James A. Dorn eds., 2000); BILL GERTZ, THE CHINA THREAT: HOW THE PEOPLE'S REPUBLIC TARGETS AMERICA (2000); STEVEN M. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD (2000); PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (2007).

57. *See* Buchanan, *supra* note 36, at 87 ("The strategic context in which the proposed [TPP Agreement] is being negotiated is one where the People's Republic of China is gradually challenging US military and economic primacy in the Western Pacific amid a general military build-up throughout the region."); *see also* Wesley, *supra* note 33 (discussing the TPP and the RCEP in the context of "co-optive socialization"—an effort to convert outsiders of the prevailing order into supporters by "welcoming rising powers into regional institutions and being willing to shift representational and decision-making structures to accommodate their interests, while demonstrating the material benefits they received from existing arrangements").

China might even have had its own reasons to stay outside of the TPP negotiations. For instance, since its accession to the WTO in December 2001,[58] China has continued to struggle with many domestic problems brought about by the WTO accession and the global economic crisis.[59] Under these circumstances, it might have been a good idea for China to keep a low profile[60] and not to participate in the TPP negotiations.[61] After all, acceptance of some of the TPP chapters, such

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58. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 15, 2016) [https://perma.cc/ANR9-JV26] (archived Feb. 7, 2017).

59. As the Author noted in an earlier opinion piece:

> China continues to face myriad challenges within its own economy, which include massive urban migration, widespread unemployment and an enormous gap between the rich and the poor. Although China has worked hard in the past two decades to ensure compliance with WTO rules, the country may not be ready for new and higher trade standards. These standards can be particularly burdensome in view of the recent downturn of the Chinese economy.

Peter K. Yu, *How China's Exclusion from the TPP Could Hurt Its Economic Growth*, FORTUNE (Oct. 19, 2015), http://fortune.com/2015/10/19/china-exclusion-tpp-economic-growth/ [https://perma.cc/TS5D-CEDX] (archived Feb. 6, 2017); *see also* Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 3 (2003) (remarks of the Author) (noting that the rapid economic growth in China has brought about many serious domestic problems, including "decreasing control by the state, decentralization of the central government, significant losses suffered by inefficient state-owned enterprises, the widening gap between the rich and the poor and between the urban and rural areas, massive urban migration, widespread unemployment, corruption, and growing unrest in both the cities and the countryside").

60. *See* Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 229–37 (2011) (discussing China's low profile in the international intellectual property arena); *see also* Henry S. Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. Y.B. INT'L L. 41, 69 (2007) ("Be it in the informal green room meetings, the formal meetings of the various committees and councils or the grand sessions of the Ministerial Conferences, China has generally been reticent.").

61. *See* CAMPBELL, *supra* note 3, at 268 (noting that "the TPP's standards are too high for China to meet at his juncture"); JEFFREY J. SCHOTT ET AL., UNDERSTANDING THE TRANS-PACIFIC PARTNERSHIP 58 (2012) (noting that "China is not ready to implement and enforce the types of obligations under construction in the TPP negotiations"); Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1134 ("At the moment, China does not possess the necessary conditions to be further integrated into what the [U.S. Trade Representative] referred to as 'a high-standard, 21st-century [trade] agreement.'") (footnote omitted); *id.* at 1149 ("Because China continues to struggle with a wide variety of internal problems, its leaders may not be convinced that the country is ready for further trade liberalization under the TPP.").

Nevertheless, the position taken by Chinese leaders may be slowly changing. As Du Ming observed:

> More recently, . . . China's attitude has been less suspicious [of the TPP]. An increasing number of policy advisers are now openly calling for the Chinese government to apply to join the TPP negotiations as early as possible. According to the Ministry of Commerce (MOFCOM), China "will analyze the pros and cons as well as the possibility of joining the TPP, based on careful research and

as those on electronic commerce, government procurement, state-owned enterprises, and telecommunications,[62] would have been highly problematic for China.[63]

Although it remains interesting and important to debate whether China should be part of the TPP, one should not forget that many other major Asian economies have also been left out of the TPP negotiations. Whether they prefer to be or not, India, Indonesia, the Philippines, South Korea, and Thailand are currently not part of the TPP.[64] The exclusion of these countries, along with China, is particularly

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according to principles of equality and mutual benefit". Similarly, a spokesman from the Ministry of Foreign Affairs said: "the Chinese side has an open-minded attitude with regard to the TPP and other initiatives conducive to promoting Asia-Pacific economic integration and common prosperity".

Du, *supra* note 33, at 415 (footnotes omitted).

62. TPP Agreement, *supra* note 1, ch. 13 (telecommunications), ch. 14 (electronic commerce), ch. 15 (government procurement), ch. 17 (state-owned enterprises).

63. As the Author noted in an earlier article:

> [S]ome of the TPP standards, if adopted as reported, would present major challenges to China. A case in point is the proposed government procurement standards, which would drastically alter the structure and operation of state-owned enterprises. . . . The TPP's electronic commerce standards could also deeply affect China's censorship and information control policy. This issue has become especially sensitive in the trade context following China's losses before both the WTO panel and the Appellate Body in *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*.

Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1146; *see also* Du, *supra* note 33, at 418 ("Whenever China intends to join the TPP, China should be braced for the fact that its accession to the TPP will not be easier than its WTO accession a decade ago, if not more difficult and time consuming. Without being prepared to make huge concessions and commit to extensive regulatory reforms, it is not possible for China to be a member of the TPP."); Zhang Jianping, *How Far Away Is China from the TPP?*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION, *supra* note 30, at 66, 66 ("[B]ehind-the-border issues—standards and certification, environmental protection, intellectual property rights, labor standards, and government procurement—constitute severe challenges to China's current management systems and mechanisms. In the short term, China is not qualified to enter the TPP negotiations."); Gordon G. Chang, *TPP vs. RCEP: America and China Battle for Control of Pacific Trade*, NAT'L INTEREST (Oct. 6, 2015), http://nationalinterest.org/feature/tpp-vs-rcep-america-china-battle-control-pacific-trade-14021 [https://perma.cc/ZE3J-3LDE] (archived Feb. 6, 2017) ("Even if China could somehow meet labor, food safety and environmental rules, it would have to adhere to restrictions on the business activities of state enterprises, which would mean a fundamental change in the Chinese economic model and permit wider internet access, which would strike at the heart of the Communist Party's quasi-monopoly on information.").

64. As Kurt Campbell, a former Assistant Secretary of State for East Asian and Pacific Affairs, noted, "already Indonesia, the Philippines, South Korea, Taiwan, and Thailand have expressed an interest in joining [the TPP]." CAMPBELL, *supra* note 3, at 195. During the TPP negotiations, South Korea and Thailand were invited to participate in the TPP negotiations, but both of them declined. *South Korea Moves Closer to TPP Talks*, *supra* note 35; *Thailand Says to Join TPP Talks*, *supra* note 35.

problematic because they are crucial players in the Asia-Pacific region.[65]

Moreover, trade rules can no longer be created in the developed world and then shoved down the throats of large developing countries.[66] With the growing economic and geopolitical strengths of China and India—and, for that matter, other emerging countries in the region—these countries will simply refuse to support a system that they did not help to shape.[67] Indeed, the need to shape trade norms based on their preferences was one of the primary reasons why large Asian developing countries have been actively negotiating the RCEP. As Shintaro Hamanaka noted,

> the formation of regional integration and cooperation frameworks can be best understood as a dominant state's attempt to create its own regional framework where it can exercise some exclusive influence. . . . For an economy that wants to increase its influence, establishing a regional group where it can be the most powerful state—dominating other members in terms of material capacity—is convenient. The most powerful state is likely to be influential in the group because it can easily assume so-called "structural leadership," which is based on material resources. While other factors such as knowledge can also be a source of power, the exercise of power based on non-material resources is uncertain. Thus, having the largest resources in a regional grouping is important to increase the likelihood of attaining leadership. By assuming leadership, an economy can set a favorable agenda and establish convenient rules. In addition, the most powerful state can increase influence through prestige and asymmetric economic interdependence with others.[68]

When all of this background is taken into consideration, it is easy to understand why countries in the Asia-Pacific region have been eager to develop a pact that could rival the TPP.[69] Even more interesting, the ongoing challenges to ratifying the TPP Agreement in the United States and elsewhere have caused policymakers and commentators to

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65. *See* Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1154–57 (discussing the exclusion of India, Indonesia, the Philippines, Thailand, and South Korea from the TPP negotiations).

66. *See* Deborah Kay Elms, *The Trans-Pacific Partnership: Looking Ahead to Next Steps*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION, *supra* note 30, at 9, 18 ("For China, in particular, joining the existing TPP with no opportunity at all for discussing any of the existing provisions may present political difficulties at the domestic level.").

67. *See* C. FRED BERGSTEN ET AL., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 139–40 (2006) ("China . . . recognized the value of being at the table to shape the rules, rather than having the rules imposed upon it."); Sam Nunn, *Address to the American Assembly*, *in* LIVING WITH CHINA: U.S.-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 277, 285 (Ezra F. Vogel ed., 1997) ("China will more likely to adhere to international norms that it has helped to shape.").

68. Hamanaka, *supra* note 23, at 1–2 (footnote and citations omitted).

69. *See supra* note 33.

begin wondering whether the RCEP would provide an attractive alternative to the TPP.[70]

At this stage, it remains unclear whether the RCEP Agreement will contain terms that are in direct conflict with the TPP Agreement even though the existence of blatant conflicts is still highly unlikely. After all, seven of the sixteen RCEP negotiating parties—or, to be more precise, three and a half of the seven parties (Australia, Japan, New Zealand, and close to half of ASEAN)—are TPP partners. These countries will therefore have strong incentives to ensure that they can join the RCEP without violating the commitments made under the TPP Agreement.[71]

Nevertheless, if conflicts do arise, they will precipitate what the Author has described as the "battle of the FTAs [free trade agreements]."[72] This battle will be problematic for not only developing countries but also their developed counterparts. Juggling two very different sets of standards within the same region will be costly, inefficient, and highly challenging. Even more importantly, the conflicts between the TPP and the RCEP will make Asia "a vital battleground in setting the rules of the global economic order."[73] As President Obama declared after the conclusion of the TPP negotiations in October 2015, "[w]hen more than 95 percent of our potential customers live outside our borders, we can't let countries like China write the rules of the global economy. We should write those rules,

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70. *See* Giovanni Di Lieto, *If The TPP Dies, Australia Has Other Game Changing Trade Options*, THE CONVERSATION (Sept. 4, 2016), https://theconversation.com/if-the-tpp-dies-australia-has-other-game-changing-trade-options-64291 [https://perma.cc/P677-97NJ] (archived Feb. 6, 2017) ("Given the TPP agreement may never enter into force due to the uncertain political landscape in the US, Australia and the other six countries (New Zealand, Japan, Singapore, Malaysia, Brunei and Vietnam) that are members to both the TPP and the RCEP are focusing their international trade policies on the latter economic partnership."); Nicholas Ross Smith, *China Will Be the Winner If US Backs Out of the TPP*, THE CONVERSATION (Aug. 1, 2016), https://theconversation.com/china-will-be-the-winner-if-us-backs-out-of-
The-tpp-63328 [https://perma.cc/K4BQ-45K5] (archived Feb. 6, 2017) ("[I]f Clinton or Trump make good on their pledge to torpedo the TPP if elected, the United States will not only miss an opportunity to consolidate its position in Asia-Pacific, it will also allow China to emerge as the uncontested trade power there.").

71. *See* Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 359, 369–70 (2013) [hereinafter Lewis, *TPP and RCEP*] ("Of course there is nothing to stop countries from seeking to join both the TPP and the RCEP, and several countries in ASEAN seem inclined to do so by seeking to join the TPP.").

72. *See* Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 1018–27 (2011) [hereinafter Yu, *Sinic Trade Agreements*] (discussing the undesirable future "battles" among conflicting bilateral, regional, and plurilateral trade agreements).

73. CAMPBELL, *supra* note 3, at 267.

opening new markets to American products while setting high standards for protecting workers and preserving our environment."[74]

B. *Building Block*

The second scenario concerns the use of the RCEP as a building block. When the RCEP negotiations were launched, there was a clear understanding that the partnership would be used to facilitate the development of the FTAAP. As noted in the *Pathways to FTAAP* and the *Beijing Roadmap*, the FTAAP can be achieved through the TPP, the RCEP, or other regional pathways.[75] While the RCEP negotiating parties may be less willing than the TPP partners to accept high trade and intellectual property standards, there is no reason why lower standards could not facilitate the development of the FTAAP.

Indeed, the existence of a low-standards regional pact is consistent with the vision of the TPP architects, though not necessarily preferred by them. Throughout the TPP negotiations, the United States and its negotiating parties never once stated that the agreement would be closed to other countries once it was finalized.[76] Article 30.4.1 of the TPP Agreement specifically states that the agreement

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74. *Statement by the President on the Trans-Pacific Partnership*, WHITE HOUSE (Oct. 5, 2015) https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership [https://perma.cc/AD7R-92TV] (archived Feb. 6, 2017).

75. *See Pathways to FTAAP*, *supra* note 28, at 1 ("We believe that an FTAAP should be pursued as a comprehensive free trade agreement by developing and building on ongoing regional undertakings, such as ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership, among others."); *Beijing Roadmap*, *supra* note 29 ("The FTAAP should aim to minimize any negative effects resulting from the proliferation of regional and bilateral RTAs/FTAs, and will be pursued by building on current and developing regional architectures. Greater efforts should be made to concluding the possible pathways to the FTAAP, including the TPP and RCEP.").

76. President Obama's remarks, for example, suggested a "TPP first, China later" approach: "[I]f we can get a trade deal with all the other countries in Asia that says you've got to protect people's intellectual property[,] that will help us in our negotiations with China." President Barack Obama, *Press Conference by the President*, WHITE HOUSE (Oct. 8, 2013), http://www.whitehouse.gov/the-press-office/2013/10/08/press-conference-president [https://perma.cc/FVF6-HPF9] (archived Feb. 6, 2017). Likewise, Hillary Clinton declared when she was Secretary of State: "We welcome the interest of any nation willing to meet 21st century standards as embodied in the TPP, including China." Hillary Rodham Clinton, Sec'y of State, Remarks at Singapore Management University (Nov. 17, 2012), http://iipdigital.usembassy.gov/st/english/texttrans/2012/11/20121117138825.html [https://perma.cc/RYP4-VMVP] (archived Feb. 6, 2017); *see also* CAMPBELL, *supra* note 3, 269 ("[I]f and when the TPP is passed, the United States should work to encourage and assist in China's movement toward the realization of the TPP's lofty entry requirements, with an aim of ultimately welcoming China into the agreement. Because the TPP is aspirational rather than invitational, the United States should make it clear that China's entry will be welcomed as long as it can meet the agreement's standards."); Capling & Ravenhill, *supra* note 52, at 292 ("Obama identified the TPP as a 'potential model' for the entire region, thus melding together US business interests and foreign policy interests to put pressure on China and others.");

> is open to accession by:
> (a) any State or separate customs territory that is a member of APEC; and
> (b) any other State or separate customs territory as the Parties may agree,
> that is prepared to comply with the obligations in this Agreement . . . .[77]

It is one thing to say that countries that have been reluctant to accept high standards are not allowed to participate in the negotiations, but quite another thing to say that these countries will not be allowed to join the final pact even if they promise to abide by the high standards that are ultimately negotiated.[78]

As far as international negotiations are concerned, the building block approach has been widely used in the negotiation of bilateral, regional, and plurilateral agreements. For example, Jason Kearns found that the United States–Morocco Free Trade Agreement [79] reflected "a 'building block' approach: first ensuring that countries accede to the WTO, then negotiating trade and investment agreements with individual countries in the region (such as the Agreement with Morocco), and finally reaching a comprehensive United States–Middle East Free Trade Area."[80] Likewise, Chia Siow Yue and Hadi Soesastro declared that "[t]he Singapore government views FTAs as building blocks towards global and APEC freer trade. Formation of bilateral FTAs among like-minded partners is seen as a way to avoid the problem in which the pace of trade liberalization is held back unnecessarily."[81]

From a standpoint of regional or international norm setting, the use of a building block approach can be very effective. Virtually all negotiating parties to an FTA belong to other FTAs or regional networks.[82] By engaging in the development of an ever-growing web of

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SCHOTT ET AL., *supra* note 61, at 58 ("We see little evidence to support the notion that China is being excluded as part of a broader containment strategy.").

77. TPP Agreement, *supra* note 1, art. 30.4.1.

78. *See* CAMPBELL, *supra* note 3, at 195 (noting that "TPP is an open-platform agreement that allows any country to join if it can meet the appropriate standards"); C.L. Lim et al., *What Is "High-Quality, Twenty-First Century" Anyway?*, *in* TRANS-PACIFIC PARTNERSHIP, *supra* note 23, at 3, 3 ("[The TPP] is an open-ended agreement that clearly contemplates an expanded membership over time.").

79. United States–Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text [https://perma.cc/284Q-HSJ2] (archived Feb. 6, 2017).

80. Jason Kearns, *United States–Morocco Free Trade Agreement*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 144, 146 (Simon Lester & Bryan Mercurio eds., 2009) [hereinafter BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES].

