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# The RCEP and Intellectual Property Normsetting in the Asia-Pacific

Peter K. Yu



## 1. Introduction\*

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As far as mega-regional trade agreements and non-multilateral intellectual property normsetting are concerned, considerable media, policy and scholarly attention has been devoted to the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). Receiving significantly, and unduly, less attention is the Regional Comprehensive Economic Partnership (RCEP), which is currently being negotiated between Australia, China, India, Japan, New Zealand, South Korea and the 10 members of the Association of Southeast Asian Nations (ASEAN).<sup>1</sup> Launched in November 2012 under the ASEAN+6 framework, the RCEP negotiations built on past trade and non-trade discussions between ASEAN and its six major Asia-Pacific neighbours.

Although the RCEP has been seldom analysed until recently, its negotiations are important for at least three reasons. First, this partnership is important globally. The 16 RCEP negotiating parties "account for almost half of the world's population, almost 30 per cent of global GDP [gross domestic product] and over a quarter of world exports."<sup>2</sup> These figures compare favourably with those relating to the TPP, which was originally created to cover "40% of global GDP and some 30% of worldwide trade in both goods and services."<sup>3</sup> Second, the RCEP is highly important within the Asia-Pacific region. Once established, this partnership will cover not only China and India but also two high-income Asian economies (Japan and South Korea) and six other TPP partners (Australia, Brunei Darussalam, Malaysia, New Zealand, Singapore and Vietnam). Third, the RCEP could serve as a viable alternative to the TPP and has become increasingly important following the United States' decision to withdraw from the pact. Given the Trump administration's position and the other negotiating parties' inability hitherto to resuscitate the partnership,<sup>4</sup> the TPP has now seemingly been placed on life support.<sup>5</sup> Unless the remaining partners can move the pact forward without the participation of the United States, the TPP Agreement will likely meet the same fate as the widely criticised Anti-Counterfeiting Trade Agreement (ACTA). Despite its adoption in April 2011, ACTA has thus far been ratified by only one country—Japan, the country of depository.

This article examines the RCEP with a focus on the intellectual property norms it seeks to develop. It begins by briefly discussing the partnership's historical origins and ongoing negotiations. It then examines the latest leaked draft of the RCEP intellectual property chapter. This article concludes by exploring three scenarios concerning the chapter's future. A close examination of these scenarios is

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\* Copyright © 2017 Peter K. Yu. This article was adapted from Peter K. Yu, "The RCEP and Trans-Pacific Intellectual Property Norms," *Vanderbilt Journal of Transnational Law* 50, no. 3 (2017): 673–740.

- 1 The 10 current ASEAN members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. They negotiate as a bloc in the RCEP negotiations.
- 2 Department of Foreign Affairs and Trade (Australia), "Regional Comprehensive Economic Partnership," <http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx>.
- 3 David A. Gantz, "The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim," *Arizona Journal of International and Comparative Law* 33, no. 1 (2016): 59.
- 4 Shortly after the United States withdrew, Australia, Japan, Singapore and New Zealand explored ways to resuscitate the agreement. These efforts, however, did not bear fruit. At the time of writing, only Japan and New Zealand have ratified the agreement. No other country is actively pursuing any effort to do the same. Nevertheless, at a May 2017 APEC meeting in Hanoi, Vietnam, the remaining TPP partners reaffirmed their commitment to the pact and agreed to explore the development of a process to move it forward even without the participation of the United States.
- 5 Peter K. Yu, "Thinking about the Trans-Pacific Partnership (and a Mega-regional Agreement on Life Support)," *SMU Science and Technology Law Review* 21 (2017): forthcoming.

instructive, as it will shed light on the future of intellectual property normsetting in the Asia-Pacific region.

## 2. Historical Origins and Ongoing Negotiations

Although the RCEP negotiations were launched in November 2012, more than two years after the beginning of the TPP negotiations, they were established not solely as a reactive response or defensive measure. Instead, the RCEP negotiations built on prior efforts at various fora to facilitate economic integration and cooperation in the Asia-Pacific region. These fora include ASEAN+3 (ASEAN, China, Japan and South Korea), ASEAN+6 (ASEAN+3, Australia, India and New Zealand) and the Asia-Pacific Economic Cooperation (APEC) Forum.

In October 2001, the East Asian Vision Group, which was charged with “develop[ing] a road map to guide future regional cooperation,”<sup>6</sup> recommended to ASEAN+3 leaders the establishment of the East Asia Free Trade Area.<sup>7</sup> Although China strongly supported this proposal, Japan and other Asian countries had serious reservations about China’s potential dominance in this pact.

Five years later, Japan advanced an alternative proposal concerning the Comprehensive Economic Partnership in East Asia.<sup>8</sup> Covering not only ASEAN+3 members but also the three remaining ASEAN+6 members (Australia, India and New Zealand), this partnership would dilute China’s influence in the regional pact while adding to the mix a major source of natural resources—namely, Australia.

Around that time, APEC members also actively explored regional integration and cooperation efforts. In November 2006, APEC began studying the concept of a Free Trade Area of the Asia-Pacific (FTAAP).<sup>9</sup> Three years later, APEC leaders pledged to create an agreement to realise this conceptual vision. As Fred Bergsten observed at that time, the proposed pact could provide a wide variety of benefits to both the Asia-Pacific region and the global economy.<sup>10</sup> Since then, APEC leaders have endorsed various declarations laying down the incremental steps needed to realise the FTAAP. These documents include the “Pathways to FTAAP,” which was adopted in November 2010, and the “Beijing Roadmap for APEC’s Contribution to the Realization of the FTAAP,” which was released four years later.<sup>11</sup>

In November 2011, ASEAN, with the support of both China and Japan, proposed to merge the initiatives concerning the East Asia Free Trade Area and the Comprehensive Economic Partnership

6 Mark Beeson, *Institutions of the Asia-Pacific: ASEAN, APEC and Beyond* (London: Routledge, 2009), 78.

7 Shujiro Urata, “Japan’s FTA Strategy and a Free Trade Area of the Asia-Pacific,” in *An APEC Trade Agenda? The Political Economy of a Free Trade Area of the Asia-Pacific*, ed. Charles E. Morrison and Eduardo Pedrosa (Singapore: ISEAS, 2007), 106.

