INTELLECTUAL PROPERTY IN THE TPP: IS CHAPTER 18 THE NEW TRIPS?

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I. INTRODUCTION

The intellectual property (IP) chapter in the Trans-Pacific Partnership Agreement (TPP) 1 was one of the most contentious during negotiations. 2 It was the subject of multiple leaks and conspiracy theories over the course of its negotiation, and something of a Mexican standoff towards the end over biologics data protection. 3 Even now it remains controversial in signatory countries where ratification is being debated. 4 Rather than analyse the import of individual provisions, 5 this paper seeks to evaluate the chapter as a whole. But how do you judge whether Chapter 18 of the TPP is a ‘good chapter’ or a ‘success’? What is the standard or standards against which we should assess its merits, demerits, or achievements?

In reality there is no single standard because, like any subpart of a broader trade agreement, Chapter 18 performs more than one role, and the demands of the various roles are not entirely congruent. Chapter 18 seeks to establish a framework of IP rules, but at the same time is an integral part of an ambitious attempt to develop regional (and potentially supra-regional) trade rules and economic integration, as a step towards establishing an Asian free trade area. Therefore in this paper I evaluate Chapter 18:

1. As part of a trade agreement: does the chapter reduce barriers to trade? Does it contribute to, or detract from, the aspirations that governments have for the TPP itself?
2. As a set of intellectual property rules: can the IP chapter legitimately be claimed to establish a “Gold Standard, 21st Century” IP framework?

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1 Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam, signed 4 February 2016 [2016] ATNIF 2 (not yet in force).
3 [Inside US trade article]
4 [citations – NZ Parliamentary debates; Canadian debates]
5 I have done this elsewhere in excruciating detail in relation to the general provisions, and the sections on copyright, trade mark, geographical indications, designs, and enforcement. I have not analysed the patent or public health provisions in detail. For my collected analyses, see <http://works.bepress.com/kimweatherall>
These are three quite different approaches to thinking about the IP chapter. Both perspectives are arguably relevant to the challenges that faced the IP negotiators and to how we should judge their success or failure.

As I will show in this paper, Chapter 18 of the TPP fails both of these standards: it does not address trade barriers (and indeed, facilitates the erection of barriers to free movement of goods and the provision of services across borders), and arguably detracts from the regional aspirations held for the TPP; and it does not establish a clear, coherent, or balanced set of IP rules. The implications are profound. There has been much complaint about Chapter 18, which TPP supporters have tended to dismiss as the self-interested or deluded ranting of the anti-IP crowd. The conclusion this paper draws is that the IP chapter demonstrably fails even by the standards claimed for it by its most enthusiastic proponents, and by the negotiators responsible for it. The conclusions in this chapter speak to an urgent need, on the part of all governments and advocates of free trade, to rethink the processes that can lead to such a result.

II. EVALUATING THE TPP’S IP CHAPTER

This part offers some standards against which the TPP’s IP chapter might be judged, and an assessment of how the chapter meets or does not meet those standards. As noted in the introduction, Chapter 18 has two identities: as a part of a broader trade agreement and as a set of rules. It should be assessed according to how well it performs each of these roles. Unlike most discussions of the TPP’s IP chapter, this paper takes on its trade role first – because the TPP is, first and foremost, a trade agreement.

A. Chapter 18 as part of a trade agreement

There are various trade-related impacts an IP chapter in a trade agreement can have. We can ask whether the TPP’s IP provisions are likely to have a direct contribution to economic integration between the TPP parties, either by (a) reducing barriers to trade among Parties, and/or (b) assisting businesses engaged in intra-TPP regional trade with IP-related issues. An IP chapter could also have an indirect impact on economic integration in the region, and on the future role of the TPP. In some imaginings, the TPP is a framework for later expansion of trade disciplines beyond its initial Membership; ‘the agreement that most transforms national regulatory systems, perhaps even more so than the Uruguay Round (1986–1994).’6 Thus, when assessing the TPP IP chapter from a trade perspective, we can also consider whether Chapter 18 contributes to, or detracts from the TPP’s broader trade-related ambitions.

