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The Battle to Define Asia's Intellectual Property Law: From TPP to RCEP

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A battle is under way to decide the intellectual property law for half the world's population. A trade agreement that hopes to create a free trade area even larger than that forged by Genghis Khan will define intellectual property rules across much of Asia and the Pacific. The sixteen countries negotiating the Regional Comprehensive Economic Partnership (RCEP) include China, India, Japan, and South Korea, and stretch to Australia and New Zealand. A review of a leaked draft reveals a struggle largely between India on one side and South Korea and Japan on the other over the intellectual property rules that will govern much of the world. The result of this struggle will affect not only access to innovation in the Asia-Pacific, but also across Africa and other parts of the world that depend on generic medicines from India, which has been called the "pharmacy to the developing world." Surprisingly, the agreement that includes China as a pillar may result in stricter intellectual property rights than those mandated by the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Perhaps even more surprisingly, such TRIPS-plus rights will be available in the RCEP states to the United States and European companies equally by somewhat recondite provisions in TRIPS. In sum, the RCEP draft erodes access to medicines and education across much of the world.

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INTRODUCTION

Two competing mega-trade agreements seek to write the rules for intellectual property for half of the world. One agreement anchored till recently by the world's largest economy, the United States, offers intellectual property rules that are generally stricter than those in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This treaty, the Trans-Pacific Partnership (TPP), was negotiated by twelve nations—Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.[1] When the United States pulled out, the remaining nations suspended a number of its provisions, especially those involving intellectual property, and proceeded with a treaty now dubbed the Comprehensive Progressive Trans-Pacific Partnership (CPTPP).[2]

A second agreement, the Regional Comprehensive Economic Partnership (RCEP), anchored by the world's second largest economy, China, is the focus of a struggle between those who seek stronger intellectual property rights and those who seek to carve out greater limitations and exceptions to intellectual property.[3] Initially conceived by the Association of Southeast Asian Nations (ASEAN), which consists in Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines,

1. The Obama Administration's description of the treaty is still available on the official government site. *See The Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/TPP/ [https://perma.cc/Z738-TERN] (last visited June 14, 2018).

2. New Zealand's trade negotiators have detailed the suspended provisions. *CPTPP Vs TPP*, N.Z. FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/tpp-and-cptpp-the-differences-explained/ [https://perma.cc/5EAV-UU2B] (last visited June 14, 2018). Because the agreement has been known popularly as the "TPP," we will use that short form in the remaining paper, except where the text is known to differ between the TPP and the CPTPP.

3. Seven states are members of both the TPP and RCEP groupings—Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam. The RCEP would create history's largest free trade zone, larger even than Genghis Khan's. *See* JACK WEATHERFORD, GENGHIS KHAN AND THE MAKING OF THE MODERN WORLD xix (2004) (crediting Khan with creating "history's largest free-trade zone").

Singapore, Thailand, and Vietnam, the RCEP includes the six states with which ASEAN has existing free trade agreements, namely, Australia, China, India, Japan, New Zealand, and South Korea.[4] Yet to be finalized, this agreement seeks to write the intellectual property rules that would govern the lives of nearly half of the world's population and a third of the world's gross domestic product.[5]

Both treaties hope to ultimately attract many other countries, especially in Asia. The proponents of the TPP hope that it will lead to broader adoption in Asia and Latin America.[6] The proponents of the RCEP too hope that it will serve as a stepping stone towards an even broader Free Trade Area of the Asia-Pacific. Before the exit of the United States from the TPP, the contest between the two mega-regional agreements was often characterized as a struggle to bring the bulk of Asia into the American or the Chinese sphere of influence, as other states would vie for membership on terms that had already been decided by the original parties. But there is another crucial struggle that is almost entirely overlooked: a battle to define the intellectual property law for Asia in the twenty-first century.

4. For a history of RCEP negotiations, see Peter K. Yu, *The RCEP and Intellectual Property Normsetting in the Asia-Pacific*, TEX. A&M U. SCH. L. LEGAL STUD. RES. PAPER NUMBER 17–74 (2017).

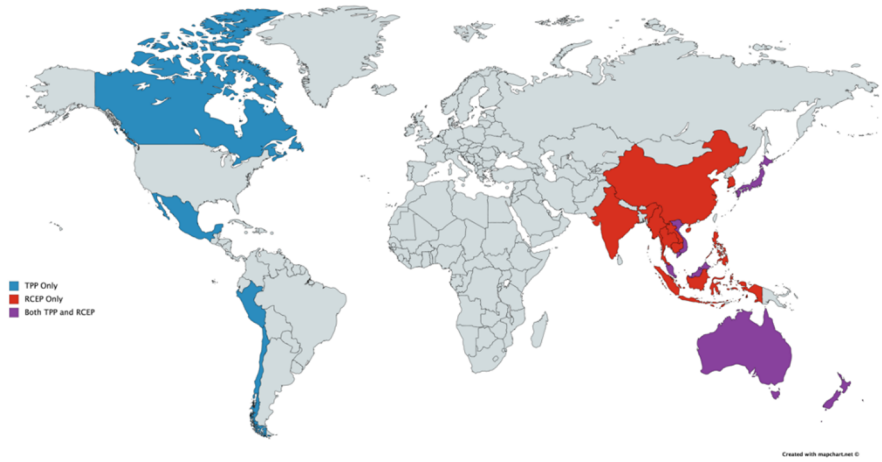
5. James Love, *2015 Oct 16 Version: RCEP Draft Text for Investment Chapter*, KNOWLEDGE ECOLOGY INT'L (April 22, 2016), https://www.keionline.org/23065 [https://perma.cc/79EH-73AQ] ("Collectively these sixteen countries have a population of 3,488,410,867 in 2014, which was 48 percent of the world population of 7,260,710,677, according to the World Bank.").

6. From the Office of the U.S. Trade Representative:

> To that end, it contains clear rules and procedures for expanding participation to other countries that are able to fully implement and enforce the full range of TPP obligations. It also creates useful precedents for both broader Asia-Pacific economic integration and new initiatives that could revitalize plurilateral and multilateral trade talks in the WTO.

OFFICE OF THE U.S. TRADE REPRESENTATIVE, THE REPORT OF THE ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS 5 (2015). The TPP's proponents hope to ultimately include other countries in Latin America as well: "It will encourage the further evolution of free markets in Latin America through the inclusion of Chile and Peru and possibly others going forward." *Id.* at 6.

Figure 1. Map of TPP and RCEP countries



Indeed, while the TPP has drawn the bulk of attention in the United States, it is the negotiations within the RCEP that might ultimately have the greatest impact. This is because of two reasons. First, unlike the TPP, the RCEP includes both China and India—the world's most populous countries—and will define intellectual property rights for half the world's population. Despite Asia's recent astonishing economic advances, the region still holds a startlingly enormous number of the world's poor, sick, and uneducated.[7] Intellectual property protections can indeed help spur medical advances and authorship, but they can also put medicines and textbooks out of the reach of billions of people. Second, India's intellectual property law and its ability to export medicines to other nations literally affect life and death across the world. South Africa's Health Minister, Aaron Motsoaledi, has called India the "pharmacy to the developing world."[8] India's role as the provider of affordable, life-saving medicines for the developing world stands at risk, and depends on the results of this obscure and secret negotiation.

A leaked version of the RCEP intellectual property chapter, then, deserves careful study. The draft includes text that seems to be agreed on by all parties, as well as proposals, oppositions, and counterproposals with respect to language that is yet being negotiated.[9] The leaked text tells us which countries are proposing or rejecting any particular controversial language, and thus gives us a unique glimpse

7. *See infra* notes 22–23 and accompanying text.

8. Vidya Krishnan & Mandakini Gahlot, *Why South Africa's Health Minister Is So Worried About India Caving in to Big Pharma*, SCROLL.IN, Aug. 10, 2015, https://scroll.in/article/745344/why-south-africas-health-minister-is-so-worried-about-india-caving-in-to-big-pharma [https://perma.cc/YH54-X3SR].

9. Regional Comprehensive Economic Partnership Free Trade Agreement, Single Working Document on the Intellectual Property Chapter.

into the process of international lawmaking.[10] Of course, leaked texts are not necessarily accurate, but, lacking any alternative, we will proceed as though they are, with the caveat that they have not been officially acknowledged as accurate. We add another caution: the text has likely progressed beyond the October 2015 version, as there have been additional negotiating rounds since then.

Not only is a study of the RCEP intellectual property chapter revealing because of its real-world consequences for access to medicines and access to knowledge, the study of the text also sheds light on fundamental theoretical inquiries about international lawmaking. What will a largely South-South intellectual property agreement look like? Do the local advanced nations—here Japan and South Korea—simply substitute for the Western metropole in a North-South agreement? Does an Asian trade agreement anchored by China and India reflect so-called "Asian Values" in any way?

Most strikingly, we conclude that the intellectual property chapter of the Asian-Pacific agreement would, if certain proposals are adopted, largely work to the benefit of United States and European enterprises. While the ratification of TRIPS by the developing world can be understood as simply concessions to gain better access to Western markets for developing country products, that rationale is absent here. Despite having been negotiated in the Asia-Pacific, the RCEP's intellectual property chapter may turn out to be largely a copy-and-paste job based on Western agreements.[11]

We proceed below as follows. Part I offers the core of our argument—that proposed intellectual property provisions in the RCEP are a threat to health and education worldwide by establishing TRIPS-plus obligations throughout the Asia-Pacific. Part II offers the most surprising insight in the Article—that these TRIPS-plus obligations negotiated among the largest Asian countries will principally benefit United States and European multinationals. Part III then evaluates aspects of the treaty-making process, specifically the claim that governments are rational national interest maximizers and that trade negotiations should remain secret. A short conclusion suggests that the RCEP intellectual property chapter should either be withdrawn or rewritten.

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10. *Id.*

11. The copying is at times literal, as can be seen in the following example. The TPP provides:

> No Party shall require, as a condition of registration, that a sign be visually perceptible, nor shall a Party deny registration of a trademark only on the ground that the sign of which it is composed is a sound. Additionally, each Party shall make best efforts to register scent marks.

