

**THE INTELLECTUAL PROPERTY DIMENSION OF
BILATERAL AND REGIONAL AGREEMENTS IN ASIA:
IMPLICATIONS FOR TRADE AND DEVELOPMENT
POLICY****

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Abstract: Beginning with the twenty first century, there has been a flurry of free trade agreements, either in the form of bilateral or regional agreements or economic partnership agreements, which have been entered into between Asian countries. Many reasons have been afforded to this rise in bilateralism and regionalism, ranging from the need to foster closer international economic partnership to regulatory cooperation. A more market-driven reason would be the need to maintain a regional supply chain, which becomes more crucial after the Asian Financial Crisis. The non-conclusion of the WTO Doha Round negotiations, with the promise of a development agenda, has forced countries to resort to bilateralism. Eventually, there are always political and diplomatic motivations, i.e. countries would not want to lose out in the rat race for lower tariffs and opening of markets, especially for an export-oriented market economy like Malaysia. As most of these instruments contain binding obligations on intellectual property rights (IPRs), this article examines the provisions on IPRs in these Free Trade Agreements (FTAs), Bilateral Trade Agreements (BTAs) and Regional Trade Agreements (RTAs) (in particular, the Trans-Pacific Agreement) in the form of mandatory international accession and TRIPS-Plus binding commitments. The paper ends with some prognosis on the implications of the web of FTA obligations on domestic policies of WTO members.

Keywords: Bilateral and Regional Trade Agreements, Intellectual Property, Development Policy

1. INTRODUCTION

The last comprehensive multilateral treaty to be concluded on IPRs was the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), under the aegis of the World Trade Organisation (WTO) in 1994. Implemented in all members of WTO, except for those that are least developed countries, since then, it represents the most comprehensive collection of standards on IPRs, building on prior treaties such as the Berne,¹ Paris² and Rome Conventions,³ the Lisbon

Agreement⁴ and the Washington Treaty⁵ and UPOV.⁶ A few years later, by the early 2000s, with the continuing uncertainty with the progress of trade negotiations at the WTO, countries started to engage in bilateralism and regionalism outside the WTO framework. By 1998, there were no free trade agreements (FTAs) or regional trade agreements (RTAs) in the Asia Pacific region, but by 2015, 271 agreements (either concluded, under negotiations, or proposed) were entered into in the Asia-Pacific Region.⁷ A substantial part of these agreements are bilateral agreements,⁸ with the exception of those with the Association for South East Asian Nations (ASEAN),⁹ European Free Trade Association (EFTA),¹⁰ Trans-Pacific Partnership Agreement (TPPA) and Regional Comprehensive Economic Partnership (RCEP).¹¹

Many of these FTAs and RTAs contain provisions, or even a complete chapter, on IPRs. When IPRs were first included as trade issues in the mid-1990s, in the negotiation of the North American Free Trade Agreement (NAFTA), the idea was revolutionary.¹² NAFTA was used as a template for the TRIPS Agreement, which constitutes the primer for intellectual property standards guarded by the WTO. The main premise behind the inclusion of intellectual property rights is the notion that weak or non-existent intellectual property standards and enforcement measures constitute trade

² Paris Convention for the Protection of Industrial Property, adopted in 1883.

³ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, concluded in 1961.

⁴ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (as amended on September 28, 1979).

⁵ Washington Treaty on Intellectual Property in Respect of Integrated Circuits, adopted 1989.

⁶ The International Union for the Protection of New Varieties of Plants (UPOV), adopted on December 2, 1961.

⁷ Christophs Antons & Reto Hilty (ed), *IP and Free Trade Agreements in the Asia-Pacific Region* (Springer, Heidelberg, 2015).

⁸ This include FTAs such as China-Costa Rica, EU-Republic of Korea, Hong Kong - China - New Zealand, Hong Kong - China-Chile, Japan-Malaysia, Japan - Mexico, Japan-Philippines, Japan-Thailand, Republic of Korea - Australia, Republic of Korea - India, Republic of Korea - Vietnam, Malaysia-Australia, US-Australia and US-Singapore.

⁹ For example, ASEAN -Australia - New Zealand; ASEAN - China, ASEAN-India and ASEAN - The Republic of Korea.

¹⁰ The European Free Trade Association (EFTA) is an intergovernmental organization set up for the promotion of free trade and economic integration to the benefit of its four member states: Iceland, Liechtenstein, Norway, and Switzerland. Such free trade agreements include EFTA - The Republic of Korea and EFTA- Singapore.

¹¹ The Regional Comprehensive Economic Partnership is a proposed free trade agreement (FTA) with the ten member states of ASEAN and another six states (Australia, China, India, Japan, South Korea and New Zealand).

¹² John M. Curtis, 'Intellectual Property Rights and International Trade: An Overview' (May 2012) CIGI Papers No.3-
<https://www.cigionline.org/sites/default/files/no.3.pdf>
accessed 17 May 2017.