8 Meredith Kolsky Lewis, “Achieving a Free Trade Area of the Asia-Pacific: Does the TPP Present the Most Attractive Path?” in *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement*, ed. C. L. Lim, Deborah Kay Elms and Patrick Low (Cambridge: Cambridge University Press, 2012), 228; Urata, “Japan’s FTA Strategy,” 106–107.

9 Lewis, “Achieving a Free Trade Area of the Asia-Pacific,” 223.

10 C. Fred Bergsten, “A Free Trade Area of the Asia-Pacific in the Wake of the Faltering Doha Round: Trade Policy Alternatives for APEC,” in *An APEC Trade Agenda?*, ed. Morrison and Pedrosa, 32–33.

11 “Pathways to FTAAP,” 14 November 2010, [http://www.apec.org/meeting-papers/leaders-declarations/2010/2010\\_aelm/pathways-to-ftaap.aspx](http://www.apec.org/meeting-papers/leaders-declarations/2010/2010_aelm/pathways-to-ftaap.aspx); “The Beijing Roadmap for APEC’s Contribution to the Realization of the FTAAP,” 11 November 2014, [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014\\_aelm/2014\\_aelm\\_annexa.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm/2014_aelm_annexa.aspx).

in East Asia to form the RCEP.<sup>12</sup> At the 19th ASEAN Summit in Bali, Indonesia, ASEAN leaders adopted the "Framework for Regional Comprehensive Economic Partnership."<sup>13</sup> Formal negotiations were finally launched in November 2012 at the 21st ASEAN Summit in Phnom Penh, Cambodia. As ASEAN+6 leaders declared at that time, the RCEP negotiations were established to

Achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement establishing an open trade and investment environment in the region to facilitate the expansion of regional trade and investment and contribute to global economic growth and development; [and]

Boost economic growth and equitable economic development, advance economic cooperation and broaden and deepen integration in the region through the RCEP, which will build upon our existing economic linkages.<sup>14</sup>

Although the ASEAN+6 leaders' joint declaration did not specifically mention the TPP, there is no denying that the development of this United States–led partnership has greatly accelerated the RCEP negotiations. The latter negotiations were particularly urgent when two major ASEAN+6 economies, China and India, were intentionally excluded from the TPP.<sup>15</sup> Also excluded were other key ASEAN+6 members, such as Indonesia, the Philippines, South Korea and Thailand. While some of these countries had been invited to the TPP negotiations but declined to participate,<sup>16</sup> others were simply ignored or left out.

Undoubtedly, there were both economic and non-economic reasons for not inviting these countries to the TPP negotiations. Yet, the outcome was the same: while the excluded countries could still join the partnership once it had been established, they would not be able to shape the standards involved. Instead, they could only accept the final terms as agreed upon by the original negotiating parties. Such an outcome was highly unattractive, if not unacceptable, to large Asian economies such as China and India. It is therefore unsurprising that these countries have turned their time, attention and energy towards the RCEP to develop regional standards based on their own preferences and experiences.<sup>17</sup>

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12 Shintaro Hamanaka, "Trans-Pacific Partnership versus Regional Comprehensive Economic Partnership: Control of Membership and Agenda Setting," *Asian Development Bank Working Paper Series on Regional Economic Integration* 146 (2014): 11, [https://aric.adb.org/pdf/workingpaper/WP146\\_Hamanaka\\_Trans-Pacific\\_Partnership.pdf](https://aric.adb.org/pdf/workingpaper/WP146_Hamanaka_Trans-Pacific_Partnership.pdf); Ganeshan Wignaraja, "The Regional Comprehensive Economic Partnership: An Initial Assessment," in *New Directions in Asia-Pacific Economic Integration*, ed. Tang Guoqiang and Peter A. Petri (Honolulu: East-West Center, 2014), 94.

13 "ASEAN Community in a Global Community of Nations': Chair's Statement of the 19th ASEAN Summit," 17 November 2011, <http://www.asean.org/wp-content/uploads/archive/documents/19th%20summit/CS.pdf>; "ASEAN Framework for Regional Comprehensive Economic Partnership," 12 June 2012, [http://asean.org/?static\\_post=asean-framework-for-regional-comprehensive-economic-partnership](http://asean.org/?static_post=asean-framework-for-regional-comprehensive-economic-partnership).

14 "Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership," 20 November 2012, <http://dfat.gov.au/trade/agreements/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership.pdf>.

15 Peter K. Yu, "TPP and Trans-Pacific Perplexities," *Fordham International Law Journal* 37, no. 4 (2014): 1132–1163.

16 Yoo Choonsik, "South Korea Moves Closer to Joining TPP Trade Talks," *Reuters*, 29 November 2013, <http://www.reuters.com/article/us-korea-trade-tpp-idUSBRE9AS06M20131129>; Alan Raybould, "Thailand Says to Join Trans-Pacific Partnership Trade Talks," *Reuters*, 18 November 2012, <http://www.reuters.com/article/us-asia-obama-trade-idUSBRE8AH06R20121118>.

17 Hamanaka, "Trans-Pacific Partnership," 12–15.

At the time of writing, ASEAN+6 members have already entered into 19 rounds of negotiations. Since the first round in May 2013 in Bandar Seri Begawan, Brunei Darussalam, negotiations have been held around the Asia-Pacific region—in Brisbane, Kuala Lumpur, Nanning, Singapore, Greater Noida, Kyoto, Bangkok, Nay Pyi Taw, Busan, Perth, Auckland, Ho Chi Minh City, Tianjin, Kobe, Manila and Hyderabad. Seven ministerial meetings, including both regular and intersessional, have also been held in Bandar Seri Begawan, Nay Pyi Taw, Kuala Lumpur, Kuala Lumpur, Vientiane, Cebu and Hanoi, respectively.

Although no draft text has thus far been officially released to the public, Knowledge Ecology International made the leaked texts of some chapters available online. Among these leaked drafts are the 15 October 2015 version of the proposed RCEP intellectual property chapter,<sup>18</sup> the original proposed intellectual property chapters from ASEAN, India, Japan and South Korea,<sup>19</sup> as well as the proposed RCEP investment chapter.<sup>20</sup> Even though this investment chapter does not focus specifically on intellectual property issues, the investor–state dispute settlement mechanism it seeks to establish will have serious ramifications for regional intellectual property developments.