81. Chia Siow Yue & Hadi Soesastro, *ASEAN Perspective on Promoting Regional and Global Freer Trade*, *in* AN APEC TRADE AGENDA?, *supra* note 22, at 190, 198.

82. *See* Henry Gao, *The RTA Strategy of China: A Critical Visit* [hereinafter Gao, *RTA Strategy*], *in* CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 53, 60 (Ross Buckley et al. eds., 2008) [hereinafter CHALLENGES TO MULTILATERAL TRADE] (discussing China's focus on

FTAs, the participating countries can help establish norms that will eventually be consolidated in a multilateral setting.[83] As Ruth Okediji pointed out, countries may seek to "consolidate and (perhaps improve) the gains from bilateralism" once they have developed a network of bilateral agreements that is sufficiently dense for that purpose.[84] Cho Sungjoon concurred: "[R]egionalism may contribute to multilateralism under certain circumstances through a 'laboratory effect'. After experiencing trial and error as well as learning-by-doing in the regional level, countries may feel confident in ratcheting these regional initiatives up to the multilateral forum."[85]

This building block approach has also been widely used in the intellectual property field. The negotiation of many key international intellectual property agreements, for instance, began with mini-negotiations between a small group of key, and often like-minded,

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negotiations with those who are already members of other RTAs). Indeed, countries have used FTAs as entry points to regional or plurilateral networks. As the Author explained in an earlier article:

> Strategically, FTAs and [economic partnership agreements] provide important entry points into other regional or plurilateral networks. In doing so, they allow developed countries to explore interstate relationships with a smaller number of countries. Such an arrangement helps reduce the complexity and high costs of negotiation with a large number of parties or a complex regional body. The negotiation of the agreements also helps countries test the feasibility of applying specific models to a particular region. In fact, because the agreements involve self-selected parties, they allow parties to avoid negotiation of issues that would require them to make concessions that are important to their domestic constituencies. The exclusion of issues will also quicken the negotiation process, as those issues tend to slow down, if not derail, the negotiations.

Yu, *Sinic Trade Agreements*, *supra* note 72, at 970–71; *see also* Sidney Weintraub, *Lessons from the Chile and Singapore Free Trade Agreements*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 79, 79 (Jeffrey J. Schott ed., 2004) (noting that the United States' free trade agreements with Chile and Singapore were "intended to be bellwethers for future FTAs in both regions, some bilateral and others plurilateral, as well as to set the substantive parameters for the hemispherewide Free Trade Area of the Americas").

83. *See* Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT'L L.J. 1, 21–22 (1989) (contending that a bilateral agreement may "provide at least a partial model for a future multilateral agreement"); IQsensato, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Global Policy Implications*, IN FOCUS, June 2, 2008, at 4 ("What appears as plurilateral in the beginning will quickly become a global standard through FTAs and [economic partnership agreements] and through political and economic pressure.").

84. Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 143 (2004).

85. Cho Sungjoon, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219, 238 (2004) (footnote omitted); *accord* Guy de Jonquières, *Comment*, *in* FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 30, 32 (Jeffrey J. Schott ed., 2004) [hereinafter FTA STRATEGIES AND PRIORITIES] (noting that FTAs "push forward the frontiers by acting as laboratories for WTO-plus innovations").

players before the negotiations were extended to other members of the international community. A case in point is the Agreement on Trade-Related Aspects of Intellectual Property Rights[86] (TRIPS Agreement), whose negotiations began with trilateral discussions between the European Communities (now the European Union), Japan, and the United States (along with their industries).[87] Other good but much earlier examples are the Paris Convention for the Protection of Industrial Property[88] (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works[89] (Berne Convention). As Bryan Mercurio recounted in regard to these two cornerstone agreements,

> [b]y the mid-1800s . . . trading nations had created a complex web of agreements in which [most-favored-nation and national treatments] applied bilaterally. When the "spaghetti bowl" agreements became unmanageable, practitioners and government[s] realized the rights needed to be formally adopted in an international framework. Such efforts built upon the bilateralism by filling gaps and providing coherence to [intellectual property rights]. This process culminated in the Paris Convention . . . and the Berne Convention . . . .[90]

This building block approach was even considered at the early stages of the ACTA negotiations. As revealed in an early discussion paper, which was presumably advanced by the United States and subsequently leaked online, a key negotiating party proposed to conduct the negotiations in two phases:

> In the initial phase, it is important to join a number of interested trading partners in setting out the parameters for an enforcement system that will function effectively in today's environment. As a second phase, other countries will have the option to join the agreement as part of an emerging consensus in favor of a strong [intellectual property] enforcement standard.[91]

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86. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

87. *See generally* DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT (2002) (discussing the trilateral intellectual property negotiations between the European Communities, Japan, and the United States before slowly multilateralizing their consolidated positions); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW 96–120 (2003) (discussing the role of Japanese, EU, and the U.S. intellectual property industries and the Intellectual Property Committee in the TRIPS negotiations).

88. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1538, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

89. Berne Convention for the Protection of Literary and Artistic Works art. 7(1), Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised at Paris July 24, 1971) [hereinafter Berne Convention].

90. Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, *in* REGIONAL TRADE AGREEMENTS AND WTO, *supra* note 36, at 215, 217.

91. DISCUSSION PAPER ON A PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT 1, 1 (2007), http://cryptome.org/acta/acta-proposal-2007.pdf [https://perma.

Although the ACTA negotiations were eventually conducted in a single phase, the final agreement was opened for signature to those countries that were not involved in the negotiations.[92] To a large extent, ACTA reflected this building block approach.

C. *Alternative Path*

Since the beginning of the global economic crisis in 2008, commentators and the media have begun to question the appropriateness of the Washington Consensus, which features a set of policy recommendations concerning fiscal deficits, public expenditure priorities, tax reform, interest rates, the exchange rate, trade policy, foreign direct investment, privatization, deregulation, and property rights.[93] The Washington Consensus is directly relevant to the intellectual property context because it is the model enshrined in the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral agreements. As Neil Netanel noted,

> [t]he [World Intellectual Property Organization (WIPO)] Development Agenda . . . reflects developing countries' growing resistance to the upward harmonization of [intellectual property] protection required by the TRIPS and subsequent "TRIPS-plus" bilateral free trade agreements . . . . [It] should be understood as part of a broad, multipronged rejection of the "Washington

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cc/5Y86-K97A] (archived Feb. 26, 2017); *see also* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1071–72 (2011) [hereinafter Yu, *Six Secret Fears*] (discussing the two-step process). It remains unclear which countries that the negotiating parties would suggest to target at the second phase. Nevertheless, a confidential U.S. government cable disclosed through WikiLeaks stated:

> The GOJ [Government of Japan] sees the most likely candidates for the first tranche including France, UK, Germany, Australia, New Zealand and Singapore. The GOJ sees Italy and Canada as countries which should be approached in the second group, but [Deputy Assistant Secretary Chris] Moore explained potential difficulties with Canada, and pushed for the inclusion of developing countries such as Jordan and Morocco in the first tranche, too. These countries had accepted high IPR [intellectual property right] standards in their FTA's with the U.S.

Michael Geist, *Japan Wanted Canada Out of Initial ACTA Group*, MICHAEL GEIST'S BLOG (Feb. 25, 2011), http://www.michaelgeist.ca/content/view/5656/125/. [https://perma.cc/5Q5K-44J8] (archived Feb. 6, 2017).

92. *See* ACTA, *supra* note 16, art. 39 ("This Agreement shall remain open for signature by participants in its negotiation, and by any other WTO Members the participants may agree to by consensus, from 1 May 2011 until 1 May 2013.").

93. *See generally* John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7, 7–20 (John Williamson ed., 1990) (identifying the economic policies Washington encouraged other states to adopt in Latin America).

> Consensus" that shunted aside the [New International Economic Order] and came to dominate development policy in the 1980s and early 1990s.[94]

Providing a sharp contrast to this Washington Consensus[95] is what Joshua Ramo, the former *Time* foreign editor, has coined the "Beijing Consensus":[96]

> [The Beijing Consensus] is simply three theorems about how to organise the place of a developing country in the world, along with a couple of axioms about why the physics is attracting students in places like New Delhi and Brasilia. The first theorem repositions the value of innovation. Rather than the "old-physics" argument that developing countries must start development with trailing-edge technology (copper wires), it insists that on the necessity of bleeding-edge innovation (fiber optic) to create change that moves faster than the problems change creates. In physics terms, it is about using innovation to reduce the friction-losses of reform.
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> The second Beijing Consensus theorem is that since chaos is impossible to control from the top you need a whole set of new tools. It looks beyond measures like per-capita GDP and focuses instead o[n] quality-of-life, the only way to manage the massive contradictions of Chinese development. This second theorem demands a development model where sustainability and equality become first considerations, not luxuries. Because Chinese society is an unstable stew of hope, ambition, fear, misinformation and politics only this kind of chaos-theory can provide meaningful organization.
>
> . . . .
>
> Finally, the Beijing Consensus contains a theory of self-determination, one that stresses using leverage to move big, hegemonic powers that may be tempted to tread on your toes.[97]

Although one could debate whether the Beijing Consensus—or what Chinese commentators have described modestly as the "Beijing proposal"[98]—actually provides a coherent model, or even whether that model is desirable, there is no denying that this model has earned great admiration throughout the developing world. In recent years, for instance, "government research teams from Iran to Egypt, Angola to Zambia, Kazakhstan to Russia, India to Vietnam and Brazil to Venezuela have been crawling around the Chinese cities and countryside in search of lessons from Beijing's experience."[99]

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94. Neil Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, *in* THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 1, 2–3 (Neil Weinstock Netanel ed., 2009).

95. *See* MARK LEONARD, WHAT DOES CHINA THINK? 134 (2008) ("[F]or the first time since the end of the Cold War, Europe and America face a formidable alternative: the Chinese model.").

96. JOSHUA COOPER RAMO, THE BEIJING CONSENSUS (2004).

97. *Id.* at 11–12. For discussions of the Beijing Consensus, see generally *id.*; STEFAN A. HALPER, THE BEIJING CONSENSUS: HOW CHINA'S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY (2010).

98. HU ANGANG, CHINA IN 2020: A NEW TYPE OF SUPERPOWER 17 (2011).

99. LEONARD, *supra* note 95, at 122; *see also* HALPER, *supra* note 97, at 31 (noting "a growing number of developing nations that are loosely connected by an admiration for China"); Stephen Marks, *Introduction* to AFRICAN PERSPECTIVES ON CHINA IN AFRICA 1,

While the Beijing Consensus may not promote democratic societies and civil liberties—the conditions often demanded by the Washington Consensus—the Chinese model shows a pragmatic approach and the government leaders' willingness to consider a wide variety of options.[100] As Deborah Brautigam noted,

> [a]t the end of the day, we should remember this: China's own experiments have raised hundreds of millions of Chinese out of poverty, largely without foreign aid. They believe in investment, trade, and technology as levers for development, and they are applying these same tools in their African engagement, not out of altruism but because of what they learned at home. . . . These lessons emphasize not aid, but experiments; not paternalism, but the "creative destruction" of competition and the green shoots of new opportunities.[101]

African analysts also appreciate that "China understands the challenges of governing in areas where the bulk of the population lives in abject poverty." [102] Indeed, China's developing-country status suggests that "the means and methods employed in Chinese operations . . . are more likely to provide appropriate models and more instructive experiences in the conditions of underdevelopment, lack of basic infrastructures and other current technical incapacities."[103]

In addition to the Beijing Consensus, ASEAN has also brought to the RCEP negotiations a unique style of negotiation. Commonly referred to as the "ASEAN Way," negotiations involving ASEAN members are conducted in "a process of regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontation styles which are often contrasted with the adversarial posturing, majority vote and other legalistic decision-

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11 (Firoze Manji & Stephen Marks eds., 2007) (citing Nigerians' appreciation of the Chinese model for providing stability and visionary leadership).

100. As William Overholt explained:

> Chinese leaders . . . do not accept Western democratic ideology, but they accept individual practices, such as village elections, because those practices have specific pragmatic value in reducing corruption. They want to discover and test these things themselves, step by step, rather than succumb to foreign ideological browbeating, but they are willing to consider nearly everything.

WILLIAM H. OVERHOLT, ASIA, AMERICA, AND THE TRANSFORMATION OF GEOPOLITICS 118 (2007).

101. DEBORAH BRAUTIGAM, THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA 311–12 (2011).

102. Hany Besada, *The Implications of China's Ascendancy for Africa* 24 (Ctr. for Int'l Governance Innovation, Working Paper No. 40, 2008), http://www.cigionline.org/sites/default/files/Paper_40-web.pdf [https://perma.cc/EZV5-V5F8] (archived Feb. 2, 2017).

103. Dot Keet, *South-South Strategic Bases for Africa to Engage China*, *in* THE RISE OF CHINA AND INDIA IN AFRICA: CHALLENGES, OPPORTUNITIES AND CRITICAL INTERVENTIONS 21, 28 (Fantu Cheru & Cyril Obi eds. 2010).

making procedures in Western multilateral negotiations."[104] While this harmonious approach to regional cooperation has facilitated diplomacy and enhanced security in Southeast Asia, it has also slowed down the negotiation process, resulting in what Mark Beeson has described as "accommodating the slowest ship in the convoy."[105]

Thus far, all the RCEP negotiating parties have bilateral agreements with ASEAN.[106] Principle 6 of the *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership* (*Guiding Principles*) explicitly stated the following:

> Any ASEAN FTA Partner that did not participate in the RCEP negotiations at the outset would be allowed to join the negotiations, subject to terms and conditions that would be agreed with all other participating countries. The RCEP agreement will also have an open accession clause to enable the participation of any ASEAN FTA partner that did not participate in the RCEP negotiations and any other external economic partners after the completion of the RCEP negotiations.[107]

Thus, "having signed an FTA with ASEAN is the precondition for participation in RCEP negotiations."[108]

The preamble of the *Guiding Principles* stated further that the RCEP negotiations "will recognize ASEAN Centrality in the emerging regional economic architecture and the interests of ASEAN's FTA Partners in supporting and contributing to economic integration, equitable economic development and strengthening economic

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104. AMITAV ACHARYA, CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER 63 (3d ed. 2014); *see also* BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 20, at 2 (describing the "ASEAN Way" as an "informal, consensus-based approach to international cooperation"); BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 20, at 219 (noting that there is "very little chance of regional elites losing 'face'" in processes conducted in the ASEAN Way); JÜRGEN HAACKE, ASEAN'S DIPLOMATIC AND SECURITY CULTURE: ORIGINS, DEVELOPMENT AND PROSPECTS 7 (2003) ("ASEAN's diplomatic and security culture comprises six core norms: sovereign equality, non-recourse to the use of force and the peaceful settlement of conflict, non-interference and non-intervention, non-involvement of ASEAN to address unresolved bilateral conflict between members, quiet diplomacy, and mutual respect and tolerance"). *See generally* ACHARYA, *supra* note 104 (providing an excellent discussion of ASEAN's distinctive approach to political and security co-operation). *But see id.* at 63 (conceding that the "ASEAN Way" is "a loosely used concept whose meaning remains vague and contested"); BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 20, at 22 (discussing criticism that "the ASEAN way of voluntarism and consensus . . . has made it primarily an organization dedicated to conflict avoidance rather than resolution"); BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 20, at 88 ("ASEAN is primarily a mechanism for sidelining problems regional leaders consider politically too difficult or sensitive.").

105. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 20, at 32.

106. *See* Hamanaka, *supra* note 23, at 11 ("[E]conomies without an FTA with ASEAN (such as the United States) cannot participate in RCEP negotiations.").

107. Guiding Principles, *supra* note 48, Principle 6.

108. Hamanaka, *supra* note 23, at 11.

cooperation among the participating countries."[109] If the RCEP is indeed centered on ASEAN and negotiated in the ASEAN Way, the final agreement is likely to be very different from the one negotiated by the United States, Australia, Canada, Japan, New Zealand, Singapore, and other like-minded countries.

Notwithstanding the possibility of having an alternative path colored by the Beijing Consensus, the ASEAN Way, or both, the detailed provisions in the leaked drafts of the RCEP intellectual property and investment chapters seem to suggest that the final agreement is unlikely to provide the alternative path that many policymakers, commentators, and civil society organizations have hoped for. Indeed, commentators were considerably disappointed by the close resemblances between the draft RCEP intellectual property chapter and the TPP intellectual property chapter. As Jeremy Malcolm declared,

> [w]e might . . . expect that [the] RCEP could be the "anti-TPP"; a vehicle for countries to push back against the neo-colonial ambitions of the United States, by proposing alternative, home-grown standards on the TPP's thorniest issues such as copyright, patents, and investor protection. Some members of RCEP have indeed spoken out against the TPP because of its unbalanced promotion of strict copyright and patent laws, and some commentators have characterized RCEP and the TPP as competitors.
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> But based on [the] leaks, the promise of [the] RCEP pushing back against the TPP is being squandered. Instead, its [intellectual property] chapter is turning out as a carbon copy. The text for the chapter that South Korea proposes, which [Knowledge Ecology International] rightly and succinctly describes as "terrible", calls for many of the same provisions and more . . . .[110]

The limited distinction between the TPP and RCEP intellectual property chapters is understandable considering that the developed-

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109. Guiding Principles, *supra* note 48, pmbl.; *see also* Yoshifumi Fukunaga, *ASEAN's Leadership in the Regional Comprehensive Economic Partnership*, 2 ASIA & PAC. POL'Y STUD. 103 (discussing ASEAN's leadership in the RCEP negotiations). Shintaro Hamanaka, however, had reservation about the effectiveness of the ASEAN-centered approach:

> RCEP recognizes "ASEAN centrality," though this is conveniently interpreted by the PRC to exclude the United States since it does not have an FTA with ASEAN. On the other hand, ASEAN's centrality would not be assured inside RCEP, where it could possibly be sidelined by larger and more powerful economies such as the PRC and Japan. In the case of TPP, little attention is paid to ASEAN centrality and only some ASEAN members are involved in TPP negotiations at this stage.