Trans-Pacific Partnership art. 18.18, February 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf [https://perma.cc/7NBU-JP75] [hereinafter TPP] (similar text appears in prior United States free trade agreements, such as the United States Korea Free Trade Agreement, art. 18.2.). The RCEP draft offers, "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 [JP/NZ/CN/KR/IN oppose: or a scent]." RCEP Draft, art. 3.1.2. This provision goes beyond TRIPS, which states to the contrary that "Members may require, as a condition of registration, that signs be visually perceptible." TRIPS, art. 15(1).

I. THREATS TO HEALTH AND EDUCATION

While there have been international intellectual property treaties stretching back into the nineteenth century, it was only with the advent of the WTO, in 1995, that international intellectual property law gained both widespread acceptance and enforceable rules. Indeed, the United States only came to implement the Berne Convention for the Protection of Literary and Artistic Works in 1989 during the WTO negotiations, more than a century after its initial adoption in 1886.[12] Peter Yu has described the TRIPS agreement as an "international enclosure movement . . . requiring nations to adopt one-size-fits-all legal standards that ignore their local needs, national interests, technological capabilities, and public health conditions."[13] Even if TRIPS may not be ideal from the perspective of developing countries, TRIPS does include important flexibilities for policy choices on intellectual property within nations. Experts advise developing countries to exercise fully the flexibilities within TRIPS.[14] Over the intervening years since 1995, however, developed states have sought to close some of those loopholes through what have become known as "TRIPS-plus" provisions in bilateral and regional free trade agreements.[15] The United Nations Secretary-General's High-Level Panel on Access to Medicines has, however, cautioned that such TRIPS-plus agreements "may impede access to health technologies."[16]

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12. *See* U.N. DEV. PROGRAMME, OUR RIGHT TO KNOWLEDGE: LEGAL REVIEWS FOR THE RATIFICATION OF THE MARRAKESH TREATY FOR PERSONS WITH PRINT DISABILITIES IN ASIA AND THE PACIFIC viii (2015).

13. Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 828 (2007); *see also* Molly Land, *Rebalancing TRIPS*, 33 MICH. J. INT'L L. 433, 435–36 (2012).

14. COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY (2002), http://www.iprcommission.org/papers/text/final_report/execsumhtmfinal.htm [https://perma.cc/ZJ86-F7VU] ("TRIPS allows considerable flexibility in how countries may design their patent systems. Since most developing countries do not have a significant research capability, they have little to gain by providing extensive patent protection as a means of encouraging research, but they stand to lose as a result of the impact of patents on prices. Therefore developing countries should aim for strict standards of patentability to avoid granting patents that may have limited value in relation to their health objectives. . . . For instance, most developing countries should exclude diagnostic, therapeutic and surgical methods from patentability, including new uses of known products, as permitted under TRIPS. Developing countries should also make provisions in their law that will facilitate the entry of generic competitors as soon as the patent has expired on a particular drug.").

15. Cynthia M. Ho, *An Overview of "TRIPS-Plus" Standards*, *in* ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS 223, 223 (2011).

16. UNITED NATIONS SEC'Y-GEN.'S HIGH-LEVEL PANEL ON ACCESS TO MEDS., ACCESS TO MEDICINES REPORT: PROMOTING INNOVATION AND ACCESS TO HEALTH TECHNOLOGIES (2016), http://www.unsgaccessmeds.org/final-report/ [https://perma.cc/BB7G-QY3G]. The Special Rapporteur on the right of health also called on countries to avoid TRIPS-plus commitments in their laws and treaties. Anand Grover (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/11/12 (Mar. 31, 2009).

This is a charge leveled, for example, against the TPP, with its United States-led effort to impose stricter intellectual property rules on countries like Vietnam. The TPP, for example, "obligates Vietnam to recognize IP rights for biologics,"[17] and increases copyright term lengths from fifty years after the death of the author or performer to seventy years after the death of the author or performer.[18]

The RCEP, however, has been negotiated entirely within Asia-Pacific nations, outside the pressures brought to bear by the United States. But even within the Asia-Pacific region, there are countries that see a future in receiving royalties for intellectual property. Within the sixteen RCEP nations, Japan and South Korea are long-standing, significant international intellectual property powers, with China emerging as a new international intellectual property power, and India occupying a middle role as an exporter of Bollywood movies.[19] Both India and China are among what Peter Yu calls the "Middle Intellectual Property Powers"—which include Brazil, Russia, South Africa, and Thailand.[20]

Even these middle-income powers must be cautious in embracing ever stronger intellectual property rights. India is a major importer of patented inventions, Hollywood movies, and foreign English-language books, and its generics industry depends, as we shall see, on both domestic standards of patentability and an ability to export.[21] Despite the immense strides in reducing poverty that they have made over the last few decades, many RCEP countries still face widespread and dire poverty. Figure 2 below sets out poverty statistics for the RCEP member states. The RCEP states hold more than 400 million people who earn less than $1.90 a day, and more than a billion people who earn less than $3.10 a day.

17. MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41550, U.S.-VIETNAM ECONOMIC AND TRADE RELATIONS: ISSUES FOR THE 114TH CONGRESS 5 (2016), https://fas.org/sgp/crs/row/R41550.pdf [https://perma.cc/P9DV-N7VG].

18. *Id.* at 10.

19. Yu, *supra* note 4.

20. Peter K. Yu, *The Middle Intellectual Property Powers*, *in* LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES 84, 89–91 (Randall Peerenboom & Tom Ginsburg eds., 2014).

21. *Id.*

Figure 2. Extremely Poor Persons in RCEP Region[22]

Country	Total Population	Number at $1.90/day	Number at $3.30/day
Cambodia	14,832,255	300,000	3,200,000
China	1,350,695,000	87,300,000	257,300,000
India	1,247,446,011	268,000,000	731,900,000
Indonesia	248,037,853	29,200,000	103,400,000
Laos	6,473,050	1,100,000	3,000,000
Philippines	96,017,322	12,600,000	36,100,000
Thailand	67,164,130	0	800,000
Vietnam	88,809,200	2,900,000	12,300,000
TOTAL	3,298,786,504	401,400,000	1,148,000,000

Three RCEP negotiating parties—Cambodia, Laos, and Myanmar—are themselves classified as Least Developed Countries (LDCs) by the United Nations. Should the agreement be expanded to neighboring countries, it could include almost a dozen more Least Developed Countries: Afghanistan, Bangladesh, Bhutan, Kiribati, Nepal, Solomon Islands, Timor-Leste, Tuvalu, Vanuatu, and Yemen.[23] The RCEP will effectively write the intellectual property law of some of the very poorest countries in the world.

Health costs, of course, are not the concern of the poorest alone. Many countries in the region have increasing obligations to care for aging populations. Aging populations mean increased demand for health technologies. Even though South Korea and Japan are major intellectual property powers, they have two of the world's most rapidly aging societies, and thus stand to become significant importers of medicines and other intellectual property. As Figure 3 shows, more than a quarter of Japan's population is already aged sixty-five or older, far higher than the 15% and 13% share of the United States' and South Korean populations, respectively.[24] In

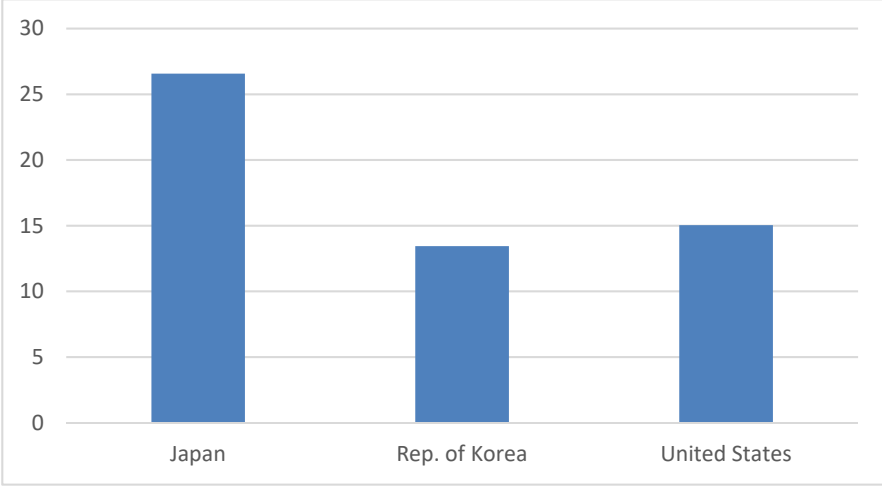
22. These are 2012 statistics, except for India, which is for 2011; all figures are adjusted for Purchasing Power Parity—World Bank statistics. No figures provided for Brunei, Japan, Myanmar, New Zealand, Singapore, or South Korea. For Thailand, the number of persons at $1.90/day is given as zero because of rounding.

23. U.N. COMM. FOR DEV. POLICY, LIST OF LEAST DEVELOPED COUNTRIES (AS OF MARCH 2018) (2018), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf [https://perma.cc/B9MH-WJ8K].

24. *DataBank: World Development Indicators*, WORLD BANK, http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators&preview=on [https://perma.cc/H7R9-8JYQ] (last visited July 30, 2017).

Japan, "[D]eaths have outpaced births for several years."[25] By 2050, Japan expects fully 39% of its citizens to be aged sixty-five or older.[26]

Figure 3. Percent of Population Aged 65 and Above (2016)[27]



Unless Japan or South Korea are confident that they will supply all the medicines that their populations need, they may reduce their own access to diagnostic tools or generic versions of medicines or other therapies pioneered in other states.[28] Japan's share of world imports of medicine grew from Japan 24 3.7 to 4.4 percent from 2010 to 2015 by value, even as its share of world exports fell from 0.9 percent to 0.7 percent during the same period.[29]

25. Jonathan Soble, *Japan, Short on Babies, Reaches a Worrisome Milestone*, N.Y. TIMES, June 2, 2017, https://www.nytimes.com/2017/06/02/business/japan-population-births.html [https://web.archive.org/web/20180407161153/https://www.nytimes.com/2017/06/02/business/japan-population-births.html].