Once the RCEP Agreement is completed, the final text is anticipated to cover a wide range of areas, including “trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition [and] dispute settlement.”<sup>21</sup> Beyond these areas, working or sub-working groups have also been established to address rules of origin; customs procedures and trade facilitation; legal and institutional issues; sanitary and phytosanitary measures; standards, technical regulations and conformity assessment procedures; electronic commerce; financial services; and telecommunications.<sup>22</sup>

Given this large number of working and sub-working groups, it remains to be seen whether their establishment will result in the creation of standalone chapters in each specific area. Regardless of how the final agreement is structured, however, that agreement is likely to be as ambitious as the TPP Agreement, whose final text contains 30 different chapters. In light of this expansive and comprehensive coverage, questions have already been raised about the potential rivalry, compatibility and complementarity between these two mega-regional agreements.

### 3. Draft Intellectual Property Chapter

When ASEAN leaders adopted the “Framework for Regional Comprehensive Economic Partnership” in November 2011, it was unclear—at least to outsiders—whether the agreement would include an intellectual property chapter. Such potential omission was plausible considering the wide variation in intellectual property protection and enforcement among ASEAN+6 members.

18 “2015 Oct 15 Version: RCEP IP Chapter,” *Knowledge Ecology International*, 19 April 2016, <http://keionline.org/node/2472>.

19 “2014 Oct 3 Version: Korea Proposal for RECP IP Chapter (Regional Comprehensive Economic Partnership),” *Knowledge Ecology International*, 3 June 2015, <http://keionline.org/node/2239>; “2014 Oct 3 Version: Regional Comprehensive Economic Partnership, Japan IPR Proposals, RCEP,” *Knowledge Ecology International*, 9 February 2015, <http://keionline.org/node/2173>; “2014 Oct 10: ASEAN Proposals for RECP IP Chapter, also India,” *Knowledge Ecology International*, 8 June 2015, <http://keionline.org/node/2241>.

20 “2015 Oct 16 Version: RCEP Draft Text for Investment Chapter,” *Knowledge Ecology International*, 21 April 2016, <http://keionline.org/node/2474>.

21 “Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership,” 30 August 2012, <http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf>.

22 Department of Foreign Affairs and Trade (Australia), “Previous Negotiating Rounds and Ministerial Meetings,” <http://dfat.gov.au/trade/agreements/rcep/news/Pages/previous-negotiating-rounds-and-ministerial-meetings.aspx>.

By the time ASEAN+6 leaders adopted the “Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership” (Guiding Principles) in August 2012, however, it became clear that the RCEP Agreement would contain an intellectual property chapter, or at least some intellectual property provisions. As Part V of the Guiding Principles declared, “The text on intellectual property in the RCEP will aim to reduce [intellectual property]-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights.”

At the third round of the RCEP negotiations in Kuala Lumpur in January 2014, the negotiators finally agreed to establish a working group on intellectual property. As shown by leaked documents, ASEAN, India, Japan and South Korea began submitting draft negotiating texts for the proposed intellectual property chapter only shortly before the sixth round of the RCEP negotiations in Greater Noida, India in December 2014. According to the brief meeting notes that the Australian Department of Foreign Affairs and Trade provides online, this negotiation round—which followed immediately from the Second RCEP Ministerial Meeting in Nay Pyi Taw, Myanmar—was the first time the working groups “made progress on draft chapter text.”<sup>23</sup> It is therefore very likely that draft negotiating texts only began to emerge at this stage, even though the meeting notes did mention that intellectual property issues were discussed as early as the second round.

At the time of writing, the draft text of the RCEP intellectual property chapter has not yet been officially released. Nevertheless, several documents have already been leaked to the public via the internet. Based on the latest leaked text, dated 15 October 2015, the intellectual property chapter may include 13 sections: (1) general provisions and basic principles; (2) copyright and related rights; (3) trademarks; (4) geographical indications; (5) patents; (6) industrial designs; (7) genetic resources, traditional knowledge and folklore; (8) unfair competition; (9) enforcement of intellectual property rights; (10) cooperation and consultation; (11) transparency; (12) transitional period and transitional arrangements; and (13) procedural matters.

Although this article does not offer detailed explorations of each of these sections, it highlights the key provisions concerning the four main branches of intellectual property law as well as the enforcement of intellectual property rights. When analysing the draft RCEP intellectual property chapter, it is worth recalling that other draft RCEP chapters, such as those on investment and electronic commerce, could include provisions relevant to intellectual property rights. For example, the TPP investment chapter, which seeks to establish an investor–state dispute settlement mechanism, became highly controversial after Eli Lilly and Philip Morris used similar mechanisms in bilateral or regional trade agreements to address their intellectual property disputes.<sup>24</sup>

### 3.1 Copyright and Related Rights

The draft RCEP intellectual property chapter includes the usual language found in free trade agreements (FTAs) requiring the accession to the two internet treaties of the World Intellectual

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23 Department of Foreign Affairs and Trade (Australia), “Previous Negotiating Rounds and Ministerial Meetings.”

24 On these disputes and the use of the investor–state dispute settlement mechanism, see Cynthia M. Ho, “Sovereignty under Siege: Corporate Challenges to Domestic Intellectual Property Decisions,” *Berkeley Technology Law Journal* 30, no. 1 (2015): 213–304; Ruth L. Okediji, “Is Intellectual Property ‘Investment’? *Eli Lilly v. Canada* and the International Intellectual Property System,” *University of Pennsylvania Journal of International Law* 35, no. 4 (2014): 1121–1138; Peter K. Yu, “The Investment-Related Aspects of Intellectual Property Rights,” *American University Law Review* 66, no. 3 (2017): 829–910.

Property Organization (WIPO)—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (Draft Article 1.7.6(g)–(h)). Going beyond the terms of the TPP Agreement, the draft chapter also requires accession to the Beijing Treaty on Audiovisual Performances, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Draft Article 1.7.6(h)–(*ibis*)).