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1. **Does the IP chapter reduce barriers to trade or facilitate cross-border business?**

You might expect that a chapter of an agreement purporting to create a free trade area would be judged according to the extent to which it reduces barriers to trade.\(^7\) Thus an IP chapter within a trade agreement ought to tackle barriers to trade in IP-intensive goods or in IP (say, difficulties in licensing IP across borders); or address IP-related challenges for businesses engaged in international trade. In reality, Chapter 18 is concerned chiefly with dictating local IP laws. It does not seek to facilitate or promote IP-intensive trade;\(^8\) and it does not remove barriers to trade.

We can contrast Chapter 18 with two benchmarks where reform in IP law and practice has been targeted at the creation of single economic market. The first is the European Union, where reform of IP law and systems has been an integral part of that region’s pursuit of the ideal of the Common Market for over twenty years. The second is much closer to home: the single economic market program between Australia and New Zealand, which has evolved out of the relationship forged through the *Australia-New Zealand Closer Economic Relations Trade Agreement of 1983*\(^9\) (ANCERTA, or more commonly, CER).\(^10\) Unlike these two precedents, the TPP does not aspire to create a single economic market. Nevertheless, the formation of a single economic market between independent countries is at the extreme end of the same continuum of economic integration as the TPP. We ought at least think about whether the issues addressed as a priority in both the EU and CER ought to be the same kinds of issues as when a lesser level of economic integration is the goal.

A first issue in IP which one might reasonably expect to be the subject of attention in creating a free trade area is the set of rules which enable IP rights to interfere with the free movement of (non-counterfeit, authorised) goods: *i.e.* the rules that allow owners to control the import, export and resale of goods embodying IP, rules that can serve to maintain price differentials within a free trade area. This raises the question of parallel importation: *i.e.*, importation of goods which have been authorized by the relevant IP owner in their place of manufacture, but which are not

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\(^7\) Note in this respect Article 24(5) of the General Agreement on Tariffs and Trade (GATT). As a regional trade agreement entered into by members of the World Trade Organization, the TPP must [***fill in text from art 24(5)***] in order to avoid triggering the WTO’s Most Favoured Nation clauses thus requiring any tariff reductions etc to be extended to all WTO members.

\(^8\) It is arguable that *other* parts of the TPP more directly address barriers to trade for IP-intensive industries, particularly in services industries. The Ecommerce chapter, for example, restricts data localisation rules, and contains a number of other provisions aimed at promoting ecommerce and data flows across borders [Burcu Kilic paper].

\(^9\) Full cite required.

authorized by the local IP owner or exclusive licensee (whether they are the same entity or a different one).\textsuperscript{11} In the EU, this was indeed a key area of early attention; the EU observes a rule of intra-European exhaustion of rights: when an IP owner sells or consents to the sale of goods embodying their IP in any part of the EU, they thereby ‘exhaust’ their rights, and cannot prevent the goods from being transported to or resold throughout the EU.\textsuperscript{12} Other moves to harmonise IP within the EU Common Market project are related to this desire to promote free trade in goods across borders: copyright term, for example, garnered early attention after differences in term prevented cross-border trade.\textsuperscript{13} One might also expect significant attention to be devoted to barriers to the offering of services on a TPP-wide basis. One difficulty with offering region-wide services providing access to copyright content (such as music or movies) is the need to obtain licences from all right holders in every jurisdiction where a service will be offered. Again, this is an issue which has attracted both attention, and proposals for reform, within the EU, albeit no action as yet.\textsuperscript{14}