26. Dallin Jack, *The Issue of Japan's Aging Population* (Law Sch. Int'l Immersion Program Papers, Working Paper No. 8, 2016), https://chicagounbound.uchicago.edu/international_immersion_program_papers/35/ [https://perma.cc/7KGY-6PET] (citing Japan's CABINET BUREAU OF STATISTICS, STATISTICAL HANDBOOK OF JAPAN 2015: CHAPTER 2—POPULATION (2016), http://www.stat.go.jp/english/data/nenkan/pdf/yhyou02.pdf [https://perma.cc/YW7V-BPCA]).

27. *DataBank: Population Estimates and Projections*, WORLD BANK, http://databank.worldbank.org/data/reports.aspx?source=population-estimates-and-projections [https://perma.cc/3KGU-A63S] (last visited Jan. 31, 2018).

28. The United States government's own studies list Japan as the number one pharmaceutical export market prospect in the near-term. INT'L TRADE ADMIN., 2016 ITA PHARMACEUTICALS TOP MARKETS REPORT 2 (2016), https://www.trade.gov/topmarkets/pdf/Pharmaceuticals_Executive_Summary.pdf [https://perma.cc/4L86-8TRV].

29. WORLD TRADE ORG., TABLE A19: TOP 10 EXPORTERS AND IMPORTERS OF PHARMACEUTICALS, 2015 (2015), https://www.wto.org/english/res_e/statis_e/wts2016_e/wts16_chap9_e.htm [https://perma.cc/9HJX-9SNC].

The RCEP would also rewrite global copyright rules for Asia, affecting the ability of nations to access the copyrighted cultural and technical knowledge that is critical for national economic development. While proponents of strong intellectual property rights in copyrights and patents argue that such rights promote innovation, developing countries often find it difficult to develop other aspects of a successful innovation environment, such as a population educated in the latest cultural and technical knowhow, capital for research and development, and resources for marketing. In its current form, the RCEP proposes strong copyright protections without correspondingly robust exceptions and limitations that would ensure access to textbooks and other educational materials at affordable prices in developing countries. As Ruth L. Okediji has argued, "[C]oncepts of literacy should extend beyond the mere ability to read. Technological, social and cultural literacy are key components of a country's productive capacity in the digital economy."[30] Unfortunately, the RCEP is not alone; global copyright law as a whole has largely failed to mandate copyright exceptions and limitations designed to promote the economic, social, and cultural needs of developing countries.[31] The exceptions and limitations that exist predominately reflect the values of developed countries, focusing on personal liberties to use, rather than distributional concerns about access to knowledge and knowledge goods.[32] The RCEP, which would affect so many of the world's poor, must strengthen its provisions for copyright exceptions and limitations to promote the ability of developing countries to educate their populations and provide the critical knowledge tools needed to absorb technology, data, and culture as necessary to succeed in the new global economy.

In short, Asia faces multiple critical, interrelated crises impacted by the contours of intellectual property rights: dire poverty, widespread morbidity, an aging population, and the need to improve the educational attainment of its population. We turn now to analyzing the RCEP provisions impacting these crises.

A. Access to Medicines

The RCEP has the potential to severely restrict access to essential medicines for the world's poor. According to the latest leaked draft, proposals in the RCEP[33]

30. Ruth L. Okediji, *Reframing International Copyright Limitations and Exceptions as Development Policy*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 429, 462 (Ruth L. Okediji ed., 2017).

31. *See id.* at 464–65 (describing failure of Stockholm Protocol of 1967, which sought to promote bulk access to copyrighted works through compulsory licenses in developing countries for educational purposes); *id.* at 480 (noting that "development-inducing L&Es must differ in kind, in scale, and in form"); *id.* at 483 ("If copyright law is to have an important role in promoting economic growth and development, it has to look different in developing countries.").

32. Okediji observes that exceptions related to teaching and translations are relevant to developing countries; other exceptions and limitations are largely biased toward developed country needs and values. *See id.* at 481.

33. The TPP would go further yet by requiring a low standard of patentability that would allow patents for mere modifications and tweaks. Naina Singh et al., *Influence of Patent Law on Price of Medicines: A Comparative Analysis of Various Countries*, *in* PATENT LAW AND INTELLECTUAL

would (1) extend patent terms to compensate for delays[34] in granting patents or in obtaining marketing approval;[35] (2) adopt new exclusive rights in clinical-trial data;[36] (3) potentially reject flexibilities, provisions for compulsory licenses and extensions for deadlines to reform pharmaceutical patent laws in Least Developed Countries; (4) adopt TRIPS-plus border measures; and (5) adopt investor-state dispute resolution process that would create state liability for regulating IP to promote public health. These provisions in the RCEP are particularly risky because they would negatively affect India, the largest global supplier of generic medicines, thereby significantly affecting access to essential medicines in Africa, Latin America, and other parts of the developing world. These are not the only provisions in the RCEP draft that may prove problematic, but are illustrative of the kinds of concerns raised by the draft. We consider these five provisions in further detail below.

First, Japan and South Korea seek an extension of a patent term for pharmaceuticals to compensate for the time needed to obtain marketing approvals.[37] This language is stronger than the TPP, which limits such extensions to cases of "unreasonable curtailment" of the effective patent term.[38] Additionally, South Korea proposes to extend the patent terms in the case of "unreasonable delays" in the granting of the patent itself, though India, China, and ASEAN oppose this, joined in this case by Japan.[39]

Second, the leaked draft proposes data exclusivity for drug companies, protecting clinical trial data needed for regulatory approval in addition to the patented drugs themselves, thereby making generic drug production much more onerous.[40] Japan and South Korea seek to slow competition from generics by preventing the use for five years (counting from the date of approval) of data

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PROPERTY IN THE MEDICAL FIELD 20, 31 (Rashmi Aggarwal & Rajinder Kaur eds., 2017) (explaining that TPP requires patents for "[n]ew uses of a known product; [n]ew methods of using a known product; [o]r new processes of using a known product"). Lower patentability standards allow for more patents and longer patents—hence the name "evergreen" patent. Innovators can go for low hanging fruit—extensions on existing patents—rather than focus on breakthrough inventions with proven therapeutic benefits. *See* Brook K. Baker, *Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere*, 13 PLOS MED. 1, 3 (2016).

34. Regional Comprehensive Economic Partnership art. 5.13.3 [hereinafter RCEP] ("Each Party, at the request of the patent owner, shall adjust the term of a patent to compensate for unreasonable delays that occur in granting the patent.").

35. *Id.* art. 5.13.1 ("With respect to the patent which is granted for an invention related to pharmaceutical products, each Party shall, subject to the terms and conditions of its applicable laws and regulations, provide for a compensatory term of protection for any period during which the patented invention cannot be worked due to marketing approval process.").

36. *Id.* art. 5.16.

37. *Id.* art. 5.13.1.

38. TPP, *supra* note 11, art. 18.48.

39. RCEP, *supra* note 34, art. 5.13.3 ("[A]n unreasonable delay shall at least include a delay in the issuance of the patent of more than four years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application, whichever is later. Periods attributable to actions of the patent applicant need not be included in the determination of such delays.").

40. *Id.* art. 5.16.

provided by the first applicant for marketing approval—the precise term of data exclusivity agreed to in the original TPP.[41] The CPTPP suspends this provision of the original TPP.[42] Unlike the original TPP, the RCEP does not include *sui generis* protections for the new class of medicines known as biologics, but the other protections available for medicines would likely apply to this class of drugs.[43] The special protection for biologics, too, has been suspended in the CPTPP.[44] Thus, if they wish to enter the market for a particular drug in a timely fashion, generic drug makers would have to invest in their own expensive and time-consuming drug trials before production—wastefully repeating the work already performed. Both patent term extensions and data exclusivity ultimately have effect of delaying the market entry of generic medicines and increasing public health costs for governments.

Third, Japan and South Korea oppose Article 5.7 of the RCEP, proposed by ASEAN, India, New Zealand, and China, which recognizes "TRIPS Flexibilities for Compulsory Licenses and LDC Extensions."[45] Currently, the WTO has pushed back the date for Least Developed Countries' compliance with TRIPS provisions regarding pharmaceuticals to 2033.[46] Japan and South Korea thus appear ready to abandon support for widely accepted TRIPS flexibilities, even those that would only target the very poorest countries in the world.

Fourth, while TRIPS explicitly excludes the requirement to police goods in transit,[47] the RCEP reintroduces this issue, though in a moderate form. The text reads: "The Parties shall cooperate on border measures [JP propose; ASN/IN oppose: such as exchanging information which is conducive to identification of suspects in importation, exportation or transit] with a view to eliminating trade which infringes intellectual property rights."[48] Even though India opposes the references to "transit" favored by Japan, it has not registered opposition to the more general requirement to cooperate on eliminating trade infringing on intellectual property rights.[49] Any understanding of this provision that subsumes transit potentially jeopardizes the transfer of medicines from one developing country (where they are legal to manufacture) to another developing country (where they are legal to sell) if they pass through a country that declares those medicines infringing.

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41. TPP, *supra* note 11, art. 18.50; RCEP, *supra* note 34, art. 5.16.

42. N.Z. FOREIGN AFF. & TRADE, *supra* note 2 (suspending art. 18.50 of the original TPP).

43. Carlos Christopher Smith Díaz, *Delving into the Fog of Ambiguity: An Analysis of the Trans-Pacific Partnership's Data Exclusivity Provisions and Their Implications for Access to Medicines in New Zealand*, 48 VICTORIA U. WELLINGTON L. REV. 1 (2017).

44. N.Z. FOREIGN AFF. & TRADE, *supra* note 2.

45. RCEP, *supra* note 34, art. 5.7.

46. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 66, April 15, 1994 [hereinafter TRIPS].