In addition, the draft RCEP intellectual property chapter includes the usual provisions on technological protection measures and electronic rights management information (Draft Articles 2.3, 2.3*bis* and 2.3*ter*), which are both significantly shorter and more flexible than their counterparts in the TPP Agreement. Targeting online streaming and other new means of digital communication, the draft chapter also includes provisions addressing the unauthorised communication, or the making available, of a copyright work to the public (Draft Article 2.1.1–2). The push for such provisions is understandable considering the recent copyright infringement litigation concerning works disseminated through streaming or other digital technologies.<sup>25</sup>

Among the negotiating parties, there was some effort—notably by Australia—to push for stronger language on copyright limitations and exceptions beyond the mere recitation of the three-step test in the TRIPS Agreement and the WIPO Copyright Treaty. Article 2.5.3 of the leaked draft states:

Each party shall endeavour to provide an appropriate balance in its copyright and related rights system by providing limitations and exceptions ... for legitimate purposes including education, research, criticism, comment, news reporting, libraries and archives and facilitating access for persons with disability.

The purposes listed in this provision are very similar to those found in the preamble of the US fair use provision.<sup>26</sup>

Like the TPP intellectual property chapter, the draft RCEP chapter includes a provision prohibiting government use of infringing computer software (Draft Article 2.4). Unlike the TPP chapter, however, the RCEP chapter does not extend the copyright term beyond the life of the author plus 50 years—the minimum required by the Berne Convention for the Protection of Literary and Artistic Works. The draft RCEP chapter also does not include detailed TPP-like provisions on internet service providers, secondary liability for copyright infringement, and the notice-and-takedown mechanism (although those provisions could easily have been negotiated as part of the yet-to-be-disclosed electronic commerce chapter, if that chapter indeed exists).

To the disappointment of consumer advocates and civil society organisations, South Korea proposed language requiring countries to “take effective measures to curtail repetitive infringement of copyright and related rights on the Internet or other digital network” (Draft Article 9*quinquies*.3). In addition, Japan called for the disclosure of information concerning the accounts of allegedly infringing internet subscribers (Draft Article 9*quinquies*.4). It further advanced a footnote supporting

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25 Among the leading cases in this area are *American Broadcasting Companies v. Aereo, Inc.* before the US Supreme Court, *ITV Broadcasting Ltd v. TVCatchup Ltd* before the Court of Justice of the European Union and the “Maneki TV” case before the Japanese Supreme Court.

26 Copyright Act 1976 17 USC § 107.

"a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of [the] right holder" (Draft Article 9*quinquies*.2, fn. 43).

Even more disturbing, the draft RCEP intellectual property chapter offers stronger and more expansive protection to broadcasters than the TPP intellectual property chapter, covering such issues as the unauthorised retransmission of television signals over the internet (Draft Article 2.6). As Jeremy Malcolm commented,

Based on the current text proposals, [the] RCEP may actually impose more stringent protections for broadcasters than the TPP does. The TPP allows authors, performers and producers to control the broadcast of their work, but it does not bestow any independent powers over those works upon broadcasters. [The] RCEP, in contrast, could create such new powers; potentially providing broadcasters with a 50 year monopoly over the retransmission of broadcast signals, including retransmission of those signals over the Internet.<sup>27</sup>

### 3.2 Trademarks

The draft RCEP intellectual property chapter includes the usual language requiring accession to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the Singapore Treaty on the Law of Trademarks and the Trademark Law Treaty (Draft Article 1.7.6(d)–(e)). The draft chapter also includes provisions broadening the protectable subject matter of trademark, thereby extending protection to sound and scent marks and signs in three-dimensional shapes (Draft Article 3.1.2–3).

In addition, the draft RCEP intellectual property chapter covers the procedural improvements relating to trademark application and registration (Draft Articles 3.4, 3.5 and 3.5*bis*), including the maintenance of "a trademark classification system that is consistent with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks" (Draft Article 3.3). The draft chapter, however, does not include extensive TPP-like language on domain names, in particular names in country-code top-level domains.

Among the RCEP negotiating parties, disagreement remains over the extent of protection for well-known trademarks, including protection through the recognition of the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (Draft Article 3.10.3). The parties also strongly disagree on ways to address the relationship between trademarks and geographical indications as well as the latter's eligibility for trademark protection (Draft Articles 3.2, 3.9 and 4.1). The current geographical indications provisions in the draft RCEP intellectual property chapter (Draft Section 4) are significantly shorter than those in the TPP Agreement.

### 3.3 Patents

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

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27 Jeremy Malcolm, "RCEP: The Other Closed-Door Agreement to Compromise Users' Rights," *Electronic Frontier Foundation*, 20 April 2016, <https://www.eff.org/deeplinks/2016/04/rcep-other-closed-door-agreement-compromise-users-rights>.

of Patent Procedure, the Patent Cooperation Treaty (PCT) and the Patent Law Treaty (Draft Article 1.7.6(a), (b), (j) and (k)). The draft chapter also includes the usual—and usually ineffective—language concerning the Doha Declaration on the TRIPS Agreement and Public Health and the Protocol Amending the TRIPS Agreement, which took effect on 23 January 2017 (Draft Article 1.7.1–4).

Like those in the TPP Agreement, the draft patent provisions cover both substantive rights and procedural issues, including those concerning patent application and examination and the maintenance of “a patent classification system that is consistent with the Strasbourg Agreement Concerning the International Patent Classification” (Draft Article 5.18). Although Japan initially called for the protection of new uses for, or new forms of, known substances, directly undercutting section 3(d) of the Indian Patents (Amendment) Act of 2005,<sup>28</sup> the draft chapter does not offer such protection. Nevertheless, there remains continued disagreement between the RCEP negotiating parties over the appropriate standards concerning worldwide novelty for patents (Draft Article 5.12), patent term restoration (or extension) as compensation for the time lost due to unreasonable regulatory delay (Draft Article 5.13), patents for new plant varieties (Draft Article 5.19) and the handling of patent-related information disclosed during the one-year grace period (Draft Article 5.14).