The TPP includes no rules that will promote region-wide licensing. Nor does Chapter 18 address cross-border trade in goods embodying IP.\textsuperscript{15} It sets no rules in relation to parallel importation:\textsuperscript{16} it allows, but does not mandate, international or region-wide exhaustion rules, and even explicitly preserves restrictions on parallel importation that might apply between particular countries within the TPP from earlier treaties.\textsuperscript{17} In fact, the IP chapter is perhaps the only chapter in the TPP which will make it easier to stop goods at the border, because the border measures in Chapter 18, which allow for detention of alleged infringements at the border, are broadly written. Where equivalent provisions in TRIPS were targeted at stopping trade in counterfeit trade mark and pirated copyright goods, the TPP provisions allow for detention of


\textsuperscript{12} See generally Lionel Bentley and Brad Sherman, Intellectual Property Law (Oxford University Press, 4th ed, 2014), 12–15; [Calboli book EU chapter]. Other alternatives are national exhaustion (ie, the right holder only ‘exhausts’ their rights once exercised within the State – thus the right holder can prevent importation), or international exhaustion – ie once the right has been exercised legitimately somewhere in the world (e.g. sold with consent) then the right holder no longer has any right to control on-sale of the item.


\textsuperscript{14} ***get sources on EU proposals for the single digital market, and EU-wide licensing.

\textsuperscript{15} Indeed, the TPP does not even include aspirational statements directed to facilitating such licensing. It would have been trivial to include some aspiration for the development of region-wide collective licensing, for example, in article 18.70 which recognises ‘the important role of collective management societies for copyright and related rights in collecting and distributing royalties’.

\textsuperscript{16} TPP art 18.11.

\textsuperscript{17} TPP art 18.11 footnote 8. This preserves, for example, limitations on parallel importation from the Australia-US Free Trade Agreement, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) (AUSFTA): see art 17.9.4 (patent) and footnote 20 (copyright).
goods merely alleged to infringe registered trade marks: a broad set of goods which would include those where infringement is legitimately disputed.\textsuperscript{18}

If the TPP does nothing to facilitate trade in goods or services across borders, the other way it might help promote trade among the Member States would be to address IP-related challenges for businesses engaged in international trade by reducing regulatory compliance costs, in particular, costs of obtaining and enforcing intellectual property rights in multiple jurisdictions. The National Interest Analysis tabled in Parliament by the Australian Government alongside the TPP claimed that Chapter 18:

\begin{quote}
will help streamline intellectual property transactions, increase transparency and lower the costs of doing business, and support Australia’s creative and innovative industries by promoting certainty and opportunities for trade and investment in the region.\textsuperscript{19}
\end{quote}

In fact, the TPP does little of significance in this area. Certainly, it includes a range of provisions on registration of IP: it has provisions aimed at ensuring that rights (such as trade marks and patents) can be applied for electronically, and that require registers to be made available online.\textsuperscript{20} The text also includes provisions on application and opposition processes in both trade mark\textsuperscript{21} and patent.\textsuperscript{22} But, as anyone knows who has ever tried to get trade marks across multiple countries, there is much more to facilitating acquisition of rights across jurisdictions than the ability to apply or search online, or even establishing basic processes for examination, opportunities to respond to office actions, and opposition. When it comes to applications for rights, varying requirements for the \textit{drafting} of applications are also important: requirements for what must be disclosed in a patent application, or how claims may be drafted; or the requirements for diagrams in design or trade mark applications vary from country to country and require redrafting and careful analysis by highly skilled advisers. Most likely, businesses would like to take a trade mark application from one country and use it in other countries. Notably, the TPP does \textit{not} require members to join existing

\textsuperscript{18} Compare TRIPS article 51 and TPP article 18.76.1. I note that there is room for debate around the extent to which the definitions of counterfeit trade mark and pirated copyright goods in TRIPS are actually restricted to counterfeiting and piracy as those terms would be generally understood. Nevertheless, TPP art 18.76.1 clearly represents a significant extension of the scope of seizures. The justification for this kind of extension is that sophisticated operators can ensure that their imitative goods do not fall within the definition of ‘counterfeit goods’. Nevertheless, to ensure the extension of seizure to ‘borderline’ counterfeit cases, the legal rules have been extended to a much broader set of infringements, including those where infringement is legitimately the subject of dispute.