47. TRIPS, *supra* note 46, art. 51 n.13 ("It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.").

48. RCEP, *supra* note 34, art. 10.2.3.

49. *Id.*

Finally, the RCEP includes an investor-state dispute resolution provision that would allow ordinary regulatory actions of states to protect public health to be challenged for violating a foreign investor's intellectual property rights. The draft of RCEP's investment chapter places intellectual property within the investor-state dispute resolution system, with a narrow exclusion for limitations or incursions on intellectual property rights only where they are consistent with RCEP's intellectual property provisions.[50] The traditional remedy for a country's failure to enact and enforce intellectual property provisions in a trade agreement is to require that country to bring its regulations into compliance after a dispute resolution proceeding conducted between states.[51] An alternative, and potentially far more expansive and expensive, remedy emerges through the investment chapters in free trade agreements or bilateral investment treaties. Such chapters can permit a foreign company to bring an arbitration claim against a country for compromising the value of its intellectual property in the country. The RCEP draft appears poised to bring intellectual property claims before the purview of the investor-state dispute resolution system, thereby permitting foreign intellectual property holders to claim that a national or local government had improperly expropriated their investment. The draft text includes both "direct or indirect" expropriation, permitting a claim when a "government action interferes with distinct, reasonable investment-backed expectations."[52] "[C]overed investments" subject to the investment chapter specifically include intellectual property.[53] India has no objection to including intellectual property within the ambit of investor-state dispute resolution,[54] nor for that matter does China.[55]

Seen from one perspective, there is nothing remarkable about recognizing intellectual property as a valuable investment in a country, which can accordingly be expropriated. But by moving intellectual property violations of a trade agreement into investor-state dispute resolution, intellectual property receives far stronger protection than the goods and services rules that are the core of trade agreements.

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50. RCEP, *supra* note 34, art. 5:

> This Article [A, Au, C, J, K, NZ: does] not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, [Au, C, J, K, NZ: in accordance with the TRIPS Agreement,] or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with [A, Au, J, K, NZ: Chapter XX (Intellectual Property Rights)] [A, Au, J: and] [A, Au, C, J, the TRIPS Agreement] [A, Au: 7].

51. This is the standard remedy for TRIPS violations, for example. If a country fails to comply with an adverse ruling, the dispute settlement body can authorize retaliatory removals of trade concessions, or, far more rarely, the nations can settle the matter through the negotiation. *See* KEITH E. MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 109 (2012) (describing United States-European Union settlement following United States failure to comply with adverse TRIPS ruling in cases involving public performance in business venues).

52. RCEP, *supra* note 34, art. 5.

53. *Id.*

54. RCEP DRAFT INVESTMENT TEXT INDIA art. 5 (2015). India has proposed a similar investment chapter.

55. RCEP DRAFT INVESTMENT TEXT: CHINA art. 5 (2015).

Violations of liberalization commitments for goods or services only carry the possibility of retaliatory reinstatement of trade barriers, not extensive damages paid from the national coffers. Furthermore, goods and services violation claims can only be brought by states, not by the adversely-affected enterprises themselves.[56] The RCEP will thus result in more, and larger, intellectual property claims.

Recent investor-state dispute resolution cases demonstrate the types of intellectual property claims that might be brought, and even reveal the risks they present for health. Phillip Morris brought claims against Uruguay and Australia for public health-related cigarette packaging requirements that interfered with its use of its trademarks, seeking some $22 million plus compound interest from Uruguay. Eli Lilly brought an arbitral claim against Canada after a Canadian court invalidated its patent on the drug Straterra.[57] Eli Lilly sought damages of $500 million from Canada for denying patent rights to this drug and another drug, Zyprexa.[58] Defending such a claim can be quite expensive. When a tribunal at the International Center for Settlement of Investment Disputes (ICSID) dismissed all claims brought by Phillip Morris against Uruguay, the tribunal ordered the company "to pay Uruguay US$7 million as partial reimbursement of the country's legal expenses."[59] Had Uruguay lost, it might have had to pay Phillip Morris's legal fees, as requested by Phillip Morris.[60] While these cases have not yet proven successful, similar cases may yet prove successful in the future—and they also send a "regulatory chill . . . on efforts by states to regulate IP industries," as James Gathii and Cynthia Ho have observed.[61]

In sum, despite some agreement on the investor-state dispute resolution, the RCEP is the site of several disputes largely between Japan and South Korea, on the one hand, and India on the other, over the ability of India to continue to produce generic medicines for the poor. As evidenced from the leaked draft, India, joined often by various other RCEP partners, has sought to rebuff Japanese and South Korean demands.[62]

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56. Kohshi Arnold Itagaki, Note, *Private Party Standing in the WTO: Towards Judicialization of WTO Decisions in U.S. Courts*, 45 GEO. J. INT'L L. 1265, 1267–68 (2014) ("One of the key characteristics of the WTO dispute settlement system is that only member states (i.e., countries signed onto the WTO) are permitted to initiate disputes.").

57. Harold Hongju Koh, *Global Tobacco Control as a Health and Human Rights Imperative*, 57 HARV. INT'L L.J. 433 (2016); Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. J. INT'L L. (2016); Recent International Decision, *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, 130 HARV. L. REV. 1986 (2017).

58. James Gathii & Cynthia Ho, *Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime*, 18 Minn. J.L. Sci. & Tech. 427, 456 (2017).

59. Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 592 (July 8, 2016) (dismissing all claims and holding that Uruguay is to receive $7 million in United States dollars reimbursement).

60. *Id.* (describing Phillip Morris seeking payment for "all of their fees and expenses, including attorney's fees, incurred in connection with this arbitration," in addition to damages and other appropriate relief).

61. Gathii & Ho, *supra* note 58, at 434.

62. RCEP, *supra* note 34, art. 5.

Public health advocates around the world have urged India not to forsake the world's poor as it negotiates the RCEP not only on behalf of its own citizens and corporations, but also on behalf of nations across the world in the RCEP negotiations. The non-profit group Doctors Without Borders estimates that nearly 80% of all antiretrovirals used in Africa come from India.[63] South African Health Minister Aaron Motsoaledi has urged India to reject changes that would erode its ability to supply generic medicines stating, "My message to India is that we really rely on them and if they reverse their position now they will end up killing a lot of people in Africa . . . ."[64] India had been particularly critical to South Africa's battle against AIDS, which by 2001 had become the leading cause of death in that country.[65] That year, Yusuf Hamied, the chairman of Cipla Pharmaceuticals, India's largest generic drug maker, announced a generic version of antiretrovirals that would cost less than $1 a day.[66] Remarkably, the availability of the Indian generics brought the price of first-generation AIDS drugs down by 99%.[67] "These medicines helped the price of HIV treatment in South Africa make the incredible drop from more than $10,000 a person a year in 2000 to just over $100 in 2016. This has enabled more than 17 million people in the developing world to receive HIV treatment," says Claire Waterhouse of Doctors Without Borders (also known as Médecins Sans Frontières or MSF). "Today, 97% of the medicines Doctors Without Borders (MSF) uses to treat nearly 230,000 people with HIV are generic antiretrovirals from India," she observes.[68]

The key to India's rise as a generic drug powerhouse was a crucial reform to India's patent law in 1970. The 1911 colonial-era patent statute had required patents in all fields in technology and in drug products and processes.[69] After Indian Independence, a study of the social and economic effects of the patent law concluded that the colonial law was not tailored to promote India's economic or humanitarian interests as its chief beneficiaries were foreigners, who outnumbered Indians nine to one in obtaining patents.[70] At the same time, the benefits of innovation were being priced out of the reach of most Indians, who were too poor to pay monopoly prices on medicines. "Patent systems," Indian Supreme Court

63. Krishnan & Gahlot, *supra* note 8.

64. *Id.*

65. *Id.*

66. Donald G. McNeil Jr., *Indian Company Offers to Supply AIDS Drugs at Low Cost in Africa*, N.Y. TIMES, Feb. 7, 2001, http://www.nytimes.com/2001/02/07/world/indian-company-offers-to-supply-aids-drugs-at-low-cost-in-africa.html [https://web.archive.org/web/20180530073857/http://www.nytimes.com/2001/02/07/world/indian-company-offers-to-supply-aids-drugs-at-low-cost-in-africa.html].

67. Claire Waterhouse, *South Africa Must Stand Firm with India – the Pharmacy of the Developing World*, BHEKISISA, July 7, 2016, http://bhekisisa.org/article/2016-07-07-south-africa-must-stand-firm-with-india-the-pharmacy-of-the-developing-world [https://perma.cc/8ZDP-CYBB].

68. *Id.* (author Claire Waterhouse is an access campaign officer for Doctors Without Borders (MSF) in Southern Africa).

69. *Id.*

70. SHRI JUSTICE N. RAJAGOPALA AYYANGAR, REPORT ON THE REVISION OF THE PATENTS LAW 3–4 (1959).

Justice N. Rajagopala Ayyangar, wrote in the study, "are not created in the interest of the inventor but in the interest of national economy," and "to secure the benefits thereof to the largest section of the public."[71] The Indian Patent Act of 1970 thus recognized patents in breakthrough chemical processes to make new drugs, but not in drug products themselves.[72] This was, in fact, a common approach taken by many European countries at the time. The crucial decision to exclude product patents permitted a company to reverse engineer a drug product, to learn its underlying composition and technology, and to ultimately make the same drug, albeit in a different way. This spurred India's generic drug industry. India would become one of the largest exporters of generic drugs throughout the world, including to the United States.[73]

But India's entry into the World Trade Organization in 1995 would doom this approach. TRIPS requires members to recognize patents in any inventions, whether products or processes, in all fields of technology.[74] When India amended its law in 2005 to comply with the TRIPS mandate, the legislature sought to utilize flexibilities within TRIPS to help generic drug manufacturing. Key to this was setting a high standard for patentability. The Indian Patent Amendment Act of 2005, for example, prohibits patents on mere modifications or tweaks on existing patents, thereby preventing what have come to be known as "evergreen" patents, where drug companies seek to extend their patents on weak grounds.[75]

India's approach to patentability can be seen in two recent events: (1) a change between the 2014 RCEP draft and the 2015 draft; and (2) a monumental Indian Supreme Court case. In the 2014 draft of the RCEP, Japan had sought to eliminate the ability of a country to challenge a patent "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."[76] That proposal is absent from the 2015 draft text, perhaps because it would have contradicted India's strict approach to patentability. The 2014 text would seem to have reversed the Indian Supreme Court's interpretation of Indian patent law in a widely-cited 2013 case. In that case, India denied Novartis a patent on a new salt form of Gleevec, its blockbuster cancer drug, on the ground that the

71. *Id.* at 12–13.