### 3.4 Trade Secrets and Undisclosed Information

The relevant provisions in this area are included in both the patent and unfair competition sections of the draft RCEP intellectual property chapter. The patent section includes a TRIPS-plus provision requiring the introduction of a data exclusivity regime, which prevents the reliance on clinical trial data submitted for the marketing approval of pharmaceuticals (Draft Article 5.16). However, no provision focuses specifically on biologic medicines, a highly contentious and controversial topic during the TPP negotiations.<sup>29</sup>

Compared with those in the patents section, the provisions in the unfair competition section do not seem to go significantly beyond the requirements of Article 39 of the TRIPS Agreement (Draft Section 8). Nevertheless, some civil society organisations have considered the RCEP negotiators’ “failure to explicitly address the need for exceptions to trade secret protection for whistleblowers, journalists, and other disclosures in the public interest ... [a] missed opportunity.”<sup>30</sup>

### 3.5 Intellectual Property Enforcement

The draft RCEP intellectual property chapter includes the usual provisions concerning civil, criminal and administrative procedures and remedies, as well as provisional and border measures (Draft Section 9). Although a considerable portion of the draft language in the enforcement section merely reaffirms the existing rights and obligations under the TRIPS Agreement, the proposed language increases the obligations concerning the seizure and destruction of allegedly infringing goods, including the grant of authority to take ex officio action (Draft Article 9ter.5) and to seize or destroy

28 “Draft Text on Areas Not Covered in the Possible Common Elements from the 2nd WGIP [Working Group on Intellectual Property]: Submitted by Japan,” 3 October 2014, [http://keionline.org/sites/default/files/RCEP\\_WGIP\\_JP\\_Revised\\_Draft\\_Text\\_3Oct2014.pdf](http://keionline.org/sites/default/files/RCEP_WGIP_JP_Revised_Draft_Text_3Oct2014.pdf).

29 Burcu Kilic and Courtney Pine, “Decision Time on Biologics Exclusivity: Eight Years Is No Compromise,” *Intellectual Property Watch*, 27 July 2015, <http://www.ip-watch.org/2015/07/27/decision-time-on-biologics-exclusivity-eight-years-is-no-compromise/>.

30 Malcolm, “RCEP.”

the materials or implements used to create infringing goods (Draft Articles 9*bis*.5, 9*bis*.6, 9*bis*.10 and 9*quater*.6). The draft chapter also seeks to empower judicial authorities to determine damages for intellectual property infringement based on lost profits, the market price or the suggested retail price (Draft Article 9*bis*.2(i)).

Like the TPP intellectual property chapter, the draft RCEP chapter calls for criminal procedures and penalties for unauthorised camcording in cinemas (Draft Article 9*quinquies*.5). Unlike their counterparts in the TPP, however, the draft RCEP provisions on criminal procedures and penalties are not extensive. They do not apply to either trade secret infringement or the circumvention of technological protection measures. The draft provisions on border measures are also less detailed and less invasive (Draft Article 9*ter*).

At the time when the leaked draft was being negotiated, the RCEP negotiating parties still strongly disagreed on the appropriate standards concerning criminal liability for aiding and abetting (Draft Article 9*quater*.4), the award of attorneys' fees (Draft Article 9*bis*.4) and obligations relating to intellectual property enforcement in the digital environment (Draft Article 9*quinquies*). Facing strong opposition from its negotiating partners, South Korea remained the lone party calling for the provision of pre-established damages (Draft Article 9*bis*.3).

### 3.6 Summary

When all of these five sections are taken together, much of the language in the draft RCEP intellectual property chapter resembles the language found in either the TRIPS Agreement or the TPP Agreement. Nevertheless, the draft RCEP chapter includes provisions that are different from those in these earlier agreements. For instance, it includes a section on genetic resources, traditional knowledge and folklore (Draft Section 7), which is more lengthy and detailed than the one found in the TPP Agreement. The language in that section can be traced back to India's 10-paragraph original proposal.<sup>31</sup> Despite opposition from Australia, India, Japan, New Zealand and South Korea, China also proposed language on the disclosure of origin or source of genetic resources (Draft Article 7.1). The proposed language resembles Article 26 of the Chinese Patent Law, which requires patent applicants to disclose the traditional knowledge and genetic resources used in their inventions.

In addition, the RCEP negotiators debated whether Draft Section 12 should be about transitional periods and arrangements or about special and differential treatment. The recognition of the need for special and differential treatment is especially attractive to the developing country members of ASEAN+6, which have consistently benefited from such treatment. Cases in point are the early harvest programmes in the ASEAN–China Free Trade Area, which provided for the early opening of markets for select goods and services.<sup>32</sup>

Special and differential treatment is also necessitated by the existence of least developed countries in the RCEP—namely, Cambodia, Laos and Myanmar, three of the four newest ASEAN members.<sup>33</sup> Thanks to a June 2013 TRIPS Council decision, the TRIPS transition period for these countries has

31 "Working Draft of IPR Chapter from India: RCEP Negotiations," <http://keionline.org/sites/default/files/06-RCEP-TNC6-WGIP3-IN-IP-Draft.pdf>.

32 Peter K. Yu, "Sinic Trade Agreements," *U.C. Davis Law Review* 44, no. 3 (2011): 996–997.

33 Shujiro Urata, "A Stages Approach to Regional Economic Integration in Asia Pacific: The RCEP, TPP, and FTAAP," in *New Directions in Asia-Pacific Economic Integration*, ed. Tang and Petri, 127.

now been extended to 1 July 2021.<sup>34</sup> The TPP, by contrast, does not include any least developed countries (even though its intellectual property chapter does offer transition periods to six of the 12 TPP partners—namely, Brunei Darussalam, Malaysia, Mexico, New Zealand, Peru and Vietnam).

In sum, the draft RCEP intellectual property chapter, like any other treaty in the middle of the negotiation process, includes a wide variety of bracketed texts. While some of the draft provisions are stronger than, or similar to, what is found in the TPP Agreement, other language is much weaker. The draft text also includes language that cannot be found in the TPP Agreement or other TRIPS-plus FTAs.<sup>35</sup> Given that “nothing is agreed until everything is agreed”<sup>36</sup>—a favourite aphorism of treaty negotiators and other government officials—it remains to be seen what the intellectual property provisions in the final RCEP Agreement will look like, or even whether the agreement will include an intellectual property chapter.