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¹ Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886

barriers. Since then, it becomes *sine qua non* or a foregone conclusion that any trade ties would include IP standards within its framework.¹³ It has been said again and again that the link between trade and IPRs is quite intimate. Rules pertaining to IPRs are considered as important commercial regulations that can have dire impacts on trade between member countries.¹⁴

This article first examines Member countries' objectives in entering into trade agreements and the varying strength of IPR provisions in FTAs, before dwelling on the maximalist treatment of IPRs with a special focus on the TPPA. The article ends with some suggestions on the possible implications of 'trading off' IPRs for the perceived benefits of market liberalisation on the development and domestic policies of WTO members.

2. THE MOTIVATION BEHIND FREE TRADE AGREEMENTS

The traditional economic theory is that countries engage in FTAs, which are treaties between two or more economies, in order to enjoy certain economic benefits, such as to reduce or remove trade barriers and bring closer economic integration. FTAs are seen as the best mechanism to simplify entry into export markets, where your export goods will enjoy preferential tariffs and increased export quotas. By being members of such agreements, countries will enjoy exclusive treatment in comparison to non-members. For example, on the Singapore government's official web site, Go Global, it is claimed that for exports of gold ore bars to India, for an export value worth S\$100,000, the duty payable was 6 percent in January 2013 and set to be reduced to zero percent once the ASEAN-India FTA takes effect.¹⁵ This reason has been cited as the main objective why countries pursue free trade agreements intensively. Economic studies have been resorted to by member countries to prove the estimated economic advantages in engaging in free trade agreements. For example, in Malaysia, prior to the ratification of the TPPA, two economic studies were released i.e. the Institute of Strategic and International Studies (ISIS)¹⁶ and the PricewaterhouseCoopers' Report.¹⁷ In the ISIS report, it was estimated that joining the TPPA would mean significant tariff cuts in the US (by 90 percent), Canada

(by 95 percent), Mexico (by 77 percent) and Peru (by 81percent).¹⁸ In the context of Malaysia, the report by PricewaterhouseCoopers further projected that the accession to the TPPA may bring about a higher GDP by USD 107-211 billion and the additional investment of USD 136-239 billion.¹⁹

It is also for this basic reason that Malaysia engages in FTAs. If the number of FTAs is evidence of how valuable they are in the eyes of the government, then this is definitely true in the case of Malaysia. Since 2003, Malaysia has inked seven bilateral FTAs and six regional FTAs, most of which are with its important export markets.²⁰ Being an export-oriented country, these FTAs would have significantly increased the volume of exports and consequently revenues to the country.

Cementing existing political and diplomatic ties is another purported reason to forge FTAs. Ravenhill argues that this may be a contributing factor to why such agreements are negotiated and entered into at such a feverish pace.²¹ In the case of the TPPA, one of the reasons why Malaysia participated is that its engagement would neutralise any negative allegations thrown against Malaysia by the US, such as 'human trafficking, currency manipulation and environmental degradation'.²²

The non-conclusion of the Doha Round of multilateral trade negotiations launched in 2001 at the WTO provides another impetus for members to seek greater trade liberalisation through FTAs.²³ Unfortunately it is much harder for developing countries to resist pressures in bilateral negotiations than in multilateral negotiations. In the latter case, countries can create a block on a certain trade issues, either to lobby for changes or resist demands for changes. As a result, very high standards on intellectual property, labelled by some as platinum

¹³ *Id.*, 13.

¹⁴ Carlos A. Primo Braga and Carsten Fink, 'The Relationship Between Intellectual Property Rights and Foreign Direct Investment' (1998) *Duke Journal of Comparative and International Law* Vol 9: 163.

¹⁵ <<https://www.iesingapore.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/Benefits>> accessed 17 May 2017.

¹⁶ 'National Interest Analysis of Malaysia's Participation in the Trans Pacific Partnership Agreement' <fta.miti.gov.my/miti-fta/resources/ISIS_The_Grand_Finale.pdf> accessed 17 May 2017.

¹⁷ 'Study on the Potential Economic Impact of TPPA on the Malaysian Economy and Selected Key Economic Sectors' (Dec 2015) <www.pwc.com/my/en/services/tpp.html> accessed 17 May 2017.

¹⁸ *Id.* 10.

¹⁹ *Id.* 9.

²⁰ The Bilateral FTAs are: (1) Malaysia-Japan Economic Partnership Agreement (MJEPA) (2) Malaysia-Pakistan Closer Economic Partnership Agreement (MPCEPA) (3) Malaysia-New Zealand Free Trade Agreement (MNZFTA) (4) Malaysia-India Comprehensive Economic Cooperation Agreement (MICECA) (5) Malaysia-Chile Free Trade Agreement (MCFTA) (6) Malaysia-Australia Free Trade Agreement (7) Malaysia-Turkey Free Trade Agreement. The Regional FTAs are (1) ASEAN-China FTAs (2) ASEAN-Korea FTAs (3) ASEAN-Japan Comprehensive Economic Partnership (4) ASEAN-Australia-New Zealand FTA (5) ASEAN-India FTA (6) ASEAN Trade in Goods Agreement; available at <http://miti.gov.my>.