Hamanaka, *supra* note 23, at 14 (footnote and citations omitted).

110. Jeremy Malcolm, *Meet RCEP, a Trade Agreement in Asia That's Even Worse Than TPP or ACTA*, ELEC. FRONTIER FOUND. (June 4, 2015), https://www.eff.org/deeplinks/2015/06/just-when-you-thought-no-trade-agreement-could-be-worse-tpp-meet-rcep [https://perma.cc/STD7-2EQF] (archived Feb. 2, 2017) [hereinafter Malcolm, *Meet RCEP*].

country participants in the RCEP negotiations, such as Australia, Japan, New Zealand, Singapore, and South Korea, have very strong incentives to push for the high intellectual property standards that have now been enshrined in the TPP Agreement. While South Korea is technically outside of the TPP, it also has similar incentives, due largely to its FTA with the United States.[111] Being one of the latest U.S. FTAs, the United States–Korea Free Trade Agreement contains very high standards of intellectual property protection and enforcement, along with side confirmation letters covering online piracy prevention and limitations on Internet service provider liability.[112]

D. *Summary*

In sum, there are three different scenarios in which the RCEP Agreement can help shape the trade and intellectual property norms in the Asia-Pacific region. While the leaked drafts of the various TPP chapters have revealed that the alternative path scenario is very unlikely to take place, it remains to be seen whether the RCEP will serve as a rival or complementary pact. At this stage, it is also unclear whether the RCEP, the TPP, or both will become a building block for the FTAAP, especially following the United States' withdrawal.

Moreover, both the rival pact and building block scenarios could happen at the same time.[113] Just as the RCEP threatens to rival the TPP, the two trade pacts could also work in tandem to help facilitate the development of the FTAAP—for example, by including the lowest common denominators of the two pacts. The possibility of these two

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111. United States–Korea Free Trade Agreement, U.S.-S. Kor., Dec. 3, 2010, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [https://perma.cc/73AU-7U8E] (archived Feb. 2, 2017) [hereinafter KORUS FTA].

112. *See* Peter K. Yu, *Trade Agreement Cats and the Digital Technology Mouse*, *in* SCIENCE AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS 185, 194–96 (Bryan Mercurio & Ni Kuei-Jung eds., 2014) (discussing the intellectual property provisions of the United States–Korea Free Trade Agreement).

113. As Shujiro Urata declared:

> [T]he RCEP and the TPP can be complementary and coexist, and they do not need to merge to become an FTAAP. Indeed, one may regard these two regional frameworks as two stages to reach an FTAAP, an eventual goal of regional integration in the Asia Pacific, while the RCEP may eventually develop into an East Asian Economic Community. Developing economies in East Asia may participate in the RCEP first, and they may join the TPP when they have grown economically and are ready to accept high-standard economic rules. In order for this approach to be realized, both the RCEP and the TPP need to accept new members that are qualified to join.

Shujiro Urata, *A Stages Approach to Regional Economic Integration in Asia Pacific: The RCEP, TPP, and FTAAP*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION, *supra* note 30, at 119, 128–29 [hereinafter Urata, *A Stages Approach*].

pacts working together is further strengthened by the positions stated in the *Pathways to FTAAP* and the *Beijing Roadmap*,[114] as well as by the beliefs of many that the two pacts will eventually merge.[115]

Such a merger is not too far-fetched considering that no ASEAN member—or, for that matter, Australia, New Zealand, or any other RCEP negotiating party[116]—wants to pick between the United States and its powerful Asian neighbors.[117] This difficult choice will be obvious if the TPP moves forward and if China and India continue to remain outside of the pact. Many ASEAN+6 members and their industries simply cannot afford to have two expansive yet conflicting

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114. *See Pathways to FTAAP*, *supra* note 28 (noting that the FTAAP should "build[] on ongoing regional undertakings, such as ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership, among others"); *Beijing Roadmap*, *supra* note 29 (including both the TPP and the RCEP among "the possible pathways to the FTAAP").

115. *See* CAMPBELL, *supra* note 3, at 193 ("For many in Asia, both the TPP and the RCEP are way stations on the path to the ultimate destination."); Matthew P. Goodman, *US Economic Strategy in the Asia-Pacific Region: Promoting Growth, Rules, and Presence*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION, *supra* note 30, at 174–75 ("[T]he TPP and the RCEP could one day converge in a region-wide agreement, or at least become interoperable, with enormous potential gains to world income."); Lewis, *Achieving a FTAAP*, *supra* note 23, at 235 ("An analyst with the Asian Development Bank has predicted that ASEAN+6 and the TPP will ultimately merge together."); Robert Scollay, *The TPP and RCEP: Prospects for Convergence*, *in* NEW DIRECTIONS IN ASIA-PACIFIC ECONOMIC INTEGRATION, *supra* note 30, at 235 ("An expectation that the FTAAP will evolve from the trans-Pacific and East Asian tracks [referring to the TPP and the RCEP, respectively] naturally implies that the two tracks will converge at some point, although no process has yet been mapped out . . . .").

116. As Ann Capling and John Ravenhill recounted:

> In November, it was reported that Australia and New Zealand: "have had to communicate to key figures supporting the TPP [in Washington] in no uncertain terms that the moment New Zealand and Australia smell a China containment policy, they are 'gone' from the negotiations". Such views are likely to be shared by other TPP members that have important trade, investment and political relationships with China, and who do not want these to be held hostage to US foreign policy concerns.

Capling & Ravenhill, *supra* note 52, at 293.

117. *See* Ellen L. Frost, *China's Commercial Diplomacy in Asia: Promise or Threat?*, *in* CHINA'S RISE AND THE BALANCE OF INFLUENCE IN ASIA 105 (William W. Keller & Thomas G. Rawski eds., 2007) (noting that Asian countries "do not wish to be forced to choose between Beijing and Washington"); David Shambaugh, *Introduction: The Rise of China and Asia's New Dynamics*, *in* POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS 17 (David Shambaugh ed., 2006) ("Having to choose between Beijing and Washington as a primary benefactor is the nightmare scenario for the vast majority of Asian states . . . . It is not an exaggeration that all Asian states seek to have sound, extensive, and cooperative relations with both the United States and China, and thus will do much to avoid being put into a bipolar dilemma."); Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1151 ("[M]any countries in the Asia-Pacific region remain reluctant to pick between China and the United States despite their concern about China's growing economic and military strengths.").

sets of regional trade and trade-related standards.[118] At some point, they will have to decide whether they want to focus on one or the other. As Meredith Kolsky Lewis observed,

> [the merger of the TPP and the RCEP] is a definite possibility. It is hard to envision economies such as India or China agreeing in the near-term to the comprehensive liberation on trade in goods that acceding to the TPP would entail. At the same time, it also does not seem realistic that in the long-term there will be an FTAAP that does not include China. Furthermore, should Korea . . . agree to join the TPP, it would not be in China's interest to remain on the outside. . . . [Thus, i]t is possible that these competing considerations will coalesce via an ultimate melding together of the TPP with ASEAN+6, such that non-TPP members of ASEAN+6 phase in their commitments over a longer and later time period.[119]

Indeed, for many policymakers and commentators, it is difficult to imagine a comprehensive trade agreement in the Asia-Pacific region without China's participation. As Lim Chin Leng, Deborah Elms, and Patrick Low observed,

> [i]f the ultimate goal of the TPP is to expand to the FTAAP, then the TPP will have to include China. If the TPP is serious about expanding trade cooperation in the Asia-Pacific, then the TPP ought to include China at some point in the future. This is not to say that China needs to participate in the negotiations at th[e] initial stage. But it is to suggest that China's involvement should be

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118. *See* Lewis, *TPP and RCEP*, *supra* note 71, at 369–70 ("[P]articularly for countries with limited human and financial resources for negotiations and those outside the Asia-Pacific, it will probably be the case that countries will seek to join [the TPP or the RCEP] rather than both."); Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1177 ("Although more than half of the TPP negotiating parties (Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, and Vietnam) are also negotiating the RCEP, countries are unlikely to have the ability, resources, and sustained interest in actively developing two rather similar trade pacts in the same region.").

119. Lewis, *Achieving a FTAAP*, *supra* note 23, at 235. Deborah Elms, by contrast, expressed skepticism over such a merger:

> Of course, a lot will ultimately depend on what happens with RCEP and the level of ambition shown. From the beginning however, a merger is already looking tricky. For instance, RCEP explicitly allows special and differential treatment for developing economies, while the TPP does not. The TPP mandates are much broader and deeper than the agenda drawn up by the 16 RCEP parties. It is highly likely that, at the end of the day, the TPP members will be reluctant to drop down the level of ambition in the TPP to meet the RCEP or that RCEP members will come up much farther to meet the TPP.
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> [E]ven if a merger of some sort were possible between RCEP and the TPP, creating a 21 member [preferential trade agreement] in such a fashion would likely be a poor way to draft an agreement. Docking on and massaging existing commitments to fit a new environment is less likely to deliver maximum benefits to all parties than a new agreement negotiated from the beginning.

Elms, *TPP Trade Negotiations*, *supra* note 52, at 396–97.

> planned for and that steps should be taken to make it more—and not less—likely that China will join in the future.120

With China, India, Indonesia, the Philippines, South Korea, and Thailand lying outside of the TPP, the benefits of this regional pact have been significantly curtailed.[121] As the economic modeling work of Peter Petri, Michael Plummer, and Zhai Fan has shown,

> [b]y 2025, the TPP track would yield global annual benefits of $295 billion and the Asian track [of regional initiatives in Northeast and Southeast Asia] $500 billion. The benefits from regionwide free trade—the grand prize involving the consolidation of the tracks—would reach $1,922 billion, or 1.9 percent of world GDP.122

IV. DRAFT INTELLECTUAL PROPERTY CHAPTER

Thus far, this Article has focused primarily on the RCEP as a mega-regional agreement. The remainder of this Article discusses more specifically the intellectual property norms that are being established through the RCEP.

When ASEAN leaders adopted the *RCEP Framework* in November 2011, it was unclear—at least to outsiders—whether the agreement would include an intellectual property chapter. The potential omission of such a chapter was plausible, considering the

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120. C.L. Lim et al., *Conclusion*, *in* TRANS-PACIFIC PARTNERSHIP, *supra* note 23, at 319, 325; *see also* SCHOTT ET AL., *supra* note 61, at 55 ("It is hard to conceive of a comprehensive Asia-Pacific trade arrangement that does not eventually include China."); Lewis, *Achieving a FTAAP*, *supra* note 23, at 235 ("[I]t . . . does not seem realistic that in the long-term there will be an FTAAP that does not include China.").

121. As Sebastian Herreros declared:

> Ultimately, the TPP will have to expand to include large, mostly Asian economies, to be a meaningful exercise. Its current commercial appeal is very modest, given the small size of most participating economies. More importantly, an agreement limited to the . . . nine [and now twelve] participants would be far from a credible platform for large-scale trans-Pacific economic integration.

Sebastian Herreros, *Coping with Multiple Uncertainties: Latin America in the TPP Negotiations*, *in* TRANS-PACIFIC PARTNERSHIP, *supra* note 23, at 260, 274; *see also* Lewis, *Achieving a FTAAP*, *supra* note 23, at 226 ("[T]he United States' interest in the Agreement was clearly tied to its potential to expand. This remains the case today, as the other countries that have joined the negotiation also provide little in the way of new market access opportunities for the US."); Kimberlee Weatherall, *The TPP as a Case Study of Changing Dynamics for International Intellectual Property Negotiations*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 50, 60 (Tania Voon ed., 2014) ("[T]he economic benefits of a TPP between the negotiating parties would be limited; only if bigger regional economies participate, such as India, South Korea, and China, will these negotiations generate a real payoff.").

122. PETER A. PETRI ET AL., THE TRANS-PACIFIC PARTNERSHIP AND ASIA-PACIFIC INTEGRATION: A QUANTITATIVE ASSESSMENT 35 (2012).

wide variation in intellectual property protection and enforcement among ASEAN+6 members.[123]

By the time ASEAN leaders adopted the *Guiding Principles* in August 2012, however, it became clear that the RCEP Agreement would contain an intellectual property chapter, or at least some intellectual property provisions. As Part V of the *Guiding Principles* declared, "the text on intellectual property in the RCEP will aim to reduce [intellectual property]–related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights."[124]

At the third round of the RCEP negotiations in Kuala Lumpur in January 2014, the negotiators finally agreed to establish a working group on intellectual property. As shown by leaked documents, ASEAN, India, Japan, and South Korea began submitting draft negotiating texts for the proposed intellectual property chapter only shortly before the sixth round of the RCEP negotiations in Greater Noida, India in December 2014.[125] According to the brief meeting notes that the Australian Department of Foreign Affairs and Trade provides online, this negotiation round—which followed immediately from the Second RCEP Ministerial Meeting in Nay Pyi Taw, Myanmar—was the first time the working groups "made progress on draft chapter text."[126] It is therefore very likely that draft negotiating texts only began to emerge at this stage, even though the meeting notes did mention that intellectual property issues were discussed as early as the second round.

At the time of writing, the draft text of the RCEP intellectual property chapter had not yet been officially released. Nevertheless, several documents have already been leaked to the public via the Internet. Based on the latest leaked draft text, dated October 15, 2015, the intellectual property chapter may include thirteen sections: (1) general provisions and basic principles, (2) copyright and related rights, (3) trademarks, (4) geographical indications, (5) patents, (6) industrial designs, (7) genetic resources, traditional knowledge, and

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123. *See* Peter K. Yu, *Clusters and Links in Asian Intellectual Property Law and Policy*, *in* ROUTLEDGE HANDBOOK OF ASIAN LAW 147, 148 (Christoph Antons ed., 2017) ("The intellectual property developments in Asia are dynamic, distinct and diverse. These developments have also been highly uneven, not to mention changing rapidly. What we see today consists of largely works in progress."); Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 339–70 (2012) (discussing the difficulty in locating any distinct values, approaches, or practices concerning intellectual property law and policy or identifying any established pan-Asian positions in this area).

124. Guiding Principles, *supra* note 48, pt. V.

125. *See* ASEAN'S DRAFT, *supra* note 42; INDIA'S DRAFT, *supra* note 43; JAPAN'S DRAFT, *supra* note 44; SOUTH KOREA'S DRAFT, *supra* note 45.

126. *RCEP News*, *supra* note 39.

folklore, (8) unfair competition, (9) enforcement of intellectual property rights, (10) cooperation and consultation, (11) transparency, (12) transitional period and transitional arrangements, and (13) procedural matters.[127]

Although this Part does not offer detailed explorations of each section, it highlights the key provisions concerning the four main branches of intellectual property law, as well as the enforcement of intellectual property rights. When analyzing the draft RCEP intellectual property chapter, it is worth recalling that other draft RCEP chapters, such as those on investment and electronic commerce, could include provisions relevant to intellectual property rights. The TPP investment chapter, for instance, became highly controversial after Eli Lilly and Philip Morris used similar investor–state dispute settlement mechanisms in bilateral or regional trade agreements to address their intellectual property disputes.[128]

A. *Copyright*

In the area of copyright and related rights, the draft RCEP intellectual property chapter includes the usual FTA language requiring accession to the two WIPO Internet Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[129] Going beyond the terms of the TPP Agreement, the draft chapter also requires accession to the Beijing Treaty on Audiovisual Performances,[130] the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

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127. October 15 Draft, *supra* note 18.

128. For discussions of the Eli Lilly case, see generally Brook K. Baker & Katrina Geddes, *Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines*—Eli Lilly v. Canada *and the Trans-Pacific Partnership Agreement*, 23 J. INTELL. PROP. L. 2 (2015); Cynthia M. Ho, *Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions*, 30 BERKELEY TECH. L.J. 213 (2015); Ruth L. Okediji, *Is Intellectual Property "Investment"?* Eli Lilly v. Canada *and the International Intellectual Property System*, 35 U. PA. J. INT'L L. 1121, 1122 (2014). For discussions of the Philip Morris cases and the related WTO complaints, see generally LUKAS VANHONNAEKER, INTELLECTUAL PROPERTY RIGHTS AS FOREIGN DIRECT INVESTMENTS: FROM COLLISION TO COLLABORATION 200–20 (2015); Susy Frankel & Daniel Gervais, *Plain Packaging and the Interpretation of the TRIPS Agreement*, 46 VAND. J. TRANSNAT'L L. 1149 (2013).

129. WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [hereinafter WCT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997); *see* October 15 Draft, *supra* note 18, art. 1.7.6(g)–(h) (requiring accession to the WIPO Internet Treaties).

130. Beijing Treaty on Audiovisual Performances, June 24, 2012, http://www.wipo.int/wipolex/en/details.jsp?id=12213 [https://perma.cc/R833-K576] (archived Feb. 2, 2017); *see* October 15 Draft, *supra* note 18, art. 1.7.6(i) (requiring accession to the Beijing Treaty). The inclusion of this treaty was proposed by Australia and Japan but opposed by South Korea.

Organizations[131] (Rome Convention), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.[132]

In addition, the draft RCEP intellectual property chapter includes the usual provisions on technological protection measures and electronic rights management information, [133] which are both significantly shorter[134] and more flexible than their counterparts in the TPP Agreement.[135] Targeting online streaming and other new means of digital communication, the draft chapter also includes provisions addressing the unauthorized communication, or the making available, of a copyrighted work to the public.[136] The push for such provisions is understandable, considering the recent copyright infringement litigation concerning works disseminated through streaming or other digital technologies.[137]

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131. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43; *see* October 15 Draft, *supra* note 18, art. 1.7.6(h) (requiring accession to the Rome Convention).

132. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013, http://www.wipo.int/wipolex/en/details.jsp?id=13169 [https://perma.cc/LH9Q-4LZU] (archived Feb. 2, 2017); *see* October 15 Draft, *supra* note 18, art. 1.7.6(*ibis*) (requiring accession to the Marrakesh Treaty).

133. *See* October 15 Draft, *supra* note 18, art. 2.3 (covering circumvention of effective technological control measures); *id.* art. 2.3*bis* (covering protection for electronic rights management information); *id.* art. 2.3*ter* (covering limitations and exceptions concerning technological control measures and rights management information).

134. *Compare id.* arts. 2.3–.3*ter*, *with* TPP Agreement, *supra* note 1, arts. 18.68–.69.

135. Nonetheless, Jeremy Malcolm suggested that these provisions may be better than their counterparts in the TPP Agreement:

> The RCEP proposals on Digital Rights Management (DRM) in Article 2.3 are a little more flexible than the equivalent Article 18.68 of the TPP. While RCEP still requires legal protection and remedies against the circumvention of DRM, this only covers DRM that constrains uses of the work that are not otherwise authorized or permitted by law.
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> Thus under RCEP, it would probably not be against the law to circumvent DRM in order to view DRM-protected content on a device of your choosing, or to copy parts of it for a fair use purpose, or for other purposes that are consistent with copyright law. This is an important limitation of the scope of a DRM circumvention provision.

Jeremy Malcolm, *RCEP: The Other Closed-Door Agreement to Compromise Users' Rights*, ELEC. FRONTIER FOUND. (Apr. 20, 2016), https://www.eff.org/deeplinks/ 2016/04/rcep-other-closed-door-agreement-compromise-users-rights [https://perma.cc/ NS44-JTQ3] (archived on Feb. 13, 2017) [hereinafter Malcolm, *RCEP*].

136. *See* October 15 Draft, *supra* note 18, art. 2.1.1–2 (providing authors with the exclusive rights to authorize any communication, or making available, of copyrighted works to the public).

137. Among the leading cases in this area are *American Broadcasting Companies v Aereo, Inc.* before the U.S. Supreme Court, *ITV Broadcasting Ltd v TVCatchup Ltd* before the Court of Justice of the European Union, and the "Maneki TV" case before the

Among the negotiating parties, there was some effort—notably from Australia—to push for stronger language on copyright limitations and exceptions beyond the mere recitation of the three-step test in the TRIPS Agreement and the WIPO Copyright Treaty.[138] Article 2.5.3 of the leaked draft text states that "[e]ach party shall endeavour to provide an appropriate balance in its copyright and related rights system by providing limitations and exceptions . . . for legitimate purposes including education, research, criticism, comment, news reporting, libraries and archives and facilitating access for persons with disability."[139] The purposes listed in this provision are very similar to those found in the preamble of the U.S. fair use provision.[140]

Like the TPP intellectual property chapter, the draft RCEP chapter includes a provision prohibiting government use of infringing computer software.[141] Unlike the TPP chapter, however, the RCEP chapter does not extend the copyright term beyond the life of the author plus fifty years[142]—the minimum required by the Berne

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Japanese Supreme Court. Am. Broad. Cos. v Aereo, Inc., 134 S. Ct. 2498 (2014); Case C-607/11, ITV Broad. Ltd. v. TVCatchup Ltd. (Mar. 7, 2013), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-607/11 [https://perma.cc/X8UW-DJXN] (archived Feb. 6, 2017); Saikō Saibansho [Sup. Ct.], Jan. 18, 2011, 65 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 121 (Japan), http://www.courts.go.jp/app/hanrei_en/detail?id=1090 [https://perma.cc/2F3P-XLPF] (archived on Feb. 13, 2017) ("Maneki TV" Case).

138. *See* TRIPS Agreement, *supra* note 86, art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."); WCT, *supra* note 130, art. 10(1) ("Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.").

139. October 15 Draft, *supra* note 18, art. 2.5.3. *But cf.* Malcolm, *RCEP*, *supra* note 136 (lamenting Australia's proposal as "a half-hearted positive obligation").

140. *See* 17 U.S.C. § 107 (2012) ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research*, is not an infringement of copyright." (emphasis added)).

141. *Compare* October 15 Draft, *supra* note 18, art. 2.4 (covering government use of software), *with* TPP Agreement, *supra* note 1, art. 18.80 (covering government use of software). The draft Article 2.4 was proposed by ASEAN, Australia, China, New Zealand, and South Korea but opposed by India.

142. *Compare* October 15 Draft, *supra* note 18 (declining to include provisions concerning the expansion of the copyright term), *with* TPP Agreement, *supra* note 1, art. 18.63 (covering the term of protection for copyright and related rights), *and* SOUTH KOREA'S DRAFT, *supra* note 45, art. X.B.1 (calling for an extension of the copyright term to life of the author plus seventy years).

Convention.[143] The draft RCEP chapter also does not include detailed TPP-like provisions on Internet service providers, secondary liability for copyright infringement, and the notice-and-takedown mechanism [144] (although those provisions could easily have been negotiated as part of the yet-to-be-disclosed electronic commerce chapter, if that chapter indeed exists).

To the disappointment of consumer advocates and civil society organizations, South Korea proposed language requiring countries to "take effective measures to curtail repetitive infringement of copyright and related rights on the Internet or other digital network."[145] In addition, Japan called for the disclosure of information concerning the accounts of allegedly infringing Internet subscribers.[146] It further advanced a footnote supporting "a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of [the] right holder."[147]

Even more disturbing, the draft RCEP intellectual property chapter offers stronger and more expansive protection to broadcasters than the TPP intellectual property chapter, covering such issues as the

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143. *See* Berne Convention, *supra* note 89, art. 7(1) ("The term of protection granted by this Convention shall be the life of the author and fifty years after his death.").

144. *See* TPP Agreement, *supra* note 1, art. 18.81–82 (covering Internet service providers, legal remedies, and safe harbors).

145. October 15 Draft, *supra* note 18, art. 9*quinquies*.3; *see also* KORUS FTA, *supra* note 111, art. 18.30(b)(iv)(A) (conditioning the eligibility for the limitations and exceptions concerning Internet service providers on the providers' "adopti[on] and reasonabl[e] implement[ation of] a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers"). The draft Article 9*quinquies*.3 was proposed by South Korea but opposed by ASEAN, Australia, and Japan.

146. *See* October 15 Draft, *supra* note 18, art. 9*quinquies*.4 (covering the disclosure of information concerning allegedly infringing subscribers of Internet service). This provision was proposed by Japan but opposed by ASEAN, Australia, and South Korea.

147. *Id.* art. 9*quinquies*.2 n.43. As the Author observed in regard to this proposed footnote:

> Japan proposes a footnote that notes that [any procedures implemented to avoid the creation of barriers to legitimate activity] could be accomplished by means of a safe harbor regime that limits remedies against online service providers, while preserving legitimate interests of rights holders. However, the footnote does not specify the details of how such a regime should operate. This is both good and bad. It is certainly good that RCEP does not prescribe a single, inflexible model, such as notice and takedown. However, it also fails to require countries to protect Internet intermediaries from liability for their users' content.

Malcolm, *RCEP*, *supra* note 136.

unauthorized retransmission of television signals over the Internet.[148] As Jeremy Malcolm commented,

> [b]ased on the current text proposals, [the] RCEP may actually impose more stringent protections for broadcasters than the TPP does. The TPP allows authors, performers and producers to control the broadcast of their work, but it does not bestow any independent powers over those works upon broadcasters. [The] RCEP, in contrast, could create such new powers; potentially providing broadcasters with a 50 year monopoly over the retransmission of broadcast signals, including retransmission of those signals over the Internet.[149]

B. *Trademark*

In the trademark area, the draft RCEP intellectual property chapter includes the usual language requiring accession to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, [150] the Singapore Treaty on the Law of Trademarks,[151] and the Trademark Law Treaty.[152] The draft chapter also includes provisions broadening the protectable subject matter of trademark, thereby extending protection to sound and scent marks and signs in three-dimensional shapes.[153]

In addition, the draft RCEP intellectual property chapter covers the procedural improvements relating to trademark application and

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148. *See* October 15 Draft, *supra* note 18, art. 2.6 (providing detailed provisions concerning the protection of broadcasts transmitted by wire or over the air as well as against the unauthorized retransmission of television signals on the Internet). This provision was proposed by Australia and South Korea but opposed by ASEAN and China.

149. Malcolm, *RCEP*, *supra* note 136. As he continued:

> [T]he proposed language on related rights for broadcasters is actually worse than the TPP. The TPP negotiators were wise to mostly avoid this topic, being that it is currently still under negotiation at WIPO, whereas RCEP has plunged ahead and sought to enshrine obligations for the protection of broadcasters that remain controversial and untested around the world.

Id.

150. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989, S. Treaty Doc. No. 106-41; *see* October 15 Draft, *supra* note 18, art. 1.7.6(e) (requiring the accession to the Madrid Protocol).

151. Singapore Treaty on the Law of Trademarks, Mar. 27, 2006, S. Treaty Doc. No. 110-2; *see* October 15 Draft, *supra* note 18, art. 1.7.6(d) (requiring accession to the Singapore Treaty).

152. Trademark Law Treaty, Oct. 27, 1994, 2037 U.N.T.S. 298; *see* October 15 Draft, *supra* note 18, art. 1.7.6(d) (requiring accession to the Trademark Law Treaty). The adoption of this treaty was proposed by Japan and South Korea but opposed by Australia.

153. *See* October 15 Draft, *supra* note 18, art. 3.1.2 ("No Party shall require, as a condition of registration, that trademarks be visually perceptible, nor deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound . . . or a scent . . . ."); *id.* art. 3.1.3 (including "three-dimensional shapes" among "signs capable of distinguishing the goods and services of one undertaking from those of other undertakings").

registration, [154] including the maintenance of "a trademark classification system that is consistent with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks." [155] The draft chapter, however, does not include extensive TPP-like language on domain names, in particular, names in country-code, top-level domains.[156]

Among the RCEP negotiating parties, disagreement remains over the extent of protection for well-known trademarks, [157] including protection through the recognition of the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks.[158] The parties also strongly disagree on ways to address the relationship between trademarks and geographical indications, as well as the latter's eligibility for trademark protection. [159] The current geographical indications provisions in the draft RCEP intellectual property chapter are significantly shorter than those in the TPP Agreement.[160]

C. *Patent*

In the patent area, the draft RCEP intellectual property chapter includes the usual FTA provisions concerning the 1991 Act of the International Convention for the Protection of New Varieties of Plants [161] (UPOV), the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of

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154. *See id.* art. 3.4 (covering procedures for trademark examination, opposition, and cancellation); *id.* art. 3.5 (covering trademark registration and application); *id.* art. 3.5*bis* (allowing for the provision of information that a trademark should not be registered).

155. *Id.* art. 3.3; *see* Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, June 15, 1957, 23 U.S.T. 1336, 550 U.N.T.S. 45.

156. *See* TPP Agreement, *supra* note 1, art. 18.28 (covering domain names, including country-code top-level domains).

157. *See* October 15 Draft, *supra* note 18, art. 3.10 (covering the protection of well-known trademarks).

158. *See id.* art. 3.10.3 ("Each Party recognises the importance of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks as adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the WIPO in 1999."). The provision was proposed by ASEAN, India, Japan, New Zealand, and South Korea but opposed by Australia and China.

159. *See id.* art. 3.2 (covering the protection of certification and collective marks); *id.* art. 3.9 (covering the protection of trademarks predating geographical indications); *id.* art. 4.1 (covering the protection of geographical indications).

160. *Compare id.* § 4 (covering the protection of geographical indications), *with* TPP Agreement, *supra* note 1, § E (covering the protection of geographical indications).

161. International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 33 U.S.T. 2703, 815 U.N.T.S. 89 (amended Mar. 19, 1991); *see* October 15 Draft, *supra* note 18, art. 1.7.6(j) (requiring the accession to the 1991 UPOV).

Patent Procedure,[162] the Patent Cooperation Treaty[163] (PCT), and the Patent Law Treaty.[164] The draft chapter also includes the usual—and usually ineffective—language[165] concerning the Doha Declaration on the TRIPS Agreement and Public Health [166] and the Protocol Amending the TRIPS Agreement.[167]

Like those in the TPP Agreement,[168] the draft patent provisions cover both substantive rights and procedural issues, including those concerning patent application and examination and the maintenance of "a patent classification system that is consistent with the Strasbourg Agreement Concerning the International Patent Classification." [169] Although Japan initially called for the protection of new uses for, or new forms of, known substances,[170] directly undercutting Section 3(d) of the Indian Patents (Amendment) Act of 2005,[171] the draft chapter

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162. Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Apr. 28, 1977, 32 U.S.T. 1241, 1861 U.N.T.S. 361; *see* October 15 Draft, *supra* note 18, art. 1.7.6(k) (requiring the accession to the Budapest Treaty).

163. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231; *see* October 15 Draft, *supra* note 18, art. 1.7.6(b) (requiring the accession to the Patent Cooperation Treaty).

164. Patent Law Treaty, June 1, 2000, 39 I.L.M. 1047; *see* October 15 Draft, *supra* note 18, art. 1.7.6(a) (requiring the accession to the Patent Law Treaty).

165. *See* October 15 Draft, *supra* note 18, art. 1.7.1–.4 (covering the TRIPS Agreement and issues relating to public health).

166. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, WTO Doc. WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

167. General Council, Amendment of the TRIPS Agreement, WTO Doc. WT/L/641 (Dec. 8, 2005). This amendment, which created Article 31*bis* of the TRIPS Agreement, took effect on January 23, 2017. *Amendment of the TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/ amendment_e.htm (last visited Apr. 6, 2017) [https://perma.cc/BEY9-V3CM] (archived Apr. 9, 2017).

168. *See* TPP Agreement, *supra* note 1, § F(A) (covering patents).

169. October 15 Draft, *supra* note 18, art. 5.18.

170. *See* JAPAN'S DRAFT, *supra* note 44, art. XX.C.2 ("2. Each Party shall ensure that a claimed invention is not excluded from the patentable subject matter solely on the ground that the invention is a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or that the invention is a new use for a known substance.").

171. Section 3(d) specifically prevents patent protection from being granted to

> the mere discovery of a new form of a known substance which does not result in increased efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such process results in a new product or employs at least one new reactant.

The Patents (Amendment) Act, No. 15 of 2005, § 3(d), INDIA CODE (2005); *see also* Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571, 1590–98 (2009) (discussing Section 3(d) of the Indian Patents (Amendment) Act of 2005).

does not offer such protection. [172] Nevertheless, there remains continued disagreement between the RCEP negotiating parties over the appropriate standards concerning worldwide novelty for patents,[173] patent term restoration (or extension) as compensation for the time lost due to unreasonable regulatory delay,[174] patents for new plant varieties, [175] and the handling of patent-related information disclosed during the one-year grace period.[176]

D. Trade Secret

In the area of trade secrets and other undisclosed information, the relevant provisions are included in both the patent and unfair competition sections of the draft RCEP intellectual property chapter. The patent section includes a TRIPS-plus provision requiring the introduction of a data exclusivity regime, which prevents the reliance on clinical trial data submitted for the marketing approval of pharmaceuticals. [177] However, no provision focuses specifically on

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172. *Compare* JAPAN'S DRAFT, *supra* note 44, art. XX.C.2, *with* October 15 Draft, *supra* note 18, § 5.

173. *See* October 15 Draft, *supra* note 18, art. 5.12 (covering worldwide novelty for patents). The provision was proposed by Japan and New Zealand but opposed by ASEAN and India. As the draft provision reads, with the usual bracketed texts:

> Each Party shall ensure that a claimed invention shall not be new, if it is [NZ propose: made available to the public by written or oral description or in any other way] [NZ oppose: [CN propose: known to the public] [CN oppose: publicly known], [CN oppose: described in a publication distributed or made available to the public through [JP propose: the Internet] in any Party or in any non-Party before the filing date of the application for a patent, where priority is claimed, before the priority date of the application.