Despite this uncertainty, it is quite possible that much of the bracketed language in the draft intellectual property provisions will be retained or only slightly altered at the end of the negotiations. If so, the final RCEP Agreement will indeed require the poorer ASEAN+6 members to offer higher levels of intellectual property protection and enforcement than the TRIPS Agreement currently requires. It is therefore understandable why the draft RCEP intellectual property chapter has sparked major concerns among policymakers, commentators, activists, consumer advocates and civil society organisations, especially in regard to the chapter’s potential deleterious impact on access to essential medicines and digital communication.<sup>37</sup>

## 4. Three Future Scenarios

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Although nobody at this point can predict how the RCEP negotiations will play out—or whether the final agreement, once completed, will ever enter into force—one can easily anticipate three scenarios concerning the future of the RCEP intellectual property chapter. A close examination of these scenarios is instructive, as it will shed light on the future of intellectual property normsetting in the Asia-Pacific region. This section discusses and assesses each scenario in turn.

### 4.1 Scenario 1: No Intellectual Property Chapter

In the first scenario, the wide disagreement among ASEAN+6 members could eventually cause them to abandon efforts to include an intellectual property chapter in the RCEP Agreement. Although highly unlikely, this scenario is still plausible in view of the diverse, highly uneven and rapidly changing intellectual property developments in the Asia-Pacific region.<sup>38</sup>

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34 Council for Trade-Related Aspects of Intellectual Property Rights, “Extension of the Transition Period under Article 66.1 for Least Developed Country Members: Decision of the Council for TRIPS of 11 June 2013,” 11 June 2013, IP/C/64.

35 Malcolm, “RCEP.”

36 Henrique C. Moraes, “Dealing with Forum Shopping: Some Lessons from the Negotiation on SECURE at the World Customs Organization,” in *Intellectual Property Enforcement: International Perspectives*, ed. Li Xuan and Carlos Correa (Cheltenham: Edward Elgar, 2009), 176.

37 “2015 Oct 15 Version: RCEP IP Chapter”; Malcolm, “RCEP”; “New Threat against Affordable Medicines in Trade Negotiations with India and ASEAN,” *Médecins Sans Frontières*, 21 April 2016, <http://msfaccess.org/about-us/media-room/press-releases/new-threat-against-affordable-medicines-trade-negotiations-india->

38 Peter K. Yu, “Clusters and Links in Asian Intellectual Property Law and Policy,” in *Routledge Handbook on Asian Law*, ed. Christoph Antons (London: Routledge, 2017), 148; Peter K. Yu, “Intellectual Property and Asian Values,” *Marquette Intellectual Property Law Review* 16, no. 2 (2012): 339–370.

For example, some ASEAN+6 members are far behind others in protecting and enforcing intellectual property rights. As a result, they continue to struggle with massive piracy and counterfeiting problems. Such problems not only have slowed down the development of their domestic intellectual property industries, but they have also created considerable demands on enforcement resources—resources that these countries either do not have or are reluctant to provide at the expense of other equally or more pressing public needs.<sup>39</sup>

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

To further complicate matters, the very strong preference of ASEAN—and, to a lesser extent, ASEAN+6 members—to achieve solutions based on the ASEAN Way has made it particularly difficult for the more powerful ASEAN+6 members, such as Japan or South Korea, to shove their high intellectual property standards down the throats of their less powerful neighbours. As Amitav Acharya described: “The ASEAN Way ... is a claim about a process of regional interactions and cooperation based on discre[et]ness, informality, consensus building and non-confrontation styles which are often contrasted with the adversarial posturing, majority vote and other legalistic decision-making procedures in Western multilateral negotiations.”<sup>40</sup> While this harmonious approach to regional cooperation has facilitated diplomacy and enhanced security, it has also slowed down the negotiation process, resulting in what Mark Beeson has described as “accommodating the slowest ship in the convoy.”<sup>41</sup> Thus, if the RCEP is to be negotiated in the ASEAN Way, it is unclear whether the RCEP participating members will eventually reach a consensus on an intellectual property chapter.

Despite all of these considerations, there are at least three reasons why the RCEP Agreement will most likely contain an intellectual property chapter in the end. First, when ASEAN+6 members adopted the Guiding Principles in August 2012, they agreed to include an intellectual property text in the RCEP Agreement (Section V). After the establishment of the Working Group on Intellectual Property at the third round of the RCEP negotiations in January 2014, that group has also worked actively to develop the draft text of the intellectual property chapter. Absent any catastrophic developments in the RCEP negotiations, the time and effort invested in this working group are just too substantial for the chapter to be abandoned at this late stage.

Second, given the importance of intellectual property industries to countries such as Australia, Japan, New Zealand and South Korea, it is very unlikely that these countries will be content with

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39 Peter K. Yu, “Enforcement, Economics and Estimates,” *WIPO Journal* 2, no. 1 (2010): 3–4.

40 Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*, 3rd edn (London: Routledge, 2014), 79.

41 Beeson, *Institutions of the Asia-Pacific*, 32.

a regional trade and investment agreement that does not contain an intellectual property chapter. If these countries threaten to pull out of the RCEP negotiations, the key question for the remaining ASEAN+6 members will no longer be about whether the agreement should omit an intellectual property chapter, but whether such omission is so important to them that they would rather lose the entire regional pact or the participation of key neighbours in this pact than include the chapter.

Third, apart from the developed country members of ASEAN+6, China, India and other emerging countries in the region—or what I have called “middle intellectual property powers”<sup>42</sup>—have begun to appreciate the strategic benefits of stronger intellectual property protection and enforcement. Although these countries have yet to embrace the very high protection and enforcement standards found in the European Union, Japan or the United States, they now welcome standards that are higher than those currently available in the Asia-Pacific region. These countries are therefore unlikely to block the inclusion of an intellectual property chapter in the RCEP Agreement.