²¹ John Ravenhill, 'The Political Economy of an "Asian" Mega-FTA, The Regional Comprehensive Economic Partnership' <<http://as.ucpress.edu/content/ucpas/56/6/1077.full.pdf>> accessed 17 May 2017.

²² 'National Interest Analysis of Malaysia's Participation in the Trans Pacific Partnership Agreement' <fta.miti.gov.my/miti-fta/resources/ISIS_The_Grand_Finale.pdf>, accessed 17 May 2017.

²³ Christoph Antons & Dilan Thampapillai, 'An Overview of Free Trade Agreements in the Asia-Pacific Region with a Particular Focus on Intellectual Property', in Christoph Antons & Reto Hilty (eds), (n. 7) 33.

standards, are being pushed through FTAs, which would otherwise be difficult to achieve through the multilateral framework.²⁴

Other reasons that have been cited include the need to protect regional supply chains within Asia following the Asian Financial Crisis.²⁵ Malaysia, for example, initially was not too keen in inking bilateral agreements but soon changed its attitude in the early 2000s. After its neighbour Singapore aggressively pursued FTAs, Malaysia feared that it would lose out to its neighbours in terms of preferential treatment enjoyed under the FTAs.²⁶ As a small trading nation, Malaysia believes that it must always engage in free trade agreements in order to garner more market access for exporting its goods and services.

3. IP CHAPTERS IN FTAS AND RTAS

A survey reveals that there is a wide range of IP provisions in FTAs and RTAs.²⁷ Some of them cover IPRs in a very minimalistic fashion, such as the inclusion of IP in the definition of 'investment'. Next, there are groups of FTAs and RTAs at mid-level that contain provisions related to specific types of IPRs but are not extensive enough to introduce significant TRIPS-plus obligations. An example is the Japanese Economic Partnership Agreement with Malaysia. This agreement requires accessions to agreements not referred to in TRIPS Agreement such as Nice²⁸ and Strasbourg Agreements,²⁹ besides having provisions on border measures³⁰ and well-known trademarks.³¹ At the extreme end are FTAs and RTAs that have a complete chapter on IPRs, with additional and stringent measures on intellectual property. The last category is typically illustrated by FTAs and RTAs championed by the US, the most recent testament to this being the TPPA, which was ratified in February 2016 but has been abandoned as a result of the US's withdrawal from the Agreement.

Among the basic characteristics of RTAs and FTAs that give minimalist treatment to IPRs is the reiteration of existing treaty obligations and mutual cooperation on matters pertaining to the enforcement of IPRs. An example is the Iceland-China FTA.³² In that FTA, the importance of IPRs in promoting economic and social development was reaffirmed. It was also mutually agreed that a transparent IPR regime be established and maintained.³³ As consistent IPR standards are of mutual interest to both parties, it was agreed in the FTA to strengthen cooperation in IPRs, exchange of information, continuous dialogue and mutually satisfactory resolution of any IP issue.³⁴ As the TRIPS Agreement is the baseline of IPR standards, the FTA reaffirms existing obligations under the TRIPS Agreement and other treaties to which both Members are party.³⁵ Another example is the Pakistan-Malaysia FTA, where the importance of IPRs in promoting economic and social development was recognised.³⁶

The mid-level agreements contain IP provisions that are modestly TRIPS-plus. An example of such an agreement is the Japanese Economic Partnership Agreements with various ASEAN countries. The FTA mandates the accession to IP agreements not referred to in the TRIPS Agreement, such as the WIPO Internet Treaties and the UPOV Convention.³⁷ It also contains additional obligations on border measures³⁸ and well-known trademarks.³⁹

At the other extreme are RTAs and FTAs that give detailed treatment to IPRs to the extent of devoting a full chapter on such rights. These FTAs cover subject matter not covered under TRIPS, and introduce new exclusive rights beyond the scope of TRIPS. As the idea is to increase IPR protection among member countries to a higher level, the proposed provisions reduce or to a certain extent take away, the flexibilities already conferred under the TRIPS Agreement. Hence, it has been alleged that they do not constitute a simple extension of obligations beyond that mandated under the TRIPS Agreement (i.e. TRIPS-plus),⁴⁰ but also undermine the concessions arrived at by the Agreement (TRIPS-minus). FTAs that are championed by the US typically exemplify this approach. These FTAs contain complex and lengthy provisions on commercial regulatory areas. The IPR standards championed are

²⁴Pedro Roffe, 'The Impact of FTAs on Public Health policies and TRIPS Flexibilities', (2006) *Int. J. Intellectual Property Management* Vol.1 Nos 1/2.

²⁵Antons (n 23) 33.

²⁶Tham Siew Yean, 'Evolution of Trade Policy Formulation In Malaysia', in Wan Khatina Nawawi, et al. *Complexity of FTAs: A Key Issue in Malaysian Trade Policy*, (Khazanah Nasional 2010), 53.

²⁷Raymundo Valdes and Maegan McCann, 'Intellectual Property Provisions in Regional Trade Agreements: Revision and Update', (World Trade Organization 23 September 2014) Staff Working Paper ERSD-2014-14.

²⁸Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of June 15, 1957.