72. *Id.*

73. Caroline Chen & Anna Edney, *Quicktake: Generic Drugs*, BLOOMBERG, Mar. 18, 2016, https://www.bloomberg.com/quicktake/generic-drugs [https://web.archive.org/web/20140924042102/https://www.bloomberg.com/quicktake/generic-drugs] ("India is the second-largest exporter of drugs to the U.S., and almost half of active pharmaceutical ingredients used in the U.S. come from India or China."). India is a large exporter by volume of medicines supplied, but not by value. In 2015, its share of global pharmaceutical exports by value was a mere 2.6 percent. WORLD TRADE ORG., *supra* note 29.

74. TRIPS, *supra* note 46, art. 27.

75. Patents (Amendment) Act, 2005, No. 5, Acts of Parliament, 2005 (India).

76. Belinda Townsend, Deborah Gleeson & Ruth Lopert, *The Regional Comprehensive Economic Partnership, Intellectual Property Protection, and Access to Medicines*, 28 ASIA PAC. J. PUB. HEALTH 682, 684 (2016).

salt form was a mere modification of the old patented technology, without therapeutic benefit.[77] Novartis had argued that some 40 countries had granted patents on the salt form of Gleevec, and that India's patent standard was unfairly high.[78] The Indian Supreme Court in 2013 affirmed the denial of Novartis's patent, finding that Congress had sought through the patent law to prevent abusive practices such as "evergreening" by pharmaceutical companies.[79] The Indian Supreme Court delivered its judgment cognizant "that an error of judgment . . . will put life-saving drugs beyond the reach of the multitude of ailing humanity not only in this country but in many developing and under-developed countries."[80] The same could be said of the text of the RCEP intellectual property chapter.

B. Access to Education

The relationship between access to education and intellectual property can perhaps best be seen through a lawsuit decided in 2016 in India. In 2012, three university presses—Oxford University Press (OUP), Cambridge University Press (CUP), and Taylor & Francis—sued the University of Delhi and Rameshwari Photocopy Service for copyright infringement for photocopying parts of their textbooks and distributing them in low cost course packs to students for a modest fee.[81] The books at issue had an average price of 2,542 rupees, equivalent to about $42 USD—similar to the price charged in the West, but a price far out of the range of most students at the university.[82] As Lawrence Liang explains, charging the same for a book published in the West as in India or South Africa is hard to justify; he writes, "if consumers in the United States had to pay the same proportion of their income towards these books as their counterparts in South Africa and India, the results would be . . . $1,027.50 for Mandela's *Long Walk to Freedom* and $941.20 for the *Oxford English Dictionary*."[83] The Court found the course packs did not constitute copyright infringement because the activities fell under the education exception in Indian copyright law under section 52(1)(i) of the Indian Copyright Act (1957), which allows reproduction by a teacher or pupil in the course of instruction.[84] The Court found that less than 9% of the original textbooks were used

77. *Id.* at 686.

78. Novartis Ag v. Union of India & Ors, (2013) 2706 SC 1311 (India).

79. *Id.*

80. *Id.*

81. Univ. of Oxford v. Rameshwari Photocopy Servs., 2016 AIR 81 (India).

82. *Id.* An appeal to the Indian Supreme Court by the Indian Reprographic Rights Organization (IRRO) was rejected, leaving the Delhi High Court's ruling intact.

83. Lawrence Liang, *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment, Law and Development*, 3 L. & DEV. REV. 197, 209 (2010).

84. Anubha Sinha, *Inside Views: Course Packs for Education Ruled Legal in India: Triumph for Access to Educational Materials*, INTELL. PROP. WATCH, Dec. 7, 2017, http://www.ip-watch.org/2017/07/12/course-packs-education-ruled-legal-india-huge-triumph-access-educational-materials/ [https://perma.cc/37HC-9V8A] ("In a liberal interpretation of the provision, the court held that the reproduction of a work is not limited to reproduction by an individual teacher or pupil, it also extends to the action of multiple teachers and students. Further, the court held that the phrase 'course

in the course packs, which were sold to students at the modest price of less than a penny per page.[85] This price put the books within reach for the students, who the Court held would not otherwise be able to afford educational materials.[86] The Court noted that increased access to education would one day enable the very same students to purchase high-priced books.[87]

Copyright, too, can have profound effects on human rights. Only a small fraction of the world's books are made available to the 253 million persons in the world who are visually impaired.[88] Copyright law can bar efforts to make books accessible to the visually impaired.[89] The recent Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities signed in 2013 by some fifty countries allows for exceptions to copyrights to make otherwise protected works available to the visually impaired.[90] India was the first to ratify the Treaty—to date some thirty-seven countries have followed suit, and nearly eighty countries have signed it.[91] The RCEP draft currently agrees to commit the member states to this agreement, which is especially critical to the region given that 90% of the world's visually impaired persons live in the developing world, especially in south, east, and southeast Asia.[92]

The RCEP draft proposes that member states "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."[93] There is no express mention of fair use of copyrighted works. The EFF observes that "RCEP fails to improve much on the TPP in areas

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of instruction' embraces any instruction for the duration of an entire course or teaching programme, it is not limited only to teaching in the classroom.").

85. *Id.*

86. *Id.*

87. *Id.*

88. *Blindness and Visual Impairment*, WORLD HEALTH ORG. (Oct. 11, 2017), http://www.who.int/news-room/fact-sheets/detail/blindness-and-visual-impairment [https://perma.cc/XUT6-Q2HS].

89. WORLD INTELLECTUAL PROP. ORG., MAIN PROVISIONS AND BENEFITS OF THE MARRAKESH TREATY (2013) (2016), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_flyer.pdf [https://perma.cc/KC7K-M89Y].

90. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 2 I.L.M. 255.

91. *Id.*; 24. MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED (MARRAKESH 2013): STATUS ON MAY 11, 2018 (2018), http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/marrakesh.pdf [https://perma.cc/4QUR-Z9JN].

92. U.N. DEV. PROGRAMME, *supra* note 12, at 7; Rupert R.A. Bourne et al., *Magnitude, Temporal Trends, and Projections of the Global Prevalence of Blindness and Distance and Near Vision Impairment: A Systematic Review and Meta-Analysis*, 5 LANCET GLOBAL HEALTH e888, e892 (2017) ("The largest number of blind people resided in south Asia (11.7 million . . .), followed by east Asia (6.2 million . . .) and southeast Asia (3.5 million . . .). The largest number of people with moderate to severe vision impairment also resided in south Asia (61.2 million . . .), followed by east Asia (52.9 million . . .), and southeast Asia (20.8 million . . .).").

93. RCEP, *supra* note 34, art. 2.5.

where it quite easily could; most notably in the language on limitations and exceptions, which fails to require countries to include an equivalent to fair use in their copyright laws."[94]

The RCEP contains a number of proposals that would strengthen the rights of copyright owners and revise procedural rules and remedies in their favor. Japan and South Korea—joined this time by Australia—propose that judges must be able to award damages for intellectual property violations (including both copyright and patent violations) based on a product's suggested retail price.[95] As James Love has pointed out,[96] this goes far beyond the TRIPS requirement that "the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization."[97] "Economic value" may be significantly lower than the "suggested retail price" in developing countries where the suggested retail price is often not adjusted for local median income.

In February 2017, a group of intellectual property scholars from around the world issued a "Statement of Public Interest Principles for Copyright Protection under the Regional Comprehensive Economic Partnership (RCEP)."[98] The scholars urged the RCEP negotiators to consider the human rights implications of copyright protections, including "freedom of opinion and expression," the "[promotion of] education, participation in the cultural life of the community, enjoyment of the arts, and sharing of scientific advancement and its benefits."[99] Urging that "RCEP negotiators should integrate the public interest as a core value for setting copyright provisions," the statement recommends inclusion of a strong and express provision for "copyright limitations and exceptions, such as fair use and compulsory licensing," and to "guarantee that the public interest in creativity, education, and free speech can be promoted through the necessary uses of copyrighted works."[100] Elaborating further, the statement declares that copyright exceptions and limitations should be made available "for legitimate purposes such as criticism, comment, education, news reporting, parody, research, and facilitating access for persons with disability."[101] Finally, the statement by scholars calls for greater transparency in the RCEP negotiations so observers can ensure the agreement promotes the public

94. Jeremy Malcolm, *RCEP: The Other Closed-Door Agreement to Compromise Users' Rights*, ELECTRONIC FRONTIER FOUND. (Apr. 20, 2016), https://www.eff.org/deeplinks/2016/04/rcep-other-closed-door-agreement-compromise-users-rights [https://perma.cc/7VXQ-R3JF].

95. RCEP, *supra* note 34, art. 9bis.2.

96. Love, *supra* note 5.

97. TRIPS, *supra* note 46, art. 31(h).

98. HAOCHEN SUN, STATEMENT OF PUBLIC INTEREST PRINCIPLES FOR COPYRIGHT PROTECTION UNDER THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) (2017), https://www.eff.org/files/2017/02/23/rcep_statement_for_the_public_interest_final.pdf [https://perma.cc/DDS3-LZ9T]. We are both signatories to this statement, which was coordinated by Haochen Sun.

99. *Id.*

100. *Id.*

101. *Id.*

interest, especially crucial given the vast numbers—half the world's population—and the huge proportion of the world's poor to be affected.[102]

II. ACCIDENTAL BENEFICIARIES OF THE RCEP: UNITED STATES AND EUROPEAN MULTINATIONALS

It may come as a surprise to some of the ASEAN, Chinese, Indian, Japanese, and South Korean negotiators that by negotiating TRIPS-plus provisions in the RCEP, they are automatically granting those TRIPS-plus rights to United States and European companies. This is because, like GATT and GATS, the other principal WTO agreements, TRIPS contains most-favored-nations (MFN) and national treatment obligations.[103] However, unlike GATT and GATS, TRIPS does not broadly exempt bilateral and regional free trade agreements from the application of MFN and national treatment.[104] One expert pithily describes this as "regionalizing in GATT/GATS and multilateralizing in TRIPS."[105] Joost Pauwelyn demonstrates this principle by applying it to the United States-Chile Free Trade Agreement (FTA):

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102. *Id.*

103. TRIPS, *supra* note 46, arts. 3–4.

104. General Agreement on Tariffs and Trade, Article XXIV exempts qualifying customs unions and free-trade areas from certain other GATT obligations, while GATS Article V exempts "economic integration agreements" from the GATS' MFN obligation. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]. In *Canada – Autos*, the panel concluded that Canada could not rely on either GATT Article XXIV or GATS Article V to avoid providing MFN treatment to Japanese and European exporters because Canada's measure failed to comply with the conditions for those exemptions. Appellate Body Report, *Canada—Certain Measures Affecting the Auto Industry*, ¶ 3, WTO Doc. WT/DS139/AB/R (adopted May 31, 2000).