#### 4.2 Scenario 2: A TPP-Like Intellectual Property Chapter

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

Even if the TPP were dead, as many policymakers and commentators fear,<sup>43</sup> the RCEP would still need to provide standards that were high enough to entice existing TPP partners to embrace the partnership as a dominant forum for setting regional intellectual property norms. Without such participation, a new regional pact could easily emerge to take the TPP's place as a rival pact. Such emergence would be particularly likely should the Trump administration change its course or be satisfied with the new arrangement.

More importantly, the RCEP intellectual property chapter may have already garnered the support of not only the developed country members of ASEAN+6 but also their developing country counterparts. It is no surprise that Japan advanced at the RCEP negotiations a very detailed proposal for an intellectual property chapter. After all, the country has the strongest and most sophisticated economy in Asia, with a GDP per capita of US\$32,477.22 in 2015, as estimated by the World Bank. It also has a well-functioning intellectual property system. According to WIPO statistics, Japan currently ranks second in terms of international patent applications filed through the PCT, behind only the United States.<sup>44</sup>

42 Peter K. Yu, “The Middle Intellectual Property Powers,” in *Law and Development in Middle-Income Countries: Avoiding the Middle-Income Trap*, ed. Randall Peerenboom and Tom Ginsburg (New York: Cambridge University Press, 2014), 84.

43 Joshua Berlinger, “TPP Unravels: Where the 11 Other Countries Go from Here,” *CNN*, 24 January 2017, <http://www.cnn.com/2017/01/24/asia/tpp-other-11-countries-what-next/>; Kaori Kaneko and Yoshifumi Takemoto, “Japan Ratifies TPP Trade Pact to Fly the Flag for Free Trade,” *Reuters*, 9 December 2016, <http://www.reuters.com/article/us-japan-tpp-idUSKBN13Y0CU>.

44 WIPO, “Who Filed the Most PCT Patent Applications in 2016?” 15 March 2017, [http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic\\_pct\\_2016.pdf](http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2016.pdf).

In addition, Japan originated the proposal to establish ACTA. Conceived as a “Treaty on Non-Proliferation of Counterfeits and Pirated Goods,” that proposal for an anti-counterfeiting treaty was advanced by Prime Minister Junichiro Koizumi at the June 2005 G8 meeting in Gleneagles, Scotland.<sup>45</sup> As a TPP member, Japan also has a strong interest in ensuring that the intellectual property standards in the RCEP Agreement are comparable to those found in the TPP Agreement. From a business standpoint, it would be a major nightmare for Japanese firms to juggle two very different sets of standards within the Asia-Pacific region.

Like Japan, South Korea's economy is highly developed, with a GDP per capita of US\$27,221.53 in 2015, as estimated by the World Bank. The country also has a well-functioning intellectual property system and a highly successful home electronics industry, with Samsung and LG being household names. Since May 2007, the Korean Intellectual Property Office has actively engaged the European Patent Office, the Japan Patent Office, the United States Patent and Trademark Office and the State Intellectual Property Office of China to identify ways to streamline and harmonise their patent examination systems. According to WIPO, South Korea currently has the world's fifth largest volume of PCT applications, behind the United States, Japan, China and Germany.<sup>46</sup> Among corporate applicants, LG and Samsung rank fifth and ninth in the world, respectively.

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

Far from setting up a positive alternative to the TPP, South Korea is channeling the [US Trade Representative] at its worst here—what on earth are they thinking? The answer may be that, having been pushed into accepting unfavorably strict copyright, patent, and trademark rules in the process of negotiating its 2012 free trade agreement with the United States, Korea considers that it would be at a disadvantage if other countries were not subject to the same restrictions.<sup>47</sup>

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

The most interesting developments leading up to this second scenario, however, concern the large developing country members of ASEAN+6, such as China, India, Indonesia, the Philippines and Thailand.

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45 Peter K. Yu, “Six Secret (and Now Open) Fears of ACTA,” *SMU Law Review* 64, no. 3 (2011): 980–983.

46 WIPO, “Who Filed the Most PCT Patent Applications in 2016?”

47 Jeremy Malcolm, “Meet RCEP, a Trade Agreement in Asia That's Even Worse than TPP or ACTA,” *Electronic Frontier Foundation*, 4 June 2015, <https://www.eff.org/deeplinks/2015/06/just-when-you-thought-no-trade-agreement-could-be-worse-tpp-meet-rcep>.

As noted earlier, China, India and other emerging countries in the Asia-Pacific region have begun to appreciate the strategic benefits of stronger intellectual property protection and enforcement.

A case in point is China. Once a technologically backward country that relied heavily on piracy and counterfeiting to catch up, China now ranks third in terms of PCT applications, behind only the United States and Japan.<sup>48</sup> Among corporate applicants, ZTE Corporation and Huawei Technologies also rank the first and second in the world, respectively. As regards trademark protection, China currently has the world's fourth largest volume of international trademark applications filed under the Madrid system.<sup>49</sup>

To be sure, China, India and other emerging countries in the region may still find the intellectual property standards proposed by Australia, Japan, New Zealand and South Korea higher than they would prefer. Nevertheless, they may not find those standards highly objectionable, especially if they manage to secure greater concessions in other trade or trade-related areas. After all, these emerging countries are now growing rapidly in both economic and technological terms. Their intellectual property standards have therefore been slowly elevated to match their changing local conditions. It will be only a matter of time before these standards catch up with those found in their more developed neighbours.

Some leaders in these emerging countries may also welcome new RCEP requirements for stronger intellectual property protection and enforcement. After all, those requirements will provide these leaders with the much-needed external push to accelerate domestic intellectual property reforms.<sup>50</sup> In China, for instance, the standards required by the TRIPS Agreement and the push for accession to the World Trade Organization (WTO) led to a complete overhaul of its copyright, patent and trademark laws in the early 2000s.<sup>51</sup> To many reformist leaders, having their hands tied by international treaties can sometimes be used as an effective weapon against hardline leaders and conservative critics at home.

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

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

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48 WIPO, "Who Filed the Most PCT Patent Applications in 2016?"

49 WIPO, "Who Filed the Most Madrid Trademark Applications in 2016?" 15 March 2017, [http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic\\_madrid\\_2016.pdf](http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2016.pdf).

50 Peter K. Yu, "Intellectual Property, Economic Development, and the China Puzzle," in *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era*, ed. Daniel J. Gervais, 1st edn (Oxford: Oxford University Press, 2007), 192.