²⁹Strasbourg Agreement Concerning the International Patent Classification of March 24, 1971.

³⁰Agreement Between the Government of Japan and the Government of Malaysia for An Economic Partnership, Article 125.

³¹*Id.* Article 121(2).

³²Iceland-China FTA, Article 63(1).

³³Iceland-China FTA, Article 63(3).

³⁴Iceland-China FTA, Article 65.

³⁵Iceland-China FTA, article 64.

³⁶Pakistan-Malaysia FTA, Article 104.1.

³⁷Japanese Economic Partnership Agreements with Indonesia, Article 106 (3).

³⁸Japanese Economic Partnership Agreements with Malaysia, Article 125.

³⁹Japanese Economic Partnership Agreements with Thailand, Article 13(2).

⁴⁰TRIPS-Plus are higher level of protection norms demanded by the developed countries that are not prescribed by the WTO's TRIP Regime.

"platinum" or high quality standards that extend beyond current WTO accords on international trade and investment regulations. The paper now explains how the TPPA is an example of maximalist approach to IP standard setting in FTAs.

4. TPPA AS AN EXAMPLE OF MAXIMALIST APPROACH TO IP STANDARD SETTING

The TPPA aims to be a 'high standard twenty-first century agreement'.⁴¹ The negotiation of the TPPA's IP negotiations started with aggressive and ambitious plans to rewrite global standards on intellectual property.⁴² The TPPA's IP chapter, extending to 75 pages of text, comprises of ten sections with eighteen articles on different types of intellectual property. It expands the existing IPR obligations under TRIPS Agreement and touches on areas not mentioned in TRIPS, such as domain names, clinical data, patent adjustment term, patent linkages, satellite signals, technological protection measures and internet service providers' liability. The provisions of TPPA, even if abandoned by the US, are relevant for our study as an example of the US pushing for a maximalist approach to IPR standard-setting in a regional framework.⁴³ This paper further examines the various binding commitments under the TPPA.

4.1 Accession to international treaties

Like many previous US preferential trade agreements (PTAs), the proposed TPPA contains a list of international agreements on IPRs to which all member countries must accede. By doing so, it will transplant international obligations into the domestic sphere, with a resulting harmonization of international and domestic obligations. In addition, TPPA contains shared principles, such as recognition of the Doha Declaration on the TRIPS Agreement and Public Health,⁴⁴ among others.

FTAs treat accession to other international treaties in a variety of ways. Some treaties are to be acceded to mandatorily, which is reflected in the language of the agreement. The second category is where future accession is treated as an obligation. In the US-Singapore FTA for example, these treaties 'shall' be given 'effect' by Member countries.⁴⁵ The third category of agreements is where parties are given an option to accede or not; labelling them as 'best to be acceded to'.⁴⁶ The phrase

used in this case is that member countries shall make best efforts to ratify or accede. The range of treaties to be acceded to depends on what type of IPR obligations are to be considered as relevant for parties in the treaties. Treaty accession entails domestic legislative reform in order to take place. Agreeing to treaty accession will mean additional domestic obligations to be satisfied, in addition to other explicit IP obligations under the treaty.

In the TPPA however, after much concessions, only two types of obligations pertain to accession to treaties.⁴⁷ The first constitutes the list of three treaties that are considered to be the floor i.e. the Paris Cooperation Treaty, the Paris Convention and the Berne Convention. The accession to these three conventions was not contentious as all twelve parties to the TPPA negotiations had already acceded to them. What could be objectionable, from a policy perspective, would be the list of treaties that the TPPA mandates accession by the date of entry into force of the agreement. These treaties include: The Protocol relating to the Madrid Agreement concerning the International Registration of Marks, the Budapest Treaty, Singapore Treaty, UPOV Convention and the two WIPO Internet Treaties. Whilst complying with the standards in the Madrid Agreement and the WIPO Internet Treaties would not necessarily clash with the interest of developing countries, acceding to the Singapore Treaty and the UPOV Convention could require a shift in domestic policy. The Singapore Treaty requires intellectual property offices of member countries to achieve a certain level of sophistication to achieve its aim in creating a modern and dynamic international framework for the harmonization of administrative trademark registration procedures.⁴⁸ Member countries would have to invest more money to improve and upgrade office processes in order for this to happen. Full accession to the UPOV Convention,⁴⁹ particularly the 1991 version, warrants the revisiting of some of the domestic policies that allow farmers to save seeds for replanting or an exchange of reasonable amounts of propagating materials among farmers, a practice which is known as 'brown bagging'.⁵⁰

4.2 TRIPS-Plus IPR Standards

Being a 21st century trade agreement, TPPA contains a list of binding commitments on important issues pertaining to IP. The minimum binding obligations can be further classified into several categories. The first are obligations in the form of TRIPS-plus standards that are mainly proposed by the US. The second are obligations

⁴¹Lim Chin Leng, et al. (ed), *The Trans-Pacific Partnership: A Quest for A Twenty First Century Trade Agreement*, (CUP, 2012).