Id.

174. *See id.* art. 5.13 (covering patent term restoration). The provision was proposed by Japan and South Korea but opposed by ASEAN, Australia, China, India, and New Zealand.

175. *See id.* art. 5.19 ("Each Party shall provide for the protection of all plant genera and species by an effective plant varieties protection system which is consistent with the 1991 UPOV Convention."). The provision was proposed by Australia, Japan, and South Korea but opposed by ASEAN, China, India, and New Zealand.

176. *See id.* art. 5.14 (allowing for the provision of information concerning the denial of novelty or inventive step). The provision was proposed by China, India, Japan, New Zealand, and South Korea but opposed by ASEAN.

177. Proposed by Japan and South Korea and opposed by ASEAN, Australia, China, India, and New Zealand, the draft provision reads:

> Each Party shall prevent applicants for marketing approval for pharmaceutical products which utilize new chemical entities from relying on or from referring to test or other data submitted to its competent authority by the first applicant for a certain period of time counted from the date of approval of that application. As of the date of entry into force of this Agreement, such period of time is stipulated as being no less than five years by the relevant laws of each Party.

biologic medicines, a highly contentious and controversial topic during the TPP negotiations.[178]

Compared with those in the patents section, the provisions in the unfair competition section do not seem to go significantly beyond the requirements of Article 39 of the TRIPS Agreement.[179] Nevertheless, some civil society organizations have considered the RCEP negotiators' "failure to explicitly address the need for exceptions to trade secret protection for whistleblowers, journalists, and other disclosures in the public interest . . . [a] missed opportunity."[180]

E. *Intellectual Property Enforcement*

With respect to intellectual property enforcement, the draft RCEP intellectual property chapter includes the usual provisions concerning civil, criminal, and administrative procedures and remedies, as well as provisional and border measures.[181] Although a considerable portion of the draft language in the enforcement section merely reaffirms the existing rights and obligations under the TRIPS Agreement, the proposed language increases the obligations concerning the seizure and destruction of allegedly infringing goods, including the grant of authority to take *ex officio* action[182] and to seize or destroy the materials or implements used to create infringing goods.[183] The draft

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Id. art. 5.16.

178. *See* TPP Agreement, *supra* note 1, art. 18.51 (covering biologics); *see also* Burcu Kilic & Courtney Pine, *Decision Time on Biologics Exclusivity: Eight Years Is No Compromise*, INTELL. PROP. WATCH (July 27, 2015), http://www.ip-watch.org/2015/07/27/decision-time-on-biologics-exclusivity-eight-years-is-no-compromise/ [https://perma.cc/3Y2F-273E] (archived Feb. 13, 2017) (discussing the controversy surrounding the protection of biologics during the TPP negotiations).

179. *Compare* October 15 Draft, *supra* note 18, § 8 (providing the section on unfair competition), *with* TRIPS Agreement, *supra* note 86, art. 39 (covering the protection of trade secrets and undisclosed information).

180. Malcolm, *RCEP*, *supra* note 136.

181. *See* October 15 Draft, *supra* note 18, § 9 (providing the section on intellectual property enforcement).

182. *See id.* art. 9*ter*.5 (covering the suspension of infringing goods by ex-officio action). The provision was proposed by Australia, Japan, and South Korea but opposed by ASEAN.

183. *See id.* art. 9*bis*.5 (providing "the authority to order the seizure of allegedly infringing goods, materials, and implements relevant to the act of infringement, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement"); *id.* art. 9*bis*.6 (covering the destruction of infringing goods, materials, and implements); *id.* 9*bis*.10 (covering provisional measures); *id.* art. 9*quater*.6 (covering the forfeiture or destruction of all infringing goods, materials, and implements used to create infringing goods); *see also* Malcolm, *RCEP*, *supra* note 136 ("Articles 9*bis*.6 and 9*quater*.6 of RCEP would allow courts to order the destruction not only of infringing goods, but also materials and implements used in their creation, such as servers used for hosting copyright-infringing files."). These provisions were proposed by Australia, South Korea, and Japan (except for art. 9*bis*.5) but opposed by ASEAN.

chapter also seeks to empower judicial authorities to determine damages for intellectual property infringement based on lost profits, the market price, or the suggested retail price.[184]

Like the TPP intellectual property chapter, the draft RCEP chapter calls for criminal procedures and penalties for unauthorized camcording in cinemas.[185] Unlike the TPP, however, the draft RCEP provisions on criminal procedures and penalties are not extensive. They apply to neither trade secret infringement [186] nor the circumvention of technological protection measures. [187] The draft provisions on border measures are also less detailed and less invasive.[188]

At the time of writing, the RCEP negotiating parties still strongly disagree on the appropriate standards concerning criminal liability for

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184. Proposed by Australia, Japan, and South Korea but opposed by ASEAN and India, the draft damages provision reads as follows:

> [AU/KR propose : at least in the case of copyrights or related rights infringements and trademark counterfeiting,] the profits of the infringer that are attributable to the infringement which may be presumed to be the amount of damages referred to in clause (i). In determining [JP/AU propose: the amount of] damages [KR/AU propose: for infringement of intellectual property rights] [JP/AU/KR propose: referred to in the paragraph above], [JP/AU propose: a Party's] judicial authorities shall have the authority to consider, inter alia, [JP/KR propose: any legitimate measure of value the right holder submits, [KR/AU oppose: which may include lost profits,]] the value of the infringed [JP/KR/AU propose: goods or services], measured by the market price, [JP/AU/KR propose: or] the suggested retail price.]

October 15 Draft, *supra* note 18, art. 9*bis*.2(i).

185. The draft provision reads:

> Each Party shall provide for criminal procedures to be applied against any person who, without authorization of the holder of copyright or related rights in a motion picture or other audiovisual work, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of the motion picture or other audiovisual work, or any part thereof, from a performance of the motion picture or other audiovisual work in a public motion picture exhibition facility.

Id. art. 9*quinquies*.5; *see also* TPP Agreement, *supra* note 1, art. 18.77.4 ("Recognising the need to address the unauthorised copying of a cinematographic work from a performance in a movie theatre that causes significant harm to a right holder in the market for that work, and recognising the need to deter such harm, each Party shall adopt or maintain measures, which shall at a minimum include, but need not be limited to, appropriate criminal procedures and penalties."). The draft Article 9*quinquies*.5 was proposed by South Korea but opposed by ASEAN, Australia, and New Zealand.

186. *See* TPP Agreement, *supra* note 1, art. 18.78.1 (calling for the provision of criminal procedures and penalties in regard to certain trade secret infringements).

187. *See id.* art. 18.61.1 ("Each Party shall provide for criminal procedures and penalties to be applied if any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the . . . activities [relating to the circumvention of technological protection measures].").

188. *See* October 15 Draft, *supra* note 18, art. 9*ter* (covering border measures).

aiding and abetting,[189] the award of attorneys' fees,[190] and obligations relating to intellectual property enforcement in the digital environment. [191] Facing strong opposition from its negotiating partners, South Korea remains the lone party calling for the provision of pre-established damages.[192]

F. *Summary*

When all of these five sections are taken together, much of the language in the draft RCEP intellectual property chapter resembles the language found in either the TRIPS Agreement or the TPP Agreement. Nevertheless, the draft RCEP chapter includes provisions that are different from those in these earlier agreements. For example, it includes a section on genetic resources, traditional knowledge, and folklore, which is more lengthy and detailed than the one found in the TPP Agreement.[193] The language in that section can be traced back to India's ten-paragraph original proposal. [194] Despite opposition from Australia, India, Japan, New Zealand, and South Korea, China also proposed language on the disclosure of origin or source of genetic resources. [195] The proposed language resembles Article 26 of the

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189. *See id.* art. 9*quater*.4 (calling for the provision of "criminal liability for aiding and abetting"). The provision was proposed by Japan but opposed by ASEAN, Australia, China, and South Korea.

190. Proposed by Australia and South Korea but opposed by ASEAN, the draft provision reads:

> Each Party shall provide that its judicial authorities, [JP oppose: except in exceptional circumstances] [JP propose: where appropriate,] shall have the authority to order, at the conclusion of civil judicial proceedings concerning copyright or related rights infringement, [AU oppose: patent infringement,] or trademark infringement, that the prevailing party shall be awarded payment by the losing party of court costs or fees and reasonable attorneys' fees.

Id. art. 9*bis*.4.

191. *See id.* art. 9*quinquies* (covering intellectual property enforcement in the digital environment).

192. Proposed by South Korea but opposed by ASEAN, Australia, India, Japan, and New Zealand, the draft provision reads:

> In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright or related rights, and in case of trademark counterfeiting, establish or maintain pre-established damages, which shall be available on the election of the right holder. Pre-established damages shall be in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.

Id. art. 9*bis*.3.

193. *See id.* § 7 (covering genetic resources, traditional knowledge, and folklore).

194. INDIA'S DRAFT, *supra* note 43, art. 14.

195. The specific draft language provides:

Chinese Patent Law, which requires patent applicants to disclose the traditional knowledge and genetic resources used in their inventions.[196]

In addition, the RCEP negotiators debated whether Draft Section 12 should be about transitional periods and arrangements or about special and differential treatment.[197] The recognition of the need for special and differential treatment is one of the key distinctions between the RCEP and the TPP. [198] Principle 4 of the *Guiding Principles* specifically declared that "[t]aking into consideration the different levels of development of the participating countries, the RCEP will include appropriate forms of flexibility including provision for special and differential treatment, plus additional flexibility to the least-developed ASEAN Member States, consistent with the existing ASEAN+1 FTAs, as applicable."[199] The provision of such flexibility is

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[ASN/CN propose; AU/IN/JP/KR oppose; 1. Subject to each Party's rights and obligations under the Convention on Biological Diversity (CBD) and other international agreements related to GRTKF [genetic resources, traditional knowledge, and folklore], each Party may establish appropriate measures to protect GRTKF and prevent misappropriation and misuse of GRTK. The Parties also recognise the importance of providing disclosure of origin or sources of GRTK used in relevant [intellectual property] applications.]

[CN propose; AU/IN/JP/KR/NZ oppose: 2. In terms of genetic resources, on which the development of the inventions claimed in patent applications relies, the Parties shall ask the applicants to disclose the detailed information about the origin.

The Parties shall take appropriate, effective and proportionate measures that aim to practically curb any violations to the obligations under Paragraph 1 of the Article. Failure to fulfill the disclosure obligations under Paragraph 1 will result in pending of corresponding patent applications and refusal to grant of patent rights.]

October 15 Draft, *supra* note 18, art. 7.1.

196. *See* Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009), art. 26 (China), *translated* in http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html [https://perma.cc/A7X4-HREZ] (archived on Feb. 13, 2017) [hereinafter Chinese Patent Law] ("With regard to an invention-creation accomplished by relying on genetic resources, the applicant shall, in the patent application documents, indicate the direct and original source of the genetic resources. If the applicant cannot indicate the original source, he shall state the reasons.").

197. The debated heading of Section 12 reads:

[AU oppose : SPECIAL AND DIFFERENTIAL TREATMENT] [AU propose : ADDITIONAL FLEXIBILITIES FOR LDC], TRANSITIONAL PERIOD AND TRANSITIONAL ARRANGEMENTS

October 15 Draft, *supra* note 18, § 12.

198. *See* Urata, *A Stages Approach*, *supra* note 113, at 127 ("One of the main differences between the TPP and the RCEP is the treatment of least-developed countries.").

199. Guiding Principles, *supra* note 48, Principle 4.

especially attractive to the developing-country members of ASEAN+6, which have consistently benefited from such treatment. Cases in point are the early harvest programs in the ASEAN-China Free Trade Area, which provided for the early opening of markets for select goods and services.[200]

Special and differential treatment is also necessitated by the existence of least developed countries in the RCEP[201]—namely, Cambodia, Laos, and Myanmar, the three newest ASEAN members.[202] Thanks to a June 2013 TRIPS Council decision, the TRIPS transition period for these countries has now been extended to July 1, 2021.[203] The TPP, by contrast, does not include any least developed countries (even though its intellectual property chapter does offer transition

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200. *See* Yu, *Sinic Trade Agreements*, *supra* note 72, at 996–97 (discussing the early harvest programs in the ASEAN-China Free Trade Area). As one commentator observes:

> The modality on tariff reduction and elimination, including the EHP [Early Harvest Program] especially, is thus far undoubtedly the jewel in the crown of the [ASEAN-China Free Trade Area]. The EHP has given ASEAN exporters significant advantage over other WTO members in the trade of agricultural goods with China. In the first half year after the EHP was implemented, ASEAN exports of fruits and vegetables increased by 30 per cent. According to the statistics released by the government of Malaysia, Malaysia's exports to China under the EHP reached RM514 million and RM540 million in 2004 and 2005 respectively. During the same period, it imported only RM14 million from China.

Wang Jiangyu, *Association of Southeast Asian Nations–China Free Trade Agreement*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES, *supra* note 80, at 192, 198 (footnote omitted); *see also* Gao, *RTA Strategy*, *supra* note 82, at 63 ("Even though many commentators have doubted the economic benefit to China from an ASEAN-China FTA, as the two are competitors on many products, China has adopted the guideline of 'give a lot while demand little' in FTA negotiations because the political significance of such an FTA greatly outweighs economic considerations.") (footnote omitted).

201. *See* Urata, *A Stages Approach*, *supra* note 113, at 127 (discussing the RCEP negotiating parties' willingness to provide special and differential treatment to least developed countries); *see also* Barry Desker, *ASEAN Integration Remains an Illusion*, E. ASIA F. (Apr. 2, 2015), http://www.eastasiaforum.org/2015/04/02/asean-integration-remains-an-illusion/ [https://perma.cc/LZ4G-JE3M] (archived on Feb, 13, 2017) ("There is a real worry that a 'two-stage' ASEAN is emerging. The six earlier members plus Vietnam are leading the way while Myanmar, Cambodia and Laos remain mired in their least-developed country status.").

202. *See* UNITED NATIONS COMMITTEE FOR DEVELOPMENT POLICY, LIST OF LEAST DEVELOPED COUNTRIES, http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf (May 2016) [https://perma.cc/SCA3-QNX5] (archived on Feb. 13, 2017) (listing what the United Nations deems least developed countries as of May 2016). Vietnam is also one of ASEAN's newest members, but its economic and technological conditions have considerably improved since it joined the association.

203. *See* Council for Trade-Related Aspects of Intellectual Property, *Extension of the Transition Period Under Article 66.1 for Least Developed Country Members: Decision of the Council for TRIPS of 11 June 2013*, ¶ 1, WTO Doc. IP/C/64 (June 11, 2013) ("Least developed country Members shall not be required to apply the provisions of the [TRIPS] Agreement, other than Articles 3, 4 and 5, until 1 July 2021, or until such a date on which they cease to be a least developed country Member, whichever date is earlier.").

periods to six of the twelve TPP partners—namely, Brunei Darussalam, Malaysia, Mexico, New Zealand, Peru, and Vietnam).[204]

In sum, the draft RCEP intellectual property chapter, like any other treaty in the middle of negotiations, includes a wide variety of bracketed texts. While some of the draft provisions are stronger than, or similar to, what is found in the TPP Agreement, other language is much weaker. The draft text also includes language that cannot be found in the TPP Agreement or other TRIPS-plus FTAs.[205] Given that "nothing is agreed until everything is agreed"[206]—a favorite aphorism of treaty negotiators and other government officials—it remains to be seen what the final RCEP intellectual property chapter will look like, or even whether the final agreement will include an intellectual property chapter.

Despite this uncertainty, this Article aims to provide some indication of the directions of the ongoing RCEP negotiations. At the end of these negotiations, it is possible that much of the bracketed language in the draft intellectual property chapter will be retained or only slightly altered. If so, the finalized chapter will indeed require the poorer ASEAN+6 members to offer higher levels of intellectual property protection and enforcement than what the TRIPS Agreement currently requires. It is therefore understandable why the draft RCEP intellectual property chapter has become a major concern among policymakers, commentators, activists, consumer advocates, and civil society organizations, especially in regard to the chapter's potential deleterious impact on access to essential medicines and digital communication.[207]

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204. *See* TPP Agreement, *supra* note 1, art. 18.83.4 (providing transition periods to Brunei Darussalam, Malaysia, Mexico, New Zealand, Peru, and Vietnam).

205. *See* Malcolm, *RCEP*, *supra* note 136 (noting that although the RCEP "manage[s] to avoid some of the worst excesses of the TPP . . . , the proposed language on related rights for broadcasters is actually worse than the TPP").

206. Henrique C. Moraes, *Dealing with Forum Shopping: Some Lessons from the Negotiation on SECURE at the World Customs Organization*, *in* INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 159, 176 (Li Xuan & Carlos Correa eds., 2009).