51 Peter K. Yu, "The Transplant and Transformation of Intellectual Property Laws in China," in *Governance of Intellectual Property Rights in China and Europe*, ed. Nari Lee, Niklas Bruun and Li Mingde (Cheltenham: Edward Elgar, 2016), 26.

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

If the RCEP Agreement included TPP-like standards, these powerful developing countries would have to completely overhaul their intellectual property systems—an outcome they have fought very hard at the WTO and WIPO to avoid.<sup>52</sup> Given the pivotal roles China and India have played in the RCEP negotiations, it is just difficult to imagine that these countries would suddenly welcome requirements they had adamantly opposed in major international fora. It is also very unlikely that Australia, Japan, New Zealand and South Korea could force these powerful emerging countries to accept the heightened requirements on a take-it-or-leave-it basis.

Nevertheless, if these developed countries managed to convince China and India to support the inclusion of an intellectual property chapter with high TPP-like intellectual property standards, or if China and India changed their minds (due perhaps to changing economic and technological conditions), the RCEP intellectual property chapter would facilitate greater harmonisation of protection and enforcement standards at both the regional and global levels. Within the Asia-Pacific region, these new standards would help pave the way for the establishment of the FTAAP. Other countries in the region would warmly welcome such harmonisation, considering that many of them remain reluctant to support—and, for some, even unable to afford—two expansive yet differing regional trade pacts.<sup>53</sup>

Across the world, the new RCEP standards would help accelerate international harmonisation of intellectual property standards at both the WTO and WIPO. As the TRIPS negotiations have demonstrated, multilateral standards tend to be developed by securing a consensus among the key negotiating parties first before slowly extending those standards to other members of the international community.<sup>54</sup> The harmonisation facilitated by the RCEP would therefore be highly important, especially in view of the current deadlock between developed and developing countries in the Doha Development Round of Trade Negotiations.

### 4.3 Scenario 3: A TPP-Lite Intellectual Property Chapter

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

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52 Peter K. Yu, "TRIPS and Its Achilles' Heel," *Journal of Intellectual Property Law* 18, no. 2 (2011): 518–520.

53 Lewis, "Achieving a Free Trade Area of the Asia-Pacific," 231; Meredith Kolsky Lewis, "The TPP and the RCEP (ASEAN+6) as Potential Paths toward Deeper Asian Economic Integration," *Asian Journal of the WTO and International Health Law and Policy* 8, no. 2 (2013): 369–370.

54 Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (London: Routledge, 2002); Susan K. Sell, *Private Power, Public Law* (Cambridge: Cambridge University Press, 2003), 96–120.

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

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

Take the CSFTA, for example. Although China was somewhat reluctant to include an expansive intellectual property chapter in its early FTAs—such as those with Chile, Pakistan, New Zealand and Singapore—the CSFTA contains a significantly more detailed intellectual property chapter.<sup>55</sup> The inclusion of such a lengthy chapter is perhaps due to Switzerland's insistence on high standards of intellectual property protection and enforcement, especially after the very limited success, if not failure, of the ACTA negotiations. The existence of such a chapter is also attributable to the timing of the CSFTA, which was signed in July 2013, as opposed to the mid to late 2000s. By then, China had already had its National Intellectual Property Strategy in place for five years. The country had also completely overhauled its patent law and was only a few weeks away from adopting the third amendment to its trademark law.<sup>56</sup>

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

In sum, like the CSFTA, the RCEP intellectual property chapter is likely to contain lower standards than those found in the TPP Agreement. It may also include language that is not found in that agreement or other TRIPS-plus FTAs. Only time will tell whether the intellectual property standards in the RCEP Agreement will complement or conflict with those found in the TPP Agreement. If conflicts indeed arise, the resulting inconsistencies and tensions may precipitate what I have described as the "battle of the FTAs."<sup>57</sup> In this battle, the TPP and the RCEP will further polarise ASEAN+6 members while fragmenting the regional and international trading and intellectual property systems.

Given ASEAN's reluctance to pick between the United States and their powerful Asian neighbours<sup>58</sup> and given the inability of many ASEAN members to afford two expansive yet conflicting sets of

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55 Peter K. Yu, "Sinic Trade Agreements and China's Global Intellectual Property Strategy," in *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region*, ed. Christoph Antons and Reto M. Hilty (Berlin: Springer, 2015), 264–265.

56 The third amendment to the Chinese Patent Law was adopted in December 2008, and the third amendment to the Chinese Trademark Law was adopted in August 2013, a month after the signature of the CSFTA.

57 Yu, "Sinic Trade Agreements," 1018–1027.

58 Ellen L. Frost, "China's Commercial Diplomacy in Asia: Promise or Threat?" in *China's Rise and the Balance of Influence in Asia*, ed. William W. Keller and Thomas G. Rawski (Pittsburgh: University of Pittsburgh Press, 2007), 105; David Shambaugh, "Introduction: The Rise of China and Asia's New Dynamics," in *Power Shift: China and Asia's New Dynamics*, ed. David Shambaugh (Berkeley: University of California Press, 2006), 17; Yu, "TPP and Trans-Pacific Perplexities," 1151.

regional trade and trade-related standards, the TPP and RCEP may eventually be combined in the name of the FTAAP. It is indeed no surprise that “[a]n analyst with the Asian Development Bank has [already] predicted that ASEAN+6 and the TPP will ultimately merge together.”<sup>59</sup>

## 5. Conclusion

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

Given that intellectual property will remain a crucial part of the economy in the twenty-first century and that its importance can only grow with time, ASEAN+6 members will squander a major opportunity to harmonise regional intellectual property standards if the RCEP Agreement does not include an intellectual property chapter. If the standards in this chapter are set too high, however, they will also hurt themselves by impeding future development, eroding global competitiveness and jeopardising access to essential medicines, educational materials and information technology. In view of these immense challenges and the high stakes involved, it is high time that policymakers, commentators, activists, consumer advocates and civil society organisations paid greater attention to the RCEP negotiations.

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59 Lewis, “Achieving a Free Trade Area of the Asia-Pacific,” 235.