⁴²Sean M. Flynn, Brook Baker, Margot Kaminski & Jimmy Koo, 'The US Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement' (2012) *American University International Law Review* 28:1, 105-202.

⁴³ Nadia Gire, 'The Trans-Pacific Partnership Agreement: A Revival in the United States Trade Policy Reform' (Summer 2012) *International Trade Law Journal*, Vol. 20, Issue 2 60 (iv).

⁴⁴<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 17 May 2017.

⁴⁵US-Singapore FTA, Article 16 (1).

⁴⁶US-Singapore FTA, Article 16(1)(c).

⁴⁷ TPPA, Article 18.7.

⁴⁸ See the Singapore Treaty on the Law of Trademarks (STLT), WIPO (2015), <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_508.pdf> accessed 17 May 2017.

⁴⁹ The International Convention for the Protection of New Plant Varieties of Plants, first adopted in 1961 and revised in 1991.

⁵⁰ Ida Madieha bt. Abdul Ghani Azmi, 'TRIPS-Plus Obligations Through Free Trade Agreements', in Wan Khatina Nawawi, et al. n 26, 221.

in areas not traditionally classified as IPRs under existing treaties, such as domain names, clinical data and internet retransmission. The third category comprises of obligations relating to the administration and management of IP that are of interest to all contracting parties, and cover areas such as registration systems, adjudication of disputes and enforcement of rights.

This article will examine some of the TRIPS-plus obligations under the TPPA. Included in the controversial provisions are extensions of the copyright term, internet service providers' liability, enforcement and criminal provisions, patent term adjustment, patent term extension, patent linkage, protection of new uses, methods or new processes of a known product and data exclusivity. The discussion now moves to the extensive IPR obligations proposed under the TPPA.

4.2.1 Copyright extension term

TPPA mandates the copyright term to be extended to 70 years after the death of the author or after the publication of the work.⁵¹ Such a lengthy duration raises a lot of concerns, as developing countries that are reliant on content produced by others may not necessarily benefit therefrom.⁵²

Moreover, economists have questioned whether such a lengthy period is beneficial to society.⁵³ Not all subject matter protected under copyright would be commercialised so long as to require such a lengthy copyright period. Even with regards to entertainment works, only selected movies and songs that enjoy repeated viewing and listening long after they are being released to the public would benefit from a long copyright duration. Ironically, with rapid technological advancement, the commercial life span of a particular copyrighted works may not even survive the extended duration as the works need to be continuously reformatted for viewing and listening.

⁵¹TPPA, Article 18.63.

⁵² Michael Yuan, 'Should Small and Large Information Economies Have the Same Duration of Copyright' (2009) <<http://www.serici.org/2008/Yuan.pdf>> accessed 7 August 2015.

⁵³ I.P.L. Png and Qiu-hong Wang, 'Copyright Duration and the Supply of Creative Work: Evidence from the Movies' (2006) <https://www.aeaweb.org/annual_mtg_papers/2007/0107_1015_1604.pdf> accessed 7 August 2015; Rufus Pollock, 'Forever Minus A Day? Some Theory and Empirics of Optimal Copyright' (2009) 6(1) *Review of Economic Research on Copyright Issues* 35–60 <http://rufuspollock.org/papers/optimal_copyright.pdf> accessed 7 August 2015; Richard Watt, 'An Empirical Analysis of the Economics of Copyright: How Valid Are the Results of Studies in Developed Countries for Developing Countries' in *The Economics of Intellectual Property: Suggestions for Further Research for Developing Countries and Countries with Economies in Transition* (WIPO 2009) <http://www.wipo.int/export/sites/www/ip-development/en/economics/pdf/wo_1012_e_ch_3.pdf> accessed 7 August 2015.

Copyright term extension is among the most contentious issues in the TPPA, resulting in many countries acquiring a transitional period for its implementation. Malaysia managed to get a transition period of four years to implement this obligation, but such a short transition period may be insufficient.

4.2.2 Internet Service Providers' Liability

Internet Service Providers (ISPs) are the gatekeepers to the free flow of information and expression on the internet. ISPs can also play strategic roles in policing the internet from harmful and illegal content, including copyright-infringing materials. As gatekeepers, they can block access and identify, or force others to identify, the origin and identity of infringing materials, thus making them the best organisation to police the internet. Under the TPPA, ISPs are mandated to expeditiously remove or disable access to alleged infringing material upon acquiring actual or constructive knowledge of such infringement.⁵⁴ With this new obligation, ISPs are obliged to take action in certain situations even without notification from the copyright owners or upon 'red flag' suspicion.⁵⁵ The language of the provision warrants that ISPs' actions do not depend on actual knowledge. If it comes to the ISPs' knowledge that certain suspicious activities are taking place, they can take action. The 'red flag' obligation originates from the US Digital Millennium Copyright Act 2000. On this point, some of the important factors that can be considered in assessing 'awareness' is whether there are blatant indicators or signs that raise alarm such as the employment of the terms 'pirate' or 'bootleg' in their URL or header. The standard of awareness has been judicially considered in *Viacom International, Inc., et al.*,⁵⁶ where the Second Circuit in that case propounded that the standard to be preferred here is 'wilful blindness' or involves 'conscious avoidance' which implicates the deliberate closing of one's eyes to a blatant infringing activity. This goes further than the system that Malaysia is currently practising, which is that ISP can only take action if there is specific notice by the copyright owner. The rationale is that ISPs must turn a blind eye to certain 'red flag' activities on the basis that the copyright owner fails to submit the notice required under the law.