207. *See 2015 Oct 15 Version*, *supra* note 41 ("Japan and Korea are pushing for test data monopolies, without the same safeguards available to patent monopolies. There are proposals for patent extensions, restrictive rules on exceptions to copyright, and dozens of other anti-consumer measures, illustrating the power of right-holder groups to use secret trade negotiations to limit democratic decisions that impact access to knowledge, the freedom to innovate and the right to health, in negative ways."); Malcolm, *RCEP*, *supra* note 136 (highlighting the problems and flaws of the leaked RCEP intellectual property chapter); Press Release, Médecins Sans Frontières Access Campaign, New Threat Against Affordable Medicines in Trade Negotiations with India and ASEAN (Apr. 21, 2016), http://msfaccess.org/about-us/media-room/press-releases/new-threat-against-affordable-medicines-trade-negotiations-india [https://perma.cc/2WKX-WNKP] (archived Feb. 13, 2017) (warning that "[a]ccess to affordable medicines could be severely restricted for millions of people around the world under the current proposals in the Regional Comprehensive Economic Partnership").

V. FINAL INTELLECTUAL PROPERTY CHAPTER

Although nobody at this point can predict how the RCEP negotiations will play out—or whether the RCEP Agreement, if completed, will ever be ratified—it is actually not that difficult to determine whether the agreement will contain an intellectual property chapter. There seem to be three plausible outcomes: First, there will be no intellectual property chapter. Second, there will be an intellectual property chapter that is similar to the one now included in the TPP Agreement. Third, there will be an intellectual property chapter, but that chapter will contain much weaker standards than those found in the TPP. This Part discusses and assesses each outcome in turn.

A. *No Chapter*

The first outcome is plausible because the wide disagreement among ASEAN+6 members could eventually cause them to abandon efforts to include an intellectual property chapter in the RCEP Agreement. Within the Asia-Pacific region, developments in the intellectual property area have been dynamic, distinct, diverse, highly uneven, and rapidly changing.[208]

For instance, some ASEAN+6 members are far behind others in protecting and enforcing intellectual property rights. As a result, they continue to struggle with massive piracy and counterfeiting problems. [209] Such problems not only have slowed down the development of their domestic intellectual property industries, but they have also created considerable demands on enforcement resources—resources that these countries either do not have or are reluctant to provide at the expense of other equally, or more, pressing public needs.[210]

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208. *See supra* note 124.

209. *See* OFFICE OF THE U.S. TRADE REP., 2016 SPECIAL 301 REPORT 3 (2014) (listing China, India, Indonesia, and Thailand on the Priority Watch List). For the Author's earlier discussions of the piracy and counterfeiting problems in China, *see generally* Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 1st ed. 2007) [hereinafter Yu, *China Puzzle*]; Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006) [hereinafter Yu, *From Pirates to Partners II*]; Peter K. Yu, *Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTEL. PROP. L. 412 (2008).

210. As the Author noted in an earlier article:

> Given the limited resources in many less developed countries, an increase in resources in the enforcement area inevitably will lead to the withdrawal of resources from other competing, and at times more important, public needs.

Many other ASEAN+6 members have also struggled with problems concerning access to essential medicines, educational materials, computer software, information technology, scientific and technical knowledge, and patented seeds and foodstuffs. Because higher standards of intellectual property protection and enforcement would limit access to these much-needed materials,[211] these countries simply do not see higher intellectual property standards as in their best interest. In their view, whatever benefits those standards provide will be far outweighed by the costs of stronger intellectual property protection and enforcement and by the adverse impact in areas not driven by intellectual property industries. [212] After all, many ASEAN+6 economies still rely heavily on agriculture and industrial production.[213]

To further complicate matters, the very strong preference of ASEAN—and, to a lesser extent, ASEAN+6 members—to achieve solutions based on the ASEAN Way [214] has made it particularly difficult for the more powerful ASEAN+6 members, such as Japan or South Korea, to shove their high intellectual property standards down the throats of their less powerful neighbors. Thus, if the RCEP is to be negotiated in the ASEAN Way, it is unclear whether the RCEP

> These public needs include, among others, purification of water, generation of power, improvement of public health, reduction of child mortality, provision of education, promotion of public security, building of basic infrastructure, reduction of violent crimes, relief of poverty, elimination of hunger, promotion of gender equality, protection of the environment and response to terrorism, illegal arms sales, human and drug trafficking, illegal immigration and corruption.

Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 3–4 (2010) [hereinafter Yu, *Enforcement, Economics and Estimates*].

211. For discussions of issues explored in the access to knowledge debate, see generally ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (Gaëlle Krikorian & Amy Kapczynski eds., 2010); SARA BANNERMAN, INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE (2016); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

212. *See, e.g.*, EDITH TILTON PENROSE, THE ECONOMICS OF THE INTERNATIONAL PATENT SYSTEM 93–109 (1951) (discussing the costs and gains involved in the participation of the international patent system); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 840–41 (1987) (listing the costs of the international patent system as established through the Paris Convention); Yu, *Enforcement, Economics and Estimates*, *supra* note 211, at 3–4 (noting the direct and indirect costs of intellectual property enforcement).

213. *See Agriculture, Value Added (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?view=chart (last visited Oct. 15, 2016) [https://perma.cc/9USS-UGRE] (archived on Feb. 13, 2017) (providing data on the added value of industry and agriculture as a percentage of GDP).

214. *See supra* text accompanying notes 104–05.

participating members will eventually reach a consensus on an intellectual property chapter.[215]

Despite all of these considerations, there are at least three reasons why the RCEP Agreement will most likely contain an intellectual property chapter in the end. First, when ASEAN+6 members adopted the *Guiding Principles* in August 2012, they agreed to include an intellectual property text in the RCEP Agreement. [216] After its establishment at the third round of the RCEP negotiations in January 2014,[217] the working group on intellectual property has also worked actively to develop the draft text of the intellectual property chapter. Absent any catastrophic developments in the RCEP negotiations, the investment in this working group is just too substantial for the chapter to be abandoned at this late stage.

Second, given the importance of intellectual property industries to countries such as Australia, Japan, New Zealand, and South Korea, it is very unlikely that these countries will be content with a regional trade and investment agreement that does not contain an intellectual property chapter. If these countries threaten to pull out of the RCEP negotiations, the key question for the remaining ASEAN+6 members will no longer be about whether the agreement should include an intellectual property chapter, but whether such inclusion is so important to them that they would rather lose the entire regional pact or the participation of key neighbors in this pact than omit the chapter.

Third, apart from these developed-country members, China, India, and other emerging countries within ASEAN+6—or what the Author has called "middle intellectual property powers" [218]—have begun to appreciate the strategic benefits of stronger intellectual property protection and enforcement. Although these countries have yet to embrace the very high protection and enforcement standards found in the European Union, Japan, or the United States, they now welcome standards that are higher than what is currently available in the Asia-Pacific region. These countries are therefore unlikely to block the inclusion of an intellectual property chapter in the RCEP Agreement.

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215. *Cf.* Gantz, *supra* note 11, at 64 ("ASEAN . . . has had a very poor track record over 20 years in reducing intra-regional tariff and non-tariff barriers and adopting effective government to government dispute settlement mechanisms, also suggests the level of difficulties facing the negotiators.").

216. *See* Guiding Principles, *supra* note 48, § V ("The text on intellectual property in the RCEP will aim to reduce [intellectual property]–related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights.").

217. *See RCEP News*, *supra* note 39 (summarizing the outcome of the third round of the RCEP negotiations in Kuala Lumpur, Malaysia in January 2014).

218. Peter K. Yu, *The Middle Intellectual Property Powers*, *in* LAW AND DEVELOPMENT IN MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP 84 (Randall Peerenboom & Tom Ginsburg eds., 2014).

B. *TPP-Like Chapter*

In the second outcome, the RCEP Agreement will include an intellectual property chapter containing high protection and enforcement standards, similar to those found in the TPP Agreement. A key rationale behind such inclusion is that, if the RCEP is to successfully compete with the TPP as a viable alternative for setting trade norms in the Asia-Pacific region—at least before the United States' withdrawal—it will need to provide effective standards in the intellectual property area. Otherwise, it will lose the support of those economies that are driven heavily by intellectual property and technology industries—both within ASEAN+6 and outside.

If the TPP is indeed dead, as some policymakers and commentators have suggested,[219] the RCEP will still need to provide standards that are high enough to entice existing TPP partners to embrace the partnership as a dominant forum for setting regional intellectual property norms. Without such participation, a new regional pact could easily emerge to take the TPP's place. Such emergence will accelerate should the Trump administration change its mind or be satisfied with the new arrangement.

More importantly, the RCEP intellectual property chapter may have already garnered the support of not only the developed-country members of ASEAN+6 but also its developing-country members. It is no surprise that Japan advanced at the RCEP negotiations a very detailed proposal for an intellectual property chapter.[220] After all, the country has the strongest and most sophisticated economy in Asia, with a GDP per capita of $32,477.22 in 2015, as estimated by the World Bank.[221] It also has a well-functioning intellectual property system. According to WIPO statistics, Japan currently ranks second in terms of international patent applications filed through the PCT, behind only the United States.[222]

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219. *See* Kaori Kaneko & Yoshifumi Takemoto, *Japan Ratifies TPP Trade Pact to Fly the Flag for Free Trade*, REUTERS (Dec 9, 2016), http://www.reuters.com/article/us-japan-tpp-idUSKBN13Y0CU ("Japanese Prime Minister Shinzo Abe has said the TPP would be 'meaningless without the United States'."); *see also* Joshua Berlinger, *TPP Unravels: Where the 11 Other Countries Go from Here*, CNN (Jan. 24, 2017, 9:59 PM), http://www.cnn.com/2017/01/24/asia/tpp-other-11-countries-what-next/ (registering the reactions of the leaders of other TPP partners after the United States' withdrawal).

220. *See* JAPAN'S DRAFT, *supra* note 44.

221. *GDP Per Capita (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last visited Oct. 15, 2016) [https://perma.cc/WT82-PKT4] (archived Feb. 13, 2017).

222. *Who Filed the Most PCT Patent Applications in 2016?*, WORLD INTELL. PROP. ORG. (Mar. 16, 2016), http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2016.pdf [https://perma.cc/5P5E-6JB5] (archived on Apr. 9, 2017) [hereinafter *Who Filed Most PCT Applications*].

In addition, Japan originated the proposal to establish ACTA. Conceived as a "Treaty on Non-Proliferation of Counterfeits and Pirated Goods," that proposal for an anti-counterfeiting treaty was advanced by Prime Minister Junichiro Koizumi at the June 2005 G-8 meeting in Gleneagles, Scotland.[223] As a TPP member, Japan also has a strong interest in ensuring that the intellectual property standards in the RCEP Agreement are comparable to those found in the TPP Agreement. From a business standpoint, it would be a major nightmare for Japanese firms to juggle two very different sets of standards within the Asia-Pacific region.

Like Japan, South Korea's economy is highly developed, with a GDP per capita of $27,221.53 in 2015, as estimated by the World Bank.[224] The country also has a well-functioning intellectual property system and a highly successful home electronics industry, with Samsung and LG being household names. Since May 2007, the Korean Intellectual Property Office has actively engaged the European Patent Office, the Japan Patent Office, the United States Patent and Trademark Office, and the State Intellectual Property Office of China to identify ways to streamline and harmonize their patent examination systems.[225] According to WIPO, South Korea currently has the world's fifth largest volume of PCT applications, behind the United States, Japan, China, and Germany.[226] Among corporate applicants, LG and Samsung rank fifth and ninth in the world, respectively.[227]

Moreover, the United States–Korea Free Trade Agreement, which entered into force in March 2012, requires South Korea to adopt some of the world's highest intellectual property standards.[228] To the extent that these standards have increased the costs of its goods and services and thereby undercut its global competitiveness, South Korea will have a strong incentive to level the playing field by introducing similar cost-raising standards to other ASEAN+6 members through the RCEP. As Jeremy Malcolm lamented,

> [f]ar from setting up a positive alternative to the TPP, South Korea is channeling the [U.S. Trade Representative] at its worst here—what on earth are they

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223. *See* Yu, *Six Secret Fears*, *supra* note 91, at 980–83 (discussing Japan's proposal for an anti-counterfeiting treaty, which eventually became ACTA).

224. *GDP Per Capita (Current US$)*, *supra* note 222.

225. *See* PETER DRAHOS, THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS 236 (2010) (noting that the European Patent Office, the Japan Patent Office, the Korean Intellectual Property Office, the State Intellectual Property Office of China, and the United States Patent and Trademark Office have met frequently since 2007 to discuss ways to "improve the efficiency of their examination systems and to harmonize their office systems").

226. *Who Filed Most PCT Applications*, *supra* note 222.

227. *Id.*

228. *See* KORUS FTA, *supra* note 111, arts. 18.1–.12 (providing high standards of intellectual property protection and enforcement).

> thinking? The answer may be that, having been pushed into accepting unfavorably strict copyright, patent, and trademark rules in the process of negotiating its 2012 free trade agreement with the United States, Korea considers that it would be at a disadvantage if other countries were not subject to the same restrictions.[229]

Together with Australia, Japan, and New Zealand—the three other ASEAN+6 members of the Organisation for Economic Co-operation and Development (OECD)—South Korea will be able to form a Developed-Country Quad within ASEAN+6. As far as the RCEP is concerned, this group of countries will be powerful enough to push actively for high standards of intellectual property protection and enforcement. Given the similarities between these standards and those found in the TPP Agreement, the four ASEAN members that are also TPP partners—Brunei Darussalam, Malaysia, Singapore, and Vietnam—may also choose to support the inclusion of TPP-like standards in the RCEP.

The most interesting developments leading up to this second outcome concerns the large developing-country members of ASEAN+6, such as China, India, Indonesia, the Philippines, and Thailand. As noted earlier, China, India, and other emerging countries in the Asia-Pacific region have begun to appreciate the strategic benefits of stronger intellectual property protection and enforcement.

A case in point is China. Once a technologically backward country that relied heavily on piracy and counterfeiting to catch up, China now ranks third in terms of PCT applications, behind only the United States and Japan.[230] Among corporate applicants, ZTE Corporation and Huawei Technologies also rank the first and second in the world, respectively.[231] As regards trademark protection, China currently has the world's fourth largest volume of international trademark applications filed under the Madrid system.[232]

To be certain, China, India, and other emerging countries in the region may still find the intellectual property standards proposed by Australia, Japan, New Zealand, and South Korea higher than what they would prefer. Nevertheless, they may not find those standards highly objectionable,[233] especially if they manage to secure greater

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229. Malcolm, *Meet RCEP*, *supra* note 110.

230. *Who Filed Most PCT Applications*, *supra* note 222.

231. *Id.*

232. *Who Filed the Most Madrid Trademark Applications in 2016?*, WORLD INTELL. PROP. ORG. (Mar. 16, 2016), http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2016.pdf [https://perma.cc/C8ZK-595T] (archived on Apr. 9, 2017).

233. *See* Peter Drahos, *Will the TPP Transform Intellectual Property Regulation in Asia?*, E. ASIA F. (Feb. 17, 2016), http://www.eastasiaforum.org/2016/02/17/will-the-tpp-transform-intellectual-property-regulation-in-asia/ [https://perma.cc/R5LF-C9K4] (archived on Feb. 13, 2017) ("China might even see some longer-term advantages in

concessions in other trade or trade-related areas. After all, these emerging countries are now growing rapidly in both economic and technological terms. Their intellectual property standards have therefore been slowly elevated to match their changing local conditions. It will be only a matter of time before these standards catch up with those found in their more developed neighbors.

Some leaders in these emerging countries may also welcome new RCEP requirements for stronger intellectual property protection and enforcement. After all, those requirements will provide these leaders with the much-needed external push to accelerate domestic intellectual property reforms.[234] In China, for example, the standards required by the TRIPS Agreement and the push for accession to the WTO led to a complete overhaul of its copyright, patent, and trademark laws in the early 2000s.[235] To many reformist leaders, having their hands tied by international treaties can sometimes be used as an effective weapon against hardline leaders and conservative critics at home.[236]

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embracing some intellectual property standards, including patent standards, given China's dominance in the manufacture of active pharmaceutical ingredients.").

234. As the Author noted in regard to intellectual property law reforms in China:

> [B]ecause reformist leaders were constantly challenged by their more conservative counterparts, who were uncomfortable with the country's rapid socio-economic changes and the social ills brought about by these changes, the rhetoric allowed the reformist leaders to deflate criticisms of their kowtowing to foreign interests, especially in times of considerable external pressure from the United States. Instead, the leaders could highlight the economic benefits of stronger intellectual property protection and justify intellectual property reforms as an important leapfrogging tool to enable China to catchup with its more advanced trading partners. The reformist leadership could also tie the reforms to the growing nationalist sentiments that longed for China's regaining its rightful place following centuries of humiliation and semi-colonial rule.

Yu, *China Puzzle*, *supra* note 210, at 192.

235. *See* Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, *in* GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 26 (Nari Lee et al. eds., 2016) [hereinafter Yu, *Transplant and Transformation*] (discussing the effort China took to undertake a major overhaul of its intellectual property laws in the run-up to the WTO accession); *see also* Yu, *From Pirates to Partners II*, *supra* note 210, at 906–23 (examining the various amendments to the Chinese intellectual property system at the turn of the new millennium).