105. Marco M. Aleman, *Impact of TRIPS-Plus Obligations in Economic Partnership- and Free Trade Agreements on International IP Law*, *in* 20 MPI STUDIES ON INTELLECTUAL PROPERTY AND COMPETITION LAW 61, 68 (Josef Drexl et al. eds., 2014); *id.* at 83 ("TRIPS-plus provisions are immediately and unconditionally multilateralized through the MFN clause of TRIPS, which does not include the regional exception that exists for concessions concerning trade in goods and services."). During the Uruguay Round negotiations, the European Communities proposed a regional trade agreement exception to the most-favored-nations and national treatment obligation. GATT Secretariat, *Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/68, art. 4 (Mar. 29, 1990); GATT Secretariat, *Draft Agreement on Trade Related Aspects of Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/70, art. 3 (May 11, 1990) (applying "except for any advantage, favor, privilege, or immunity which exceeds the requirements of this Agreement and which is provided for in an international agreement to which the contracting party belongs, so long as such agreement is open for accession by any contracting party of this Agreement"). Developing countries were skeptical of the need to include an MFN principle in the text. GATT Secretariat, *Meeting of the Negotiating Group of 1 November 1990*, GATT Doc. MTN.GNG/NG11/27, ¶¶ 3–4 (Nov. 14, 1990) ("Speaking on behalf of a number of developing countries, a participant . . . said that he was still not convinced of the need to include the mfn principle in the text, since it was alien to the intellectual property system, and would in any case be rendered meaningless by the growing list of exceptions written into it.").

"[A]ny IP benefit conferred regionally between, for example, the US and Chile, must be extended automatically to all WTO members."[106]

The specific obligations are as follows. Under MFN, "[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members . . . ."[107] Under national treatment, "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property."[108] A footnote makes clear that the national treatment and MFN obligations apply not only to intellectual property rights, but also to their enforcement: "For the purposes of Articles 3 [national treatment] and 4 [MFN], 'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement."[109] In the report, *United States – Section 211 Omnibus Appropriations Act of 1998*, the Appellate Body agreed with the Panel that the appropriate standard to apply under Article 3.1 of TRIPS was whether a measure provided "effective equality of opportunities" to non-nationals.[110] The result is plain: if China, India, Indonesia, and Thailand agree to strengthen intellectual property rights vis-à-vis each other or for their own nationals within the RCEP, they have automatically agreed to offer the same stronger rights to American and European corporations as well.[111]

Thus, *the greatest beneficiaries of the RCEP intellectual property chapter are likely to be United States and European companies*. Those companies, after all, have the greatest stock of intellectual property to be protected.[112] In promoting TRIPS-plus provisions in the RCEP, the South Korean and Japanese governments are effectively arguing on behalf of United States and European enterprise.

An additional irony: Chinese, Indian, Japanese, and South Korean companies will not be guaranteed reciprocal rights in Europe or the United States. Any rights

106. Joost Pauwelyn, *Legal Avenues to 'Multilateralizing Regionalism': Beyond Article XXIV*, *in* MULTILATERALIZING REGIONALISM 368, 382–83 (Richard Baldwin & Patrick Low eds., 2009); *see also* Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 223 (Lorand Bartels & Federico Ortino eds., 2006) ("[I]f the US and a developing country member negotiate an FTA, MFN will force the developing nation to make the same IP concessions it accepted in the FTA available to all nations.").

107. TRIPS, *supra* note 46, art. 4.

108. *Id.* art. 3(1).

109. *Id.* art. 3(1) n.3.

110. Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 8.131, WTO Doc. WT/DS176/R (adopted Aug. 6, 2001); *see also* Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 258, WTO Doc. WT/DS176/AB/R (adopted Jan. 2, 2002).

111. There is a substantial question as to whether the MFN and national treatment obligations would extend to the investor-state dispute resolution chapter.

112. *See infra* notes 121-122 and accompanying text (describing global intellectual property royalty receipts, by country).

granted in those jurisdictions depend on their own laws and TRIPS-plus commitments, not on the rights given in the RCEP. Thus, the RCEP intellectual property chapter makes United States and European corporations free riders—benefiting from its provisions, without their home jurisdictions facing any additional obligations.[113]

Skeptics may ask: If this process is indeed the case, then what explains the United States' zealous promotion of TRIPS-plus provisions in its free trade agreements? The answer may lie in the fact that, by and large, the United States is promoting provisions that are already part of its law. Thus, the addition of free trade agreement obligations does not in fact expand United States obligations to nationals of other WTO members because those foreign nationals already can claim those benefits by operation of national treatment.[114]

The advantages to be extended under the MFN and national treatment obligations are mandated, in both cases, only with respect to "the protection of intellectual property."[115] This narrows these obligations somewhat as TRIPS defines "intellectual property" as "all categories of intellectual property that are the subject of Sections 1 through 7 of Part II" of TRIPS.[116] Those particular sections protect copyright and related rights, trademarks, geographical indications, industrial designs, patents, designs of integrated circuits, and undisclosed information.[117] Thus, any part of the RCEP intellectual property chapter that does not protect those forms of intellectual property is not immediately available to nationals of all other WTO member states by operation of either MFN or national treatment. For the most part, however, the RCEP intellectual property chapter tracks the categories of TRIPS, so the bulk of the chapter would likely be subject to the MFN and national treatment obligations.[118] The RCEP proposals on plant variety protection and on

113. Focusing on United States efforts to establish TRIPS-plus provisions in its free trade agreements, Ruth Mayne observes that "the EC in effect is able to free-ride on the US bilateral strategy [through] the Most Favoured Nation (MFN) provision in TRIPS." RUTH MAYNE, UNITED NATIONS DEV. PROGRAMME, REGIONALISM, BILATERALISM, AND "TRIPS PLUS" AGREEMENTS: THE THREAT TO DEVELOPING COUNTRIES 11 (2005), http://hdr.undp.org/sites/default/files/hdr2005_mayne_ruth_18.pdf [https://perma.cc/EH7E-3HDF]. Europe can sit back and benefit from the sharp US negotiation, receiving "considerable commercial advantage without having to face the kind of international opprobrium faced by the US," Mayne insightfully notes. *Id.* Mayne may not have anticipated that both Europe and the United States might be able to free-ride on Korean and Japanese efforts to achieve stronger protections in Asia.

114. Mercurio, *supra* note 106, at 220 ("It is . . . clear that the TRIPS-Plus provisions appearing in US FTAs . . . are identical to aspects of its domestic law. . . . [T]he US law providing the President with the power to conclude trade agreements . . . [states as a negotiating objective] an IP regime that 'reflect(s) a standard found in United States law.'").

115. *See supra* note 109 and accompanying text.

116. TRIPS, *supra* note 46, art. 1(2). The limitation to intellectual property rights recognized in the agreement leaves open the possibility of countries to offer new forms of rights—such as those for traditional knowledge—without automatically conferring them to all WTO members.

117. *Id.* arts. 9–39.

118. Whether some provisions are covered by TRIPS "intellectual property" will prove controversial in certain cases. For example, whether TRIPS requires data exclusivity has been subject

genetic resources, traditional knowledge, and folklore[119] prove an exception to this rule because they have no TRIPS counterpart; thus, they would not be subject to the MFN and national treatment obligations.

Yet another exception to the MFN obligation (but not the national treatment obligation) can be found in free trade agreements predating TRIPS, and duly notified to the TRIPS Council. This includes the intellectual property provisions in NAFTA, MERCOSUR, and the European Union (formerly European Communities), which have all been notified to the WTO.[120] However, because the grandfather exclusion does not apply to national treatment, TRIPS-plus obligations in these regional arrangements will still be multilateralized through WTO member states because of the national treatment obligation.

Strong intellectual property protections in the RCEP benefit United States and European companies in yet additional ways. First, as other nations in Asia join the RCEP, they will be required to accept the existing intellectual property protections in the agreement. Second, it will be difficult for the RCEP nations to reject such strong provisions in any future trade agreement with Europe or the United States when they have accepted them in such agreements already (and they are already effectively applicable to European and United States companies via the national treatment and MFN obligations). Third, such provisions will reduce the ability of the RCEP nations to manufacture generic medicines for either domestic use or export.