4.2.3 Enforcement and Criminal Provisions

The TPPA contains provisions on criminal offences that originate from US laws.⁵⁷ These provisions are TRIPS-plus or TRIPS-minus in the sense that some of them take away the flexibilities conferred under the TRIPS Agreement.⁵⁸ The provision on border measures is one

⁵⁴TPPA, Article 18.81and 18.82.

⁵⁵ TPPA, Article 18.82 (3).

⁵⁶676 f.3d 19 (2d Cir. 2012).

⁵⁷ Brook Baker, Sean Flynn, Margot Kaminski, & Jimmy Koo 'The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement', (2012) 28 Am. U. Int'l L. Rev. 105.

⁵⁸ Criminal sanctions are set out in Section I of the TPPA.

of such examples. Under the TRIPS Agreement, Member countries are only mandated to take action for the export of counterfeit trademarks and infringing copyright goods.⁵⁹ The provision is silent on counterfeit patent goods. In addition, the provision captures the movement of goods outside the country, i.e. exports, and expressly provides in the footnote that it does not cover goods in transit.⁶⁰ The TPPA mandates that border measures be applicable to prevent not only the exportation of infringing goods but also importation of such goods, as well as in transit goods.⁶¹

More extensive criminal provisions could be found scattered in the TPPA. The former notion under the TRIPS Agreement that criminal procedures should be applicable for acts for commercial gain is reversed under TPPA.⁶² Commercial gain has been defined in TPPA as applicable not only for acts carried out for commercial advantage but also significant acts, not carried out for commercial advantage or financial gain, but have a substantial prejudice impact on the interests of the copyright owner.⁶³

Among other activities that deserves criminal punishment under TPPA includes performance of a cinematographic work in a movie theatre⁶⁴ and the act of aiding and abetting copyright infringement.⁶⁵ In all these instances, the law is modelled after US law, in particular the No Electronic Theft Act (1997), as well as jurisprudence in cases such as *Columbia Pictures Industries, Inc. & Anor v Galozuniga*,⁶⁶ *Meadowgreen Music Company, et al., v Voice in the Wilderness Broadcasting, Inc., et al*(the United States District Court for the Eastern District of Texas, Beaumont Division),⁶⁷ *John Lamb, d.b.a. Alpha Productions v Michael Starks, and 3d Tv Corp*,⁶⁸ *United States Of America, v. Julius Chow Lieh Liu*,⁶⁹ *Sony BMG Music Entertainment, Et Al., v.*

Joel Tenenbaum,⁷⁰ *Capitol Records & Anor v Jammie Thomas Rasset*⁷¹ and *Johnson v. Salomon*.⁷²

4.2.4 Patent term adjustment, patent term extension and patent linkage

The TRIPS Agreement sets the period of protection for patent to be twenty years after its filing.⁷³ This period was said to be unnecessarily short for certain patent products that require other administrative approval for the product to be marketed. There could possibly be some delays in the granting of the patent, resulting in the loss of beneficial time covered under such patent. As a result, patent owners argue that though most countries have already granted twenty years for patents, but not the whole twenty years can be enjoyed by the patent owners in order to recoup their investment, i.e. their effective life is shorter than twenty years. Patent term adjustment and patent term extension were created specifically for this, to compensate the loss of time suffered by the patent owners and effectively lengthening the life span of patent, a practice that is called 'evergreening' by critics.⁷⁴ The provisions on this in the TPPA were meant to compensate for unreasonable delays in the granting of the patent as well as to compensate the patentee for delays during the marketing and regulatory approval process.

Both patent adjustment term and patent extension term are nothing new in developed countries, such as the US and the EU. However, for countries that import a substantial share of their medicines, the adjustment and extension could result in the delay of entrance of generics into the market. Consequently, the cost of healthcare will rise and the generics industry's growth will be slowed down.⁷⁵

The constraint on the generics industry is further tightened with the patent linkage requirement. Essentially, this requires the marketing authority to check the patent status of the originator drugs before approving generic drugs. Initially, the US was pressing for hard linkage i.e. the generic drugs should not be approved as long as the originator drug's patent has not expired. Finally, after much bargaining, the parties agreed to a softer approach whereby the approval

⁵⁹TRIPS Agreement, Article 51.

⁶⁰TRIPS Agreement, Footnote 18.

⁶¹ Krista L. Cox. 'US Demands for Intellectual Property Enforcement in Trans-Pacific Partnership Agreement and Impacts for Developing Countries' (2014), *University of Pennsylvania Journal of International Law* Vol 35 Issue 4 1045 <<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1874&context=jil>> accessed on 1st February 2015.

⁶²TRIPS Agreement, Article 61.