236. *See* MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION 41 (1999) ("An international institution such as the WTO can help bolster China's reform leadership against powerful hard-liners. International institutions can tie the hands of leaders in ways that the ineffectual bilateral relationship is not able to do so."); Michael E. DeGolyer, *Western Exposure, China Orientation: The Effects of Foreign Ties and Experience on Hong Kong*, *in* THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997–1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE 299, 300 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) ("[Economic integration] would help the reformers tilt the internal Chinese debate in directions that would minimize, if not avoid, future economic conflicts. It would encourage and perhaps accelerate the inevitable transformation of China's political regime.") (internal quotation marks omitted); Peter

To be certain, the weaker and poorer ASEAN+6 members may still be reluctant to accept an intellectual property chapter with high protection and enforcement standards. Nevertheless, the benefits they will secure from the RCEP in other trade or trade-related areas may more than compensate for their losses in the intellectual property area. To a large extent, the trade-offs in the RCEP may not be that different from the trade-offs they have experienced in the WTO.

From a Realist standpoint, many of these poorer and weaker countries also have very limited power or recourse if their more powerful neighbors insist on including an intellectual property chapter with high protection and enforcement standards. For the former, it is just not a viable option to lose the new trade and trade-related benefits provided by Australia, China, India, Japan, New Zealand, South Korea, and other more powerful neighbors through the RCEP.

Although it is entirely possible that the RCEP Agreement will include a TPP-like intellectual property chapter, it is still unlikely that the agreement will do so considering that the FTAs China and India have thus far entered into do not include similarly high protection and enforcement standards.[237]

If the RCEP Agreement included TPP-like standards, these powerful developing countries would have to completely overhaul their intellectual property systems—an outcome they have fought very hard at the WTO and WIPO to avoid.[238] Given the pivotal roles China and India have played in the RCEP negotiations, it is just difficult to imagine that these countries would suddenly welcome requirements they had adamantly opposed in major international fora.[239] It is also

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K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1107 (2011) [hereinafter Yu, *TRIPS Enforcement Dispute*] ("In China, the reformists are constantly challenged by their more conservative counterparts, who are uncomfortable with the country's rapid socio-economic changes and the resulting social ills. By providing the much-needed external push that helps reduce resistance from conservative leaders, the panel report [in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*] has helped accelerate reforms in the area of intellectual property protection and enforcement.") (footnote omitted).

237. For discussions of China's FTAs, see generally Gao, *RTA Strategy*, *supra* note 82, at 53; Marc Lanteigne, *Northern Exposure: Cross-Regionalism and the China-Iceland Preferential Trade Negotiations*, 202 CHINA Q. 362 (2010); Yu, *Sinic Trade Agreements*, *supra* note 72.

238. *See* Minutes of Meeting from TRIPS Council, ¶¶ 248–73, WTO Doc. IP/C/M/63 (Oct. 4, 2010) (reporting the criticisms by China and India of the TRIPS-plus enforcement standards established by ACTA and other bilateral and regional trade agreements); Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 518–20 (2011) [hereinafter Yu, *TRIPS and Its Achilles' Heel*] (discussing the interventions China and India made at the TRIPS Council's June 2010 meeting addressing the release of the draft ACTA text and the growing push for TRIPS-plus intellectual property enforcement standards via bilateral and regional trade agreements).

239. *See* Yu, *TRIPS and Its Achilles' Heel*, *supra* note 239, at 514–21 (noting the developing countries' resistance to high intellectual property enforcement standards).

very unlikely that Australia, Japan, New Zealand, and South Korea could force these powerful emerging countries to accept the heightened requirements on a take-it-or-leave-it basis.

Nevertheless, if these developed countries managed to convince China and India to support the inclusion of an intellectual property chapter with high TPP-like intellectual property standards, or if China and India changed their minds (due perhaps to changing economic and technological conditions), the RCEP intellectual property chapter would facilitate greater harmonization of protection and enforcement standards at both the regional and global levels. Within the Asia-Pacific region, these new standards would help pave the way for the establishment of the FTAAP. Other countries in the region would warmly welcome such harmonization, considering that many of them remain reluctant to support—and, for some, even unable to afford—two expansive yet differing regional trade pacts.[240]

Across the world, the new RCEP standards would help accelerate international harmonization of intellectual property standards at both the WTO and WIPO. As the TRIPS negotiations have demonstrated, multilateral standards tend to be developed by first securing a consensus among the key negotiating parties before slowly extending those standards to other members of the international community.[241] The harmonization facilitated by the RCEP would therefore be highly important, especially in view of the current deadlock between developed and developing countries in the Doha Round.

240. *See* Lewis, *Achieving a FTAAP*, *supra* note 23, at 231 ("The most likely alternatives to the TPP . . . are either ASEAN+6 or ASEAN+3, or perhaps a new model with a China-Japan-Korea FTA at its core."); *see also id.* at 223 (examining the prospects for the TPP to expand into a FTAAP); Jane Kelsey, Jane Kelsey, *Introduction* to NO ORDINARY DEAL, *supra* note 36, at 10, 17–18 ("[T]he [TPP Agreement] was envisaged as the foundation for an APEC-wide free trade agreement.").

241. *See supra* text accompanying notes 86–92.

C. *TPP-Lite Chapter*

In the final outcome, China and India will push for an intellectual property chapter that contains much lower standards than those initially proposed by Japan and South Korea and now supported by other developed-country members of ASEAN+6. While these proposals may have provided useful starting points for the working group on intellectual property, the remaining RCEP negotiating parties—led by China and India, perhaps—have actively bargained down the terms of the draft intellectual property chapter. In the end, this chapter will contain terms that offer more limited protection than the TPP intellectual property chapter, but still more expansive protection than the TRIPS Agreement or what is currently available in many Asian countries.

This outcome is the most likely and is already happening. The terms of the RCEP intellectual property chapter will be even more diluted if the negotiations have to conclude soon—that is, before China, India, and other emerging countries further elevate their intellectual property standards to match their rapidly changing local conditions. After all, the current standards in these countries are still quite close to those of the developing-country members of ASEAN+6.

This final outcome also reflects the approach currently taken by both China and India in their FTA negotiations. If one is interested in the type of intellectual property provisions that will find their way to the final text of the RCEP Agreement, a good starting point will be the China–Switzerland Free Trade Agreement [242] (CSFTA) or the European Union–India Free Trade Agreement.[243]

Take the CSFTA, for instance. Although China was somewhat reluctant to include an expansive intellectual property chapter in its early FTAs—such as those with Chile, Pakistan, New Zealand, and Singapore [244]—the CSFTA contains a significantly more detailed

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242. Free Trade Agreement Between the Swiss Confederation and the People's Republic of China, Switz.-China, July 6, 2013, 2006, https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/Switzerland_China_FTA_Main_Agreement.pdf [https://perma.cc/5ZA5-Q3A7] (archived Feb. 4, 2017) [hereinafter CSFTA].

243. *See* Patralekha Chatterjee, *Leaked IP Chapter of India-EU FTA Shows TRIPS-Plus Pitfalls for India, Expert Says*, INTELL. PROP. WATCH (Mar. 12, 2013, 5:35 PM), http://www.ip-watch.org/2013/03/12/leaked-ip-chapter-of-india-eu-fta-shows-trips-plus-pitfalls-for-india-expert-says/ [https://perma.cc/AA4X-8V22] (archived Feb. 4, 2017) (reporting about the leaked draft text of the intellectual property chapter of the India-European Union Free Trade Agreement).

244. As the Author noted in an earlier book chapter:

> [T]he intellectual property chapters in [China's FTAs] continue to increase in size, content, sophistication and complexity. While neither the [agreement] with Singapore nor the one with Pakistan has a single intellectual property provision, the intellectual property chapter in the [China–New Zealand Free Trade

intellectual property chapter.[245] The inclusion of such a lengthy chapter is perhaps due to Switzerland's insistence on high standards of intellectual property protection and enforcement, especially after the very limited success, if not failure, of the ACTA negotiations. The existence of such a chapter is also attributable to the timing of the CSFTA, which was signed in July 2013, as opposed to the mid- to late 2000s. By then, China had already had its National Intellectual Property Strategy in place for five years.[246] The country had also completely overhauled its patent law and was only a few weeks away from adopting the new amendments to its trademark law.[247]

Indeed, the CSFTA bears a remarkable resemblance to the current leaked draft of the RCEP intellectual property chapter. Although the former includes provisions found in the TRIPS Agreement and other TRIPS-plus FTAs, some of its provisions are quite unique. Article 11.9 of the CSFTA, for example, offers language on the disclosure of origin or source of genetic resources. Article 11.9 also calls for efforts "to enhance a mutually supportive relationship between the TRIPS Agreement and the Convention on Biological Diversity, regarding genetic resources and traditional knowledge."[248]

In sum, like the CSFTA, the RCEP intellectual property chapter is likely to contain lower standards than those found in the TPP Agreement.[249] It may also include language that is not found in that

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> Agreement] has close to 800 words. That number has quickly doubled to more than 1500 words in the [China–Costa Rica Free Trade Agreement] and again doubled to more than 3000 words in the [China–Switzerland Free Trade Agreement].

Peter K. Yu, *Sinic Trade Agreements and China's Global Intellectual Property Strategy*, *in* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION 247, 265 (Christoph Antons & Reto M. Hilty eds., 2015).

245. *See id.* at 264–65 (discussing the intellectual property chapter in the China–Switzerland Free Trade Agreement).

246. STATE COUNCIL, OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY (2008), *translated at* http://english.gov.cn/2008-06/21/content_1023471.htm (last visited Feb. 4, 2017) [https://perma.cc/CKS8-8PB9] (archived Feb. 4, 2017); Peter K. Yu, *Five Oft-repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 90–96 (discussing China's National Intellectual Property Strategy).

247. The third amendment to the Chinese Patent Law was adopted in December 2008, and the third amendment to the Chinese Trademark Law was adopted in August 2013, a month after the signature of the CSFTA. *See* Chinese Patent Law, *supra* note 197; Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended of Aug. 30, 2013, effective May. 1, 2014) (China), *translated at* http://www.wipo.int/wipolex/en/text.jsp?file_id=341321 (last visited Feb. 4, 2017) [https://perma.cc/NK7C-2RFX] (archived Feb. 4, 2017).

248. CSFTA, *supra* note 243, art. 11.9.

249. *Cf.* Du, *supra* note 33, at 425 ("[T]he FTAs negotiated by China and ASEAN are typically less ambitious than the TPP, narrower in their coverage of trade in goods and services, and having few WTO-plus provisions.").

agreement and other TRIPS-plus FTAs. Only time will tell whether the intellectual property standards in the RCEP Agreement will complement or conflict with those found in the TPP Agreement. If conflicts indeed arise, the resulting inconsistencies and tensions may precipitate the "battle of the FTAs" discussed in Part III.[250] In this battle, the TPP and the RCEP will further polarize ASEAN+6 members while fragmenting the regional and international trading and intellectual property systems.

VI. INTELLECTUAL PROPERTY POLICY DILEMMA

The previous Part asked the question of whether the final RCEP Agreement will contain an intellectual property chapter. This Part turns to a much more difficult question concerning the actual content of this chapter—namely, how high the standards in the potential RCEP intellectual property chapter will, and should, be. After explaining why lower standards are naturally attractive to developing countries in the Asia-Pacific region, this Part discusses why the recent technological rise of China, India, and other emerging countries in the region has revealed some benefits of higher intellectual property standards. By bringing together these opposing views, this Part highlights the challenging dilemmas confronting intellectual property policymakers in the Asia-Pacific region.

A. *Lower Standards*

Since the developed countries' active push for bilateral and regional FTAs in the mid-2000s, developing-country governments, academic and policy commentators, and civil society organizations have actively criticized these agreements for enclosing the policy space of developing countries.[251] These criticisms can be broken down into at least five strands of arguments.

First, through the transplant of high intellectual property standards from the developed world[252]—often beyond what is required

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250. *See supra* text accompanying notes 72–74.

251. *See* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting essays discussing FTAs in the intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259 (criticizing the U.S.-Australia Free Trade Agreement); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392–400 (2004) (discussing the growing use of bilateral and regional trade agreements to push for higher intellectual property standards).

252. As the Trade Act of 2002 stated:

by the TRIPS Agreement—bilateral, regional, and plurilateral agreements are notorious for ignoring the local needs, national interests, technological capabilities, institutional capacities, and public health conditions of developing countries.[253] Because of the differences in economic conditions, imitative or innovative capacity, and research and development productivities, an innovative model that works well in one country does not always suit the needs and interests of another.[254] Unquestioned adoption of foreign intellectual property laws therefore may not only fail to result in greater innovative efforts, industrial progress, and technology transfer, but may also drain away the resources needed for dealing with the socioeconomic and public health problems created by the new legislation.

Second, the introduction of reforms based on foreign laws may exacerbate the dire economic plight of many developing countries, as the new laws would enable foreign rights holders in developed and emerging countries to crush local industries through litigation threats or actual lawsuits.[255] Even if the new laws were beneficial *in the long run*, many of these countries might not have the wealth, infrastructure, and technological base to take advantage of the opportunities created

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> The principal negotiating objectives of the United States regarding trade-related intellectual property are . . . to further promote adequate and effective protection of intellectual property rights, including through . . . ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law . . . .

19 U.S.C. § 3802(b)(4)(A)(i)(II) (2004).

253. *See generally* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827 (2007) [hereinafter Yu, *International Enclosure Movement*] (discussing the enclosure of the policy space developing countries have in designing intellectual property systems that fit their needs, interests, conditions, and priorities).

254. *See* Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 89, 93–97 (Mitchel B. Wallerstein et al. eds., 1993) (arguing that countries should tailor intellectual property protection to their economic needs, productive and research capabilities, and institutional and budgetary constraints); David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, *in* INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 155, 156 (George R. Stewart et al. eds., 1994) ("[A] truly successful [intellectual property] system must be culturally-specific and responsive to the different economic and social realities of each country."); Yu, *International Enclosure Movement*, *supra* note 254, at 889 ("[B]ecause of the differences in economic conditions, imitative capacity, and research and development productivities, an innovative model that works well in developed countries often does not suit the needs and interests of less developed countries.") (footnote omitted).

255. *See* Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 30–31 (2002) (discussing the lawsuit major pharmaceutical manufacturers brought against the South African government).

by the system *in the short run.*[256] For countries with urgent public policy needs and a population dying due to a lack of access to essential medicines, the realization of the hope for a brighter long-term future seems far away, if not unrealistic. If protection is strengthened beyond the point of appropriate balance, the present population undoubtedly would suffer greatly.

Third, although the development of uniform rules can be beneficial, greater harmonization of legal standards can also take away valuable opportunities for experimentation with new regulatory and economic policies.[257] The creation of diversified rules could also facilitate competition among jurisdictions, thereby rendering the lawmaking process more accountable to the local populations by allowing them to decide for themselves what rules and systems they want to adopt.[258] In the digital age, when laws are quickly introduced, often without convincing empirical evidence, greater experimentation and competition are indeed badly needed.[259]

Fourth, whether intentional or not, TRIPS-plus bilateral, regional, and plurilateral agreements sometimes call for a higher level of protection than what is currently offered in the developed world[260]—

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256. *See* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 237 (2000) (noting that "long-run gains would come at the expense of costlier access in the medium term").

257. *See* John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 707–08 (2002) (discussing how countries can develop legal systems by experimenting with new regulatory and economic policies).

258. *See id.* at 706–07 (discussing how variation in standards will breed interjurisdictional competition, which in turn will provide a check on governmental inefficiency and abuse).

259. *See* Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13, 40–58 (2006) [hereinafter Yu, *Anticircumvention and Anti-Anticircumvention*] (using anti-circumvention protection to illustrate why developing countries may need different laws in this area).

260. As Carlos Correa observed:

> The [Central America–Dominican Republic Free Trade Agreement] . . . raises questions about how bilateral the U.S. bilateralism actually is. As mentioned, the absolute and automatic patent-registration linkage seems to go beyond U.S. law. Also, Article 15.10 may ban, in practice, the use of patented inventions for compulsory licensing and governmental non-commercial purposes. By creating through bilateral negotiations standards of protection higher than those applied domestically, the powerful U.S. pharmaceutical industry may be able to force an amendment of U.S. domestic law in ways simpler and less costly that through lobbying in Congress.

Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT'L L. 79, 93 (2004); *see also* Yu, *Anticircumvention and Anti-Anticircumvention*, *supra* note 260, at 41 (lamenting that "the [anti-circumvention] protection under the free trade agreements is often stronger than what is required under the [Digital Millennium Copyright Act]").

for instance, by omitting important limitations and exceptions.[261] If developed countries, such as the European Union or the United States, do not even see the benefits of having such high standards, one has to wonder why higher standards are needed in countries that have more limited resources and that often lack adequate safeguards or correction mechanisms.[262]

Fifth, the web of bilateral, plurilateral, and regional agreements could lead to fragmentation. Commentators have referred to such

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261. A case in point is the provision on technological protection measures. The anti-circumvention provision of the U.S. Digital Millennium Copyright Act includes a wide variety of limitations and exceptions. *See* 17 U.S.C. § 1201 (d)–(j) (2012) (providing exceptions for nonprofit libraries, archives, and educational institutions; law enforcement, intelligence, and other government activities; law enforcement, intelligence, and other government activities; encryption research; minors; and security testing). By contrast, Article 18.68 of the TPP Agreement does not include those exceptions. *See* TPP Agreement, *supra* note 1, art. 18.68. Instead, Article 18.68.4 merely allows a TPP partner to

> provide certain limitations and exceptions to the [covered technological protection] measures . . . in order to enable non-infringing uses if there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party's law.