Stronger intellectual property rights are likely to benefit the United States most of all, if past international intellectual property payments are a guide. The RCEP nations lag far behind the United States and the EU in receiving international payments on intellectual property, as Figure 4 shows. While the RCEP has been described as a counterweight to the United States, in fact, the intellectual property provisions in the RCEP may ultimately benefit United States and European

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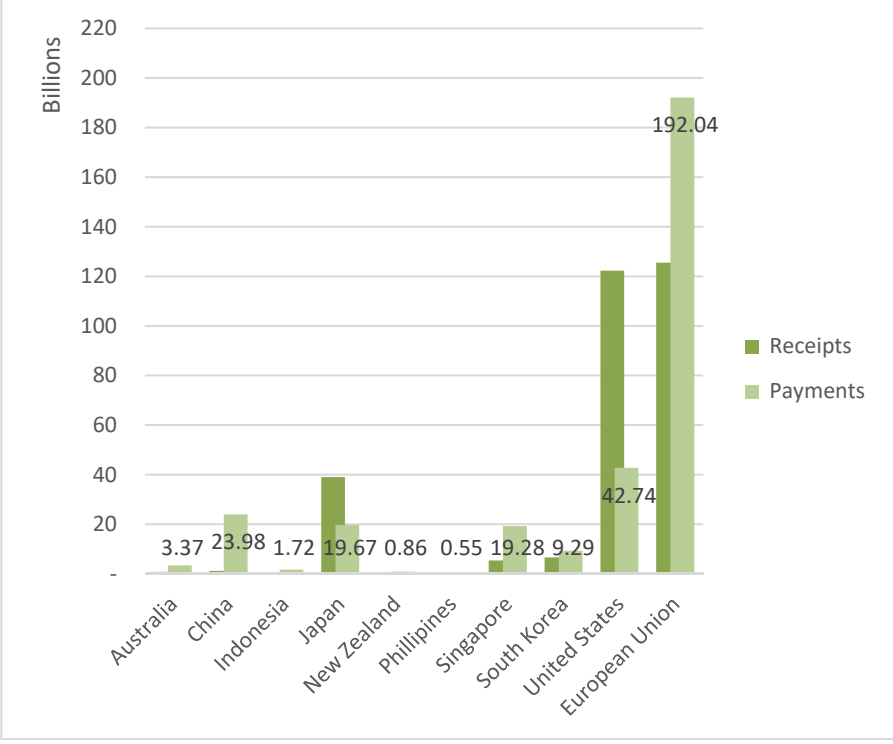
to debate. Olasupo A. Owoeye, *Data Exclusivity and Public Health Under the TRIPS Agreement*, 23 J.L. INFO. & SCI. 106, 111–12 (2014).

119. RCEP, *supra* note 34, art. 5.19 (New Varieties of Plants); *id.* art. 7.1 (Genetic Resources, Traditional Knowledge, and Folklore).

120. The United States only notified to the TRIPS Council a single article of NAFTA, while Mexico notified all of NAFTA's intellectual property provisions. Council for Trade-Related Aspects of Intellectual Property Rights, *Notification Under Article 4(d) of the Agreement United States*, WTO Doc. IP/N/4/USA/1 (Feb. 29, 1996); Council for Trade-Related Aspects of Intellectual Property Rights, *Notification Under Article 4(d) of the Agreement Mexico*, WTO Doc. IP/N/4/MEX/1 (Feb. 12, 1996). The European Communities' notification seeks to exclude not only existing rights, but also "future acts adopted by the Community as such and/or by the Member States which conform with these agreements following the process of regional integration." Council for Trade-Related Aspects of Intellectual Property Rights, *Notification Under Article 4(d) of the Agreement European Communities and their Member States*, WTO Doc. IP/N/4/EEC/1 (Jan. 29, 1996). The notification from Mercosur (established by the Treaty of Asunción in 1991) follows this model as well, covering "all agreements, protocols, decisions, resolutions and guidelines adopted or to be adopted in the future by MERCOSUR or its States Parties." Council for Trade-Related Aspects of Intellectual Property Rights, *Notification Under Article 4(d) of the Agreement Argentina, Brazil, Paraguay, Uruguay*, WTO Doc. IP/N/4/ARG/1, IP/N/4/BRA/1, IP/N/4/PRY/1, IP/N/4/URY/1 (July 14, 1998).

companies. The European Union and the United States receive the great bulk of international royalties on intellectual property, some $125 billion and $122 billion USD respectively in 2016, according to World Bank statistics.[121] Japan receives but a fraction of this amount, some $39 billion USD, and South Korea even less, at less than $7 billion USD, and the other RCEP countries report much smaller amounts, and some do not collect such statistics at all.[122] South Korea and even the European Union, in fact, pay out more than they receive in international intellectual property payments.

Figure 4. International Intellectual Property Receipts and Payments (2016) (World Bank Data Available at data.worldbank.org)



III. THE INTERNATIONAL TREATY-MAKING PROCESS

The availability of a draft text of a major international treaty complete with annotations indicating precisely the language proposed or rejected by each negotiating partner offers an unusual glimpse into the treaty-making process. At the

121. *Data: Charges for the Use of Intellectual Property, Receipts*, WORLD BANK, http://data.worldbank.org/indicator/BX.GSR.ROYL.CD?view=map [https://perma.cc/WS68-9ADP] (last visited Mar. 8, 2018).

122. *Id.*

same time, the very nature of this draft, representing a leaked chapter of the text, highlights another procedural aspect of the treaty-making process—the lack of planned transparency in international lawmaking related to intellectual property. We explore each aspect of the treaty-making process below.

A. Idiosyncratic

In the realist view, "international relations is essentially a story of Great Power politics."[123] The realist school understands international relations as a forum dominated by power politics, with each nation-state seeking to maximize its advantage through international fora. While earlier formulations focused on enhancing security,[124] contemporary realists often adopt a wider cost-benefit framework for international obligations and engagements.[125] Jack Goldsmith and Eric Posner offer what Greg Shaffer describes as "international relations realism."[126] States enter into international agreements not out of a sense of international obligation, but to maximize self-interest. Goldsmith and Posner argue that "international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."[127] They recognize that domestic interest groups play a significant role in international trade negotiations in particular, and acknowledge that "elites, corporations, the military, relatives of dictators—have disproportionate influence on leaders' conduct of state."[128] They also understand that "leaders' information errors" and interest group capture can lead nations to fail to maximize rational self-interest.[129]

The negotiating text of the intellectual property chapter of the RCEP seems to confirm that the parties seek in large part to promote their self-interest in this international treaty-making process, though this conclusion must be hedged in two ways. At the macro level, India, home to a large generic medicine industry as well as poorer consumers, seeks to maintain its right to produce and export generic medicines. At the same time, South Korea and Japan, home of technology industries dependent on pharmaceutical and other patents as well as wealthier consumers, seek to restrict that right.

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123. Anne-Marie Slaughter & Thomas Hale, *International Relations, Principal Theories*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011).

124. Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1141 (2011) ("[Classical realism] treats nations as single units with one overriding interest: their security.").

125. Jack Goldsmith & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1828 (2009) ("[N]ations create and comply with international law when, and only when, the perceived benefits of doing so outweigh the costs.").

126. Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189, 205 (2015).

127. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005).

128. *Id.* at 6.

129. *Id.* at 206.

This initial evidence to support the rationalist claim proves more equivocal upon closer inspection. First, it is not clear that South Korea or Japan will in fact gain a net social benefit from stronger patent rights, given that they will be required to offer them simultaneously to United States and European companies—and thus face higher healthcare costs over the long term as they pay more in royalties for the intellectual property held by United States and European companies.

Second, the realist claim only holds true at a very general level, one that is neither particularly controversial nor informative—and which largely replicates common sense. It does not seem to predict the particular language each side is proposing, accepting, or rejecting. Instead, a reading of the RCEP intellectual property draft chapter gives evidence for Kal Raustiala's critique that the rationalist internationalist account "fails to explain much of the texture of international cooperation."[130] A purely political economy analysis might suggest a simple strategy: minimize intellectual property protections if one expects to be a net importer of intellectual property, or maximize intellectual protections if one expects to be a net exporter of intellectual property (this strategy could be further refined by type of intellectual property—copyrights, trademarks, patents, etc.). As Greg Mandel notes, "most countries will tend to be either net producers or net consumers of innovation."[131] If this is the case, there should largely be two positions in international intellectual property law negotiations—one arguing for weaker intellectual property protections, and the other seeking stronger protections, perhaps varied by the particular kind of intellectual property one's nation exports or imports. Anthony Taubman notes the conventional view of intellectual property negotiations as being largely between "the industry interests of the North and the public policy interests of the South."[132] Thus, the rationalist might predict a unified front among intellectual property importers, and a similar front among intellectual property exporters (or perhaps united depending on the particular type of intellectual property at stake).

A review of the RCEP leaked draft, however, reveals an astounding and seemingly inexplicable array of views on the details. At times, India will be aligned with Australia against South Korea and Japan (as predicted), and at other times, the alignments will be mixed—with little obvious explanation. If we understood South Korea and Japan as generally preferring the intellectual property maximalist position, we might expect them to consistently propose stricter enforcement provisions, while India proposes less demanding ones. The reality, however, seems reversed: while South Korea and Japan propose that remedies should be

130. Kal Raustiala, *Refining the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423, 424 (2006).

131. Greg Mandel, *Leveraging the International Economy of Intellectual Property*, 75 OHIO ST. L.J. 733, 737 (2014).

132. Anthony Taubman, *Thematic Review: Negotiating "Trade-Related Aspects" of Intellectual Property Rights*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 15, 22 (Jayashree Watal & Anthony Taubman eds., 2015).

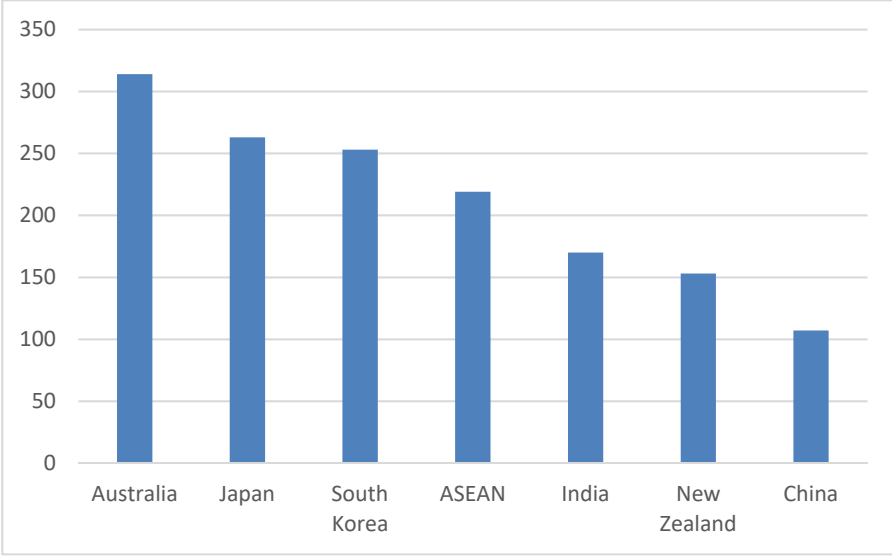
proportionate to the offense, India takes no view.[133] While South Korea proposes statutory damages for copyright infringement and trademark counterfeiting, Japan opposes it.[134] While China, Japan, and New Zealand propose worldwide novelty for patentability (though they each have quibbles with each other on the precise language), India and ASEAN oppose such a requirement; these positions are hard to square with the understanding that India seeks to raise the bar for patentability, while Japan seeks to lower it.[135]

So how can we explain the various preferences of each country on specific language? A number of possible explanations might be assayed. First, particular wording may maximize domestic social welfare, as the rational choice theorists might suggest—for example, by lowering royalty payments made to foreigners or increasing royalty payments received from foreigners. Second, the specific wording might reflect the specific needs of particular constituencies, which, for example, might want stronger domestic and cross-border broadcasting rights. This differs from the first explanation because the constituency that has the ear of the trade negotiators may not capture the broader economic consequences for that nation; to take a non-intellectual property example, a country might advocate for investor-state protection on behalf of its outward-bound investor companies, even while opening itself to ultimately larger inward-bound claims. Third, perhaps the specifics reflect the historically contingent content of local laws because negotiators might simply seek to reduce necessary conforming changes to domestic law as much as possible. Finally, the specifics might reflect the more idiosyncratic beliefs of individual negotiators. The reality is likely to consist in a mix of all of these rationales.