⁶³ TPPA, Article 18.77.

⁶⁴ TPPA, Article 18.77(4).

⁶⁵ TPPA, Article 18.77(5).

⁶⁶ *Columbia Pictures Industries, Inc & Ors v. Galo Zuniga, Individually And D/B/A Crazy Video*, Defendant. 1995 U.S. Dist. LEXIS 15824; 38 U.S.P.Q.2D (BNA) 1360.

⁶⁷789 F. Supp. 823; 1992 U.S. Dist. LEXIS 5005; Copy. L. Rep. (CCH) P26,916; 23 U.S.P.Q.2D (BNA) 1545.

⁶⁸ *John Lamb, D.B.A. Alpha Productions, vs. Michael Starks, And 3d Tv Corp.*, Defendants.1997 U.S. Dist. Lexis 11369.

⁶⁹731 F.3d 982; 2013 U.S. App. LEXIS 20011; 108 U.S.P.Q.2D (BNA) 1371.

⁷⁰660 F.3d 487; 2011 U.S. App. LEXIS 19086; Copy. L. Rep. (CCH) P30,134; 100 U.S.P.Q.2D (BNA) 1161.

⁷¹*Capitol Records, Inc.; Sony BMG Music Entertainment & Anor v. Jammie Thomas-Rasset*, 692 F.3d 899; 2012 U.S. App. LEXIS 19040; Copy. L. Rep. (CCH) P30,313; 104 U.S.P.Q.2D (BNA) 1063.

⁷²1977 U.S. Dist. LEXIS 15735; 197 U.S.P.Q. (BNA) 801.

⁷³TRIPS Agreement, Article 31.

⁷⁴ Thomas A Faunce & Joel Lexchin, 'Linkage Pharmaceutical Evergreening in Canada and Australia', (2007) Australia and New Zealand Health Policy 4:8.

⁷⁵ Benjamin Coriat (ed), *The Political Economy of HIV/AIDS in Developing Countries: TRIPS, Public Health Systems and Free Access* (Edward Elgar,2008), 13.

authorities only need to list on their websites any impeding registration by generic drugs.⁷⁶ The approving authority need not be the patent enforcement agency responsible for preventing generic drugs from entering the market.

4.2.5 New uses, methods or new processes of a known product.

The TPPA mandates that all new use, method or new processes of a known product to be patentable.⁷⁷ The purport of the provision is that there should not be any denial of patents on the basis that the new forms and use do not demonstrate any therapeutic difference from previous patented products. This provision gives rise to the concern that patent is given to a mere 'tweak' of a product and may be resorted to by the patent owner to extend the patent life of their pharmaceutical products, a practice which is known as 'evergreening'.⁷⁸ Such generous protection is nothing new in the developed world where second and third medicinal use is granted over the same product. In the UK and EU, even a change in dosage may be considered as a new medical use.⁷⁹

4.2.6 Data exclusivity

The TRIPS Agreement does not provide any special obligations with respect to data exclusivity (only that 'the undisclosed test or other data be protected against unfair commercial use').⁸⁰ The TPPA mandates that such data be protected for at least five years from the date of the marketing approval of the new pharmaceutical product in the territory where the approval is sought.⁸¹ Critics voice concern over data exclusivity protection, citing it as an effort to delay the entry of originator products in the market. As generic manufacturers typically rely on the test data of originator drugs to get marketing approval, the conferral of protection over test data would force generics' companies to further wait for this period to expire first.

For biologics,⁸² the TPPA provides for a maximum of eight years of protection or five years plus other measures that deliver a comparable outcome in the market.⁸³ Under the TPPA, the obligation is to a minimum; 'a product that is, or, alternatively, contains, a product produced using biotechnology processes, for

use in human beings for the prevention, treatment, or cure of a disease or condition'.⁸⁴ Such products include vaccines, blood and blood components, allergenics, somatic cells, gene therapy, tissues and recombinant therapeutic proteins. Critics argue that giving biologics a longer data exclusivity period would cost the healthcare industry a substantial amount of money. Further, lengthy protection need not necessarily incentivise the industry further.⁸⁵

5. CONCLUSION: IMPLICATIONS FOR DOMESTIC POLICY

An International Monetary Fund (IMF) report in 2005 speculated that the streams of FTAs entered into in the Asia-Pacific Region will entail the creation of a complex web of BTAs and RTAs in the Asia-Pacific.⁸⁶ Such a web was described by Jagdish Bhagwati in 1995, as a spaghetti bowl that 'maligns and threatens the multilateral trading system'.⁸⁷ These trade agreements that are a 'rage' or 'continuing in a feverish pace' in Asia were described by the Economist magazine in 2009 as leading to 'worrying times for world trade'. This is because one country may have differing obligations to another under an unrelated framework agreement, with the possible emergence of overlapping and inconsistent rules of origin. To make it more complex, some of the FTAs contain linkages to other global treaties and FTAs. Wan Khatina, for example, identifies four types of linkages in the universe of agreement; inter-linkages between chapters in an FTA, inter-linkages between FTAs, inter-linkages between FTAs and WTO agreements and inter-linkages between FTAs, WTO and non-WTO agreements. She posits that the inconsistency in commitments may result in sub-optimal outcomes; for example, it may be at the expense of flexibility.⁸⁸ There is also the risk that negotiators in different FTAs work in silos, which means that they lose sight of the inter-linkages.⁸⁹ Businesses and investors must also be mindful and alert to all the inter-linkages when they trade different goods in different markets. Failure to fully appreciate the full implications of the inter-linkages may cost them dearly.⁹⁰

Despite the positive prognosis by Lewis who sees TPPA and RCEP as the impetus for deeper Asian Economic

⁷⁶ TPPA, Article 18.53.