Id. art. 18.68.4(a).

262. As the Author noted in an earlier article:

> Although commentators have emphasized the importance of a counter-balancing competition system, it remains disturbing that many less developed countries do not have the resources to put together at the same time both a patent system and a competition system; instead, they often have to choose between the two. Many of these countries also may not have the ability to put in place a correction mechanism once they have exhausted their financial and human resources to update or strengthen their intellectual property system. Even worse, because reforms based on foreign models always incur political costs on those pushing the reforms, policymakers may have limited political capital to put in place further "correction" reforms once their initial reforms fail.

Yu, *International Enclosure Movement*, *supra* note 254, at 889 (footnotes omitted); *see also* COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 4 (2002) ("We consider that, if anything, the costs of getting the IP system 'wrong' in a developing country are likely to be far higher than in developed countries. Most developed countries have sophisticated systems of competition regulation to ensure that abuses of any monopoly rights cannot unduly affect the public interest."); MASKUS, *supra* note 257, at 237 (noting that developed countries "have mature legal systems of corrective interventions" where "the exercise of [intellectual property rights] threatens to be anticompetitive or excessively costly in social terms").

fragmentation as the "spaghetti bowl"[263]—or, in the Asian context, the "noodle bowl"[264]—which is filled with "a mish-mash of overlapping, supporting, and possibly conflicting, obligations." [265] Although fragmentation has its benefits, commentators tend to agree that it would hurt developing countries more than it would help them. Eyal Benvenisti and George Downs, for example, described a number of ways in which the growing proliferation of international regulatory

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263. *See* Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995) (coining the term "spaghetti bowl"); *see also Beijing Roadmap*, *supra* note 29 ("The proliferation of regional RTAs/FTAs has . . . resulted in a 'spaghetti bowl' effect, posing complex new challenges to regional economic integration and to business."). One commentator described this bowl vividly as "a certain lumpiness, with the spaghetti tangled in or around four or five discernible clumps—meatballs, perhaps." Viet D. Do & William Watson, *Economic Analysis and Regional Trade Agreements*, *in* REGIONAL TRADE AGREEMENTS AND WTO, *supra* note 36, at 7, 10.

264. *See* Wang, *supra* note 201, at 224 (noting "'Asian noodle bowl effect' as highlighted by officials of the Asian Development Bank"); Yu, *Sinic Trade Agreements*, *supra* note 72, at 978 (noting the creation of the "noodle bowl" in Asia); Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* (Asian Dev. Bank, Working Paper on Regional Economic Integration No. 7, 2007), http://www.adb.org/documents/papers/regional-economic-integration/WP07-Baldwin.pdf (last visited Feb. 4, 2017) [https://perma.cc/CU6B-XQ73] (archived Feb. 4, 2017); Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 3 (Asian Dev. Bank, Working Paper No. 144, 2009), http://www.adb.org/documents/Working-Papers/2010/ Economics-WP226.pdf (last visited Feb. 4, 2017) [https://perma.cc/M6XN-B7WX] (archived Feb. 4, 2017) (noting "a 'noodle bowl' problem of crisscrossing agreements that potentially distort trade toward bilateral channels, excessive exclusions and special treatment in FTAs, and the possibility that the multilateral trading system may be progressively eroded"). Jagdish Bhagwati traced the term "noodle bowl" to President Haruhiko Kuroda of the Asian Development Bank. JAGDISH N BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE 63 n.16 (2008).

265. Simon Lester & Bryan Mercurio, *Introduction*, *in* BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES, *supra* note 80, at 1, 2; *accord* JAGDISH N. BHAGWATI, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY 290 (1999) ("As [preferential trade agreements] proliferate, the main problem that arises is the proliferation in turn of discriminatory access to markets, with a whole maze of trade duties and barriers that vary according to source."); Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT'L L.J. 345, 375 (2009) ("Further proliferation of FTAs results in transaction costs that serve to the detriment of multilateral trade liberalization at the WTO level, thereby provoking a fragmentation of multilateralism."); Meredith Kolsky Lewis, *The Prisoners' Dilemma and FTAs: Applying Game Theory to Trade Liberalization Strategy*, *in* CHALLENGES TO MULTILATERAL TRADE, *supra* note 82, at 21, 25 ("The large number of FTAs has led to a trading system with complicated and sometimes inconsistent rules due to different rules of origin."); Jeffrey J. Schott, *Free Trade Agreements: Boon or Bane of the World Trading System*, *in* FTA STRATEGIES AND PRIORITIES, *supra* note 85, at 3, 14–15 (expressing concern about "domino regionalism" that "fragments the trading system into protectionist blocs or spurs competitive liberalization that reinforces multilateral reforms" and noting that FTAs "can create overlapping sets of trade rules and regulations that make sourcing products to different markets complicated and often more costly").

institutions with overlapping jurisdictions and ambiguous boundaries has helped powerful states to preserve their dominance.[266]

In addition, the existence of a dense web of bilateral and regional trade agreements could create conflicting obligations within many developing countries.[267] It is bad enough to be forced to sign an agreement that does not accommodate local conditions, but it is even worse to be put in a position of juggling two potentially conflicting agreements that do not accommodate local conditions and that are very difficult, if not impossible, to honor.

In sum, many reasons exist to support the RCEP's adoption of low standards of intellectual property protection and enforcement. Such adoption would be consistent with the development agendas that have been established at the WTO and WIPO and in other

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266. As Eyal Benvenisti and George Downs wrote:

> First, [fragmentation] limits the ability of weaker states to engage in the logrolling that is necessary for them to bargain more effectively with more powerful states . . . . Second, by creating a multitude of competing institutions with overlapping responsibilities, fragmentation provides powerful states with the opportunity to abandon—or threaten to abandon—any given venue for a more sympathetic venue if their demands are not met . . . . Third, a fragmented system's piecemeal character suggests an absence of design and obscures the role of intentionality . . . . This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both closely reflects their interests and that only they have the capacity to alter.

Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597–98 (2007).

267. As Robert Scollay noted:

> A particular problem for convergence arises if more than one major economy establishes its own FTA "template", and if there are inconsistencies between the different "templates". The outlook then is for the establishment of multiple "hub and spoke" configurations centred on each major economy as a "hub", where the FTAs in each configuration converge on the "template" of the "hub", but where the prospect of convergence between the configurations with their inconsistent "templates" is remote. Other economies may then either seek to follow one of the "hub" templates in their own FTAs, as Mexico has tended to do (essentially following the NAFTA template), or, if they seek to participate in more than one "hub and spoke" configuration, be willing to adapt the design of their FTAs to the "template" of each configuration, as Chile and Singapore have tended to do.

Robert Scollay, *Prospects for Linking Preferential Trade Agreements in the Asia-Pacific Region*, *in* AN APEC TRADE AGENDA?, *supra* note 22, at 164, 185; *see also* Yu, *Access to Medicines*, *supra* note 12, at 386 (suggesting that "conflicts may arise if less developed countries sign the trade agreements supplied by both the European Communities and the United States without appropriate review and modification"); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 407 (2006) (highlighting the need to better understand the tension between the European Union and the United States so as to avoid making commitments to conflicting FTA obligations).

international fora.[268] Such adoption will also be important if the final agreement provides limited special and differential treatment to the poorer RCEP partners,[269] especially those in the least developed world.

B. *Higher Standards*

Although policymakers and commentators tend to have a kneejerk resistance to high international intellectual property standards, the need for low standards—or what Daniel Gervais has called "the subtractive narrative"[270]—does not present the complete picture. Indeed, the recent technological rise of China, India, and other emerging countries in the Asia-Pacific region has called for a pause to rethink appropriate intellectual property norm-setting strategies.

During the TRIPS negotiations, developing countries were repeatedly told that the TRIPS Agreement, along with other commitments in the WTO, would provide the painful medicine they need to boost economic development. As Professor Gervais observed in the TRIPS context, these countries "were told to overlook the distasteful aspects of introducing or increasing intellectual property protection and enforcement in exchange for longer-term economic health."[271] Although it is easy to dismiss the sales pitch of TRIPS advocates and supporters, it is much harder to evaluate whether China, India, and the now-emerging countries in the Asia-Pacific region have in fact benefited from the many economic reforms pushed on them by the WTO Agreement.

Indeed, many policymakers and commentators have taken the view that China would not have been as economically developed and as technologically proficient as it is today had it not embraced the reforms required by WTO accession.[272] To be certain, one could still

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268. *See* Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 511–40 (2009) (discussing these development agendas).

269. *See supra* text accompanying notes 197–204 (underscoring the need for special and differential treatments in the RCEP).

270. Daniel Gervais, *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation*, 77 FORDHAM L. REV. 2353, 2357–60 (2009) (discussing the attacks on the TRIPS Agreement and the subtractive narrative).

271. Daniel J. Gervais, *The TRIPS Agreement and the Doha Round: History and Impact on Economic Development*, *in* 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 23, 43 (Peter K. Yu ed., 2007); *see also* Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 166–67 (1994) (arguing that developing countries agreed to stronger intellectual property protection during the TRIPS negotiations because they found such protection in their self-interests).

272. As the Author noted in an earlier article:

> To some extent, the push for China to strengthen intellectual property protection has resulted in the slow and paradoxical erosion of the United States' competitive

debate whether the improvements actually originated from the WTO or from the TRIPS Agreement—an important distinction. Nevertheless, the WTO's "single undertaking" approach has virtually guaranteed this distinction to be a non-issue. Under this approach, any country acceding to the WTO cannot have non-intellectual property reforms and benefits without also implementing the TRIPS-based reforms.[273]

Moreover, as China moved from the stage of transplanting foreign laws to the stage of developing indigenous standards,[274] the country skillfully deployed "selective adaptation" strategies[275] to ensure the

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> position. This point sounds counterintuitive, but it actually makes a lot of sense. From a long-term competition standpoint, greater intellectual property protection will make China more innovative and therefore more competitive. Such increased competitiveness will slowly erode the competitive advantage the United States has traditionally enjoyed as a result of its much higher intellectual property standards.

Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 550–51 (2012) (footnotes omitted); *see also* CAMPBELL, *supra* note 3, at 195 ("The last time China signed on to a difficult trade agreement was when it joined the WTO, and after a period of costly but necessary domestic reforms, it benefited dramatically."); Chang, *supra* note 63 ("[China] reaped large gains after it joined the World Trade Organization in December 2001, due mostly to the reforms required by its accession agreement.").

273. *See* Marrakesh Agreement Establishing the World Trade Organization art. 2.2, Apr. 15, 1994, 1867 U.N.T.S. 154 ("The agreements and associated legal instruments included in Annexes 1, 2 and 3 [including the TRIPS Agreement] . . . are integral parts of this Agreement, binding on all Members."); *see also Legal Texts: The WTO Agreements*, WORLD TRADE ORG., https://www.wto.org/English/docs_e/legal_e/ursum_e.htm (last visited Oct. 17, 2016) [https://perma.cc/JR3E-MH67] (archived Feb. 4, 2017) ("The WTO framework ensures a 'single undertaking approach' to the results of the Uruguay Round—thus, membership in the WTO entails accepting all the results of the Round without exception.").

274. *See* Peter K. Yu, *Building the Ladder: Three Decades of Development of the Chinese Patent System*, 5 WIPO J. 1, 3–13 (2013) (discussing the different stages of intellectual property reform in China, including creation, imitation and transplantation, standardization and customization, and indigenization); *see also* Guo He, *Patents*, *in* CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 25, 28 (Rohan Kariyawasam ed., 2011) ("The impetus for the early amendments [to Chinese Patent Law] came from outside, whilst the need for the third amendment originated from within China, that is to say, the majority of the third amendment was to meet the needs of the development of the domestic economy and technology originating in China.").

275. As Pitman Potter describes, China takes the norms by engaging in "selective adaptation" based on local conditions:

> Applied to China, selective adaptation analysis permits understanding of local responses to international legal obligations. China's interpretation and implementation of international agreements in trade, such as the General Agreement on Tariffs and Trade (GATT) and agreements associated with the . . . WTO . . . , for example, will depend on the extent to which interpretive communities—comprising government officials, socio-economic and professional elites, and other privileged groups exercising authority borne of political and/or

incorporation of only beneficial features from the outside without also transplanting the harmful and unsuitable elements.[276] In the past fifteen years, China has had its fair share of WTO disputes,[277] including *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.[278] China prevailed in some of these disputes but lost in others.[279]

> professional position, specialized knowledge, and/or socio-economic status—assimilate norms of trade liberalization.
>
> Influenced by their training and education, members of China's interpretive communities bring their perceptions about international law and relations to bear in responding to the requirements of international rule regimes. Perceptions contrasting China's colonial past and resulting weakness in foreign relations with its current strengths tend to encourage both a sense of grievance and of opportunities for correction and redress. Perception dynamics are also evident in academic and policy assessments of the international legal system that acknowledge the challenges posed by globalization for sovereignty imperatives of the nation-state generally, and focus on the intrusive nature of international regimes whose underlying norms are seen as a challenge to China. Such perceptions affect the reception of international legal standards by local interpretive communities, and ultimately China's responses of implementation.

Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, *in* CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 145, 147–48 (Donald C. Clarke ed., 2008) (footnotes omitted); *accord* Wu Handong, *One Hundred Years of Progress: The Development of the Intellectual Property System in China*, 1 WIPO J. 117, 118–19 (2009) (discussing the stage of "selective arrangement in light of domestic development"); *see also* Frederick S. Tipson, *China and the Information Revolution*, *in* CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 231, 232 (Elizabeth Economy & Michel Oksenberg eds., 1999) ("Th[e] attempt to borrow selectively from outsiders is a familiar one in Chinese history.").

276. *See* Yu, *Transplant and Transformation*, *supra* note 236 (discussing how China not only transplanted intellectual property laws from abroad but also transformed them to suit the local contexts); *see also* Frederick M. Abbott, *Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism*, 8 J. INT'L ECON. L. 77, 100 (2005) (noting the possibility for "benign neglect" of the TRIPS Agreement).

277. *See* Yu, *TPP and Trans-Pacific Perplexities*, *supra* note 2, at 1140 ("China has . . . been the respondent in a growing number of WTO complaints, on issues ranging from intellectual property enforcement to duties on steel products to exports of rare earths."). *See generally* CHINA AND GLOBAL TRADE GOVERNANCE, *supra* note 55 (collecting essays discussing China's performance in its first decade in the WTO).

278. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (Jan. 26, 2009).

279. In *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, for example, China prevailed on the first claim concerning the thresholds for criminal procedures and penalties, but the United States won the last claim concerning the denial of copyright protection to works that have not been authorized for publication or dissemination within China. Somewhat divided between the two parties was the remaining claim concerning the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border. *See id.* For the Author's discussions of this dispute, *see generally* Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727 (2011); Yu, *The TRIPS Enforcement Dispute*, *supra* note 237.

In sum, even though one could continue to debate how much China, India, and other emerging countries have benefited from TRIPS-induced intellectual property reforms, it is much harder to deny the contributions the TRIPS Agreement has provided to the economic development and technological proficiency in these countries. Thus, as much as policymakers and commentators are eager to criticize the deleterious effects of TRIPS-plus bilateral, regional, and plurilateral agreements, they cannot lose sight of the agreements' potential positive benefits.

In the RCEP context, debating what flexibilities, safeguards, and correction mechanisms are needed in the final agreement will likely be more productive than exploring ways to resist the incorporation of TRIPS-plus standards. It will also be interesting to see whether countries in the Asia-Pacific region will end up accepting norms that are now enshrined in TRIPS-plus FTAs. Indeed, as the Author noted in the inaugural issue of the *WIPO Journal* several years ago, "[i]t is premature to assume that less-developed countries, once developed, will always want the existing international intellectual property system. There is a good chance that they may want or need something rather different."[280]

VII. CONCLUSION

Regardless of the standards included in the final intellectual property chapter, the RCEP will raise important questions about the future of intellectual property norm setting in the Asia-Pacific region and about the future levels of protection and enforcement that will be found in intellectual property systems across this region. That the RCEP negotiations have involved many different trade and trade-related areas will also drive ASEAN+6 members to think more deeply about the future directions of both their national economy and the overall regional economy.

Given that intellectual property will remain a crucial part of the twenty-first-century economy, and that its importance can only grow with time, ASEAN+6 members will squander a major opportunity to harmonize regional intellectual property standards if the RCEP Agreement does not include an intellectual property chapter. If the standards in this chapter are set too high, however, they will also impede future development, erode global competitiveness, and jeopardize access to essential medicines, educational materials, and information technology. Given these immense challenges and the high stakes involved, it is high time that policymakers, commentators, activists, consumer advocates, and civil society organizations studied the RCEP negotiations more closely.

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280. Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 15 (2009).