Despite being described as a China-centered treaty, the RCEP's intellectual property chapter does not show an especially active Beijing pen during the negotiation. Figure 5 below shows the number of times each country inserted a comment in the RCEP text. China offers fewer comments than New Zealand.

133. RCEP, *supra* note 34, arts. 9.2–9.3.
134. *Id.* arts. 9bis.2–9bis.3.
135. *Id.* art. 5.12.

Figure 5. Number of Comments on RCEP IP Chapter, by Country



Overall, it is possible to see strategies at work: India seeks to minimize intellectual property rights with respect to patent rights, while South Korea and Japan seeks to maximize enforcement of intellectual property rights across the region. But countries are not easy to predict on much of the language they prefer for specific provisions in the agreement.

B. Secret

The TPP was roundly and rightly criticized for being negotiated in secret, with no draft presented for public review till the negotiations had been concluded.[136] As the negotiations came to a conclusion, reports would describe "senators and representatives, who are now allowed, under strictly controlled conditions—in a guarded basement room under the Capitol, with no note-taking—to read drafts of the eight-hundred-page agreement."[137] The RCEP is perhaps even less transparent

136. Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105, 114 (2012) ("[T]he TPP . . . is being negotiated under intense secrecy, including an agreement among the parties that no text of any proposal in the negotiation will be released until four years after the end of the negotiation.").

137. William Finnegan, *Why Does Obama Want This Trade Deal So Badly?*, NEW YORKER, June 11, 2015, http://www.newyorker.com/news/daily-comment/why-does-obama-want-the-trans-pacific-partnership-so-badly [https://web.archive.org/web/20180309194338/https://www.newyorker.com/news/daily-comment/why-does-obama-want-the-trans-pacific-partnership-so-badly].

than the TPP, with the public forced to rely on leaked texts of a few chapters published by the civil society group Knowledge Ecology International.[138]

Defenders of the TPP note that trade negotiation is usually conducted in secret. The rationale for such secrecy is that the industries whose protections are being reduced or eliminated should not learn of this plan for fear that they might be able to mount an effective opposition, scuttling trade liberalization negotiations.[139]

However, that rationale for secrecy does not apply to the intellectual property provisions of trade agreements. The intellectual property chapter does not consist in the dismantling of protectionism; rather it consists in establishing the contours of intellectual property protections. There is no trade liberalization that is allegedly put in jeopardy by disclosure of what is contemplated in the intellectual property chapters.[140] That does not mean that domestic constituencies might not protest when proposed terms are disclosed. Local publishers, local generics manufacturers, or local medical agencies might complain of strong TRIPS-plus rights, while other publishers and pharmaceutical companies might complain that the provisions are not strict enough.

Secrecy in negotiating trade deals is, moreover, a poor strategy, even for the substantive trade liberalization provisions.[141] First, practically speaking, in a world of leaks, when texts are being negotiated among a dozen or more countries, it may

138. For a collection of the leaked chapters of RCEP, see *RCEP Leaks*, BILATERALS.ORG, http://www.bilaterals.org/rcep-leaks [https://perma.cc/F952-FGPT] (last visited June 14, 2018).

139. Panagiotis Delimatsis, *TTIP, CETA, and TiSA Behind Closed Doors: Transparency in the EU Trade Policy*, *in* MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TISA 216, 244 (Stefan Griller et al. eds., 2017) ("Excessive transparency upfront . . . may delay negotiations and . . . prompt trade negotiators to posture by taking uncompromising positions . . . [because of] domestic constituencies monitoring such international developments . . ."); EUROPEAN COMMISSION, THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) FACT SHEET 4 (2008), http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf [https://perma.cc/B6Q3-9FLT] ("For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion."). Sometimes "national security" is asserted. *See* David S. Levine *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 109 (2012).

140. This is not to suggest that secrecy is likely to prove beneficial to achieving trade liberalization in goods and services. In fact, secrecy in the negotiations of goods, services, and intellectual property is likely to be counter-productive because it "increases rather than decreases controversy so that whatever final text arrives from the process will be received by the public and their representatives with derision." Flynn et al., *supra* note 136, at 201.

141. The United States Chamber of Commerce's defense of secrecy in negotiations—that "disclosure of negotiating texts would risk giving foreign governments a roadmap to U.S. sensitivities"—seems inapposite as negotiating texts necessarily are disclosed to foreign governments involved in the negotiation (and eventually to all other foreign governments when they are ratified). John G. Murphy, *New York Times Op-Ed Attacking Secrecy in Trade Negotiations Misses Mark*, U.S. CHAMBER COM.: ABOVE FOLD (Apr. 15, 2015), https://www.uschamber.com/above-the-fold/new-york-times-op-ed-attacking-secrecy-trade-negotiations-misses-mark [https://perma.cc/XQJ7-8VYA]. Secrecy in trade negotiations is not about keeping secrets from foreign governments, but about keeping secrets from domestic interests.

be difficult to maintain secrecy, as recent events have demonstrated.[142] Second, early disclosure may stave off manipulative disclosures timed and drafted to make the text look scandalous. Third, the secrecy of the process becomes a key focal point of critics of the agreement. Finally, a secret process makes it impossible to include civil society in the negotiations, which may help produce provisions that are more widely acceptable and balanced.[143]

CONCLUSION

The negotiation of an Asia-Pacific trade agreement represents an opportunity for developing and recently developed countries to set a new agenda for intellectual property—one focused not just on protecting property rights, but on ensuring access to medicine and access to knowledge. At present, the RCEP fails to make a start towards such goals, and, if some parties prevail in the negotiation, will in fact impede them. In lieu of the current intellectual property chapter, countries in the region could instead agree to a new funding mechanism to find treatments for the diseases of the developing world—perhaps borrowing as inspiration the newly-established Asian Infrastructure Investment Bank.[144] Scholars have increasingly recognized the usefulness of prizes and grants as a mechanism to spur innovation along useful lines.[145] If it includes an intellectual property chapter at all, the RCEP

142. *See, e.g.*, TRADE LEAKS, https://trade-leaks.org/ [https://perma.cc/WH2V-P3KX] (last visited June 14, 2018); WIKILEAKS, https://wikileaks.org/ [https://perma.cc/T6RT-AG2R] (last visited June 14, 2018); *see also* David S. Levine, *Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking*, 26 AM. U. INT'L. L. REV. 811, 829 (2011) ("Because the Internet exists as a pervasive means to disseminate information on issues of significant public concern, the remainder of this paper suggests that the benefit of secrecy is difficult, and in some cases impossible, to maintain when (1) an issue of significant national interest is receiving national attention, and (2) there is an organized and technologically-savvy group of interested members of the public that are not receiving desired information about the issue.").

143. Civil society has long called for transparency in trade negotiations. *See, e.g.*, IGF DYNAMIC COAL. ON TRADE & THE INTERNET, RESOLUTION ON TRANSPARENCY (2017), https://www.eff.org/files/2017/12/19/igf_dc_trade_resolution_on_transparency.pdf [https://perma.cc/987J-8DRU]. Even some corporations have joined the call. *See, e.g.*, David Weller, *Bringing Internet Voices into Trade*, GOOGLE: PUBLIC POLICY (Mar. 25, 2016), https://blog.google/topics/public-policy/bringing-internet-voices-into-trade/ [https://perma.cc/3URA-2UB5] ("For trade and Internet policy to work together, trade negotiators need to have input from the full range of Internet stakeholders.").

144. *See, e.g.*, Tim Hubbard & James Love, *A New Trade Framework for Global Healthcare R&D*, 2 PLOS BIOL. 147 (2004).

145. *See, e.g.*, Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003); Jonathan H. Adler, *Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1 (2011); Michael J. Burstein & Fiona E. Murray, *Innovation Prizes in Practice and Theory*, 29 HARV. J.L. & TECH. 401 (2016); Daniel J. Hemel & Lisa L. Ouellette, *Beyond the Patents—Prizes Debate*, 92 TEX. L. REV. 303 (2013) (comparing various schemes to promote innovation, including patents, prizes, grants, and tax incentives); Benjamin N. Roin, *Intellectual Property Versus Prizes: Reframing the Debate*, 81 U. CHI. L. REV. 999, 1001–03 (2014); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001); Ted Sichelman, *Patents, Prizes, and Property*, 30 HARV. J.L. & TECH. 279, 279–80 (2017). The principal criticism of prize and grant mechanisms as an innovation tool is that governments lack sufficient information to guide innovation. But if the governments' goals are well-defined—say to develop cures

should create a new model of intellectual property agreement, devoted not to promoting intellectual property first and foremost and for its own sake, but to promoting health, education, and innovation. The sixteen countries negotiating the RCEP should either withdraw or rewrite the intellectual property chapter of that agreement.

for a particular illness, or to improve methods to deliver medicines, say, in tropical climates—this particular defect can be ameliorated.