⁷⁷ TPPA, Article 18.37.

⁷⁸ UNITAID, *The Trans-Pacific Partnership Agreement: Implications for Access to Medicines and Public Health* (World Health Organization 2014) <<http://www.unitaid.eu/en/rss-unitaid/1339-the-trans-pacific-partnership-agreement-implications-for-access-to-medicines-and-public-health>> accessed 7 August 2015.

⁷⁹ *Abbott Respiratory/Dosage Regime*, [2010] EPOR 26.

⁸⁰ TRIPS Agreement, Article 39(3).

⁸¹ TPPA, Article 18.50.

⁸² Biologics are medicinal preparations made from living organisms and their products, including serums, vaccines, antigens, antitoxins etc.

⁸³ TPPA, Article 18.51.

⁸⁴ TPP Agreement, Article 18.51(2).

⁸⁵ Deborah Gleeson, Ruth Lopert & Hazel V.J. Moir, 'Proposals for Extending Data Protection for Biologics in the TPPA: Potential Consequences for Australia' (2014) <<http://aftinet.org.au/cms/node/907>> accessed 7 August 2015.

⁸⁶ Tubagus Feridhanusetyawan, 'Preferential Trade Agreements in the Asia-Pacific Region' (2005) IMF Working Paper.

⁸⁷ Jagdish Bhagwati, 'U.S. Trade Policy: The Infatuation with Free Trade Areas,' in Jagdish Bhagwati and Anne O Krueger (ed) *The Dangerous Drift to Preferential Trade Agreements* (American Enterprise Institute for Public Policy Research 1995).

⁸⁸ Wan Khatina Nawawi, 'Interlinkages in the Universe of Agreements', in Wan Khatina Nawawi, et al., n 26, 159.

⁸⁹ *Id.* 160.

⁹⁰ *Id.* 162.

Integration,⁹¹ many academics and scholars are worried about the trend, especially in relation to the race to the top with regard to IPR standards. With the exception of the US, other countries are IP dependent, and giving IP platinum protection is not in their best offensive interests. The TRIPS-plus provisions are 'designed best to protect US domestic interests'.⁹² The cost of the triggering upward spiral in IP protection may be passed down to consumers.⁹³ For example, more stringent IPR protection may eat up public coffers and resources that are already limited.⁹⁴ Civil society and non-governmental organisations also question the wisdom of giving away the flexibilities negotiated heavily in the Uruguay Round in the TRIPS Agreement. For example, it was said that lengthening of the patent term, data exclusivity and patent linkages will delay the entry of generic drugs and this will increase drug prices.⁹⁵ Furthermore, as Malaysia has a small cultural and creative industry, extending copyright term would further lengthen the payment of royalties for foreign content used domestically. The estimated cost of the extension is USD 115 million a year for books, music and films.⁹⁶ Despite this, in the ISIS report, it was conceded that stronger IP protection on drugs would have minimal impact on firms and that enhanced capabilities of the Drug Control Authority would mitigate any potential risks.⁹⁷ In the final analysis, whilst countries are ever ready to negotiate preferential treatment for better market access, they have to be mindful of the implications posed to their domestic policy.

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⁹¹ Meredith Kolsky Lewis, 'The TPP and the RCEP (ASEAN+6) As Potential Paths Toward Deeper Asian Economic Integration', *AJWH* Vol 8 359.

⁹² Bryan Mercurio, 'TRIPS-Plus Provisions in FTAs: Recent Trends' in Lorand Bartels and Federico Ortino (ed), *Regional Trade Agreements and the WTO Legal System* (OUP, 2006), 220.

⁹³ Marc Stuhldreier, 'The Trans-Pacific Partnership Agreement and Its Threats to the Affordability of Medical Products in Developing Countries' *Trinity College Law Review* Vol. 19:175-195.

⁹⁴ Nawawi (n 84), 159.

⁹⁵ Stefano, Barazza, 'The Draft Trans-Pacific Partnership Agreement and Its Implications for Public Health and Access to Medicines: the UNITAID Report' (2014) *European Journal of Risk Regulation* (EJRR) Vol. 5 Issue 3 366-373.

⁹⁶ 'National Interest Analysis of Malaysia's Participation in the Trans Pacific Partnership Agreement' <fta.miti.gov.my/miti-fta/resources/ISIS_The_Grand_Finale.pdf>, 12 accessed 17 May 2017.

⁹⁷ *Id.*

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