\textsuperscript{19} National Interest Analysis, Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam (Auckland, 4 February 2016) [2016] ATNIA 4, [37].

\textsuperscript{20} TPP art 18.9 (general provision on transparency); see also TPP art 18.24 (regarding trade marks in particular).

\textsuperscript{21} TPP arts 18.23–18.26. Relatedly the text deals with processes relating to geographical indications: TPP art 18.31.

\textsuperscript{22} TPP arts 18.38–18.39, 18.42–18.45.
treaties which get closest to this ideal by streamlining multi-jurisdictional applications.23

Again, compare the achievements of the TPP to initiatives in both Europe and in the Australia-New Zealand relationship aimed at the development of a common market. The EU has developed a series of systems for Europe-wide IP registered IP rights in trade mark,24 patent,25 and designs.26 These clearly facilitate the acquisition of EU-wide rights. As for Australia and New Zealand, in 2011 the two governments announced the following goals in IP:27

- one regulatory framework for patent attorneys;
- one application process for patents in both jurisdictions, and a single examination for patents (but separate registration);
- one trade mark regime through alignment of registration practice and a single register; and
- one plant variety rights regime.

One of the most interesting features of the Australia–New Zealand developments is that it does not involve harmonising IP laws. Rather, the governments’ collective efforts are focused on streamlining administration of rights while allowing differences in the law (including the law regarding patentability and registrability of trade marks) to continue.28 To me, this seems more likely to achieve the stated goals of facilitating IP applications in multiple jurisdictions.

A person familiar with IP law in the EU might point out that in addition to addressing issues like parallel importation and digital licensing, and creating EU-wide rights systems, the EU has also worked on harmonising substantive IP law on the basis that this is also important when attempting to create a single market.29 It might be argued that the TPP is tackling this aspect of assisting in trade, even if other issues

23 Parties are not required to join the Hague Convention which seeks to streamline application processes for design rights in multiple countries (see TPP art 18.56). Parties are not required to join the Madrid Protocol which streamlines applications for trade mark rights in multiple countries (parties can choose whether to join the Madrid Protocol or instead sign the Singapore Treaty which harmonises some aspects of trade mark office practice): see TPP art 18.7, footnote 1.
24 Cite CTM Regulation
25 Cite European Patent Convention
26 Cite Community Designs Regulation.
27 Frankel and Kolsky Lewis, above n ***.
28 For a discussion, see sources cited above n 10. There are significant differences in registrability of trade marks particularly from New Zealand’s rules relating to the use of Māori signs, and in patents, New Zealand has different rules relating to both medical methods and to the patentability of software: see Kimberlee Weatherall, 'The Emergence and Development of Intellectual Property Laws in Australia and New Zealand' in Rochelle Dreyfuss and Justine Pila (eds), Oxford Handbook of Intellectual Property Law (Oxford University Press, forthcoming 2016).
would be too hard or too ambitious. However, there is harmonisation, and
harmonisation: harmonisation aimed at actually facilitating trade across borders, and
harmonisation directed solely at ‘raising’ standards without in fact making law across
jurisdictions more similar. To illustrate the difference, consider copyright term. When
the EU took on copyright term, it recognised that trade across borders would be
facilitated by the existence of a common term: if that could be achieved, then material
protected in one country would be protected in others, material in the public domain
in one country would also be public domain in others – and material legitimate in one
country would also be legitimate in others. The EU directive on copyright term
therefore sets the term of copyright. Contrast the TPP, which (a) sets a minimum term
only, and (b) does not set the basis on which term is to be calculated, leaving
considerable differences between the way the US calculates term, and how most other
countries do.\textsuperscript{30} The whole TPP is founded on this model of minimum standards – a
model it shares with the historical multilateral conventions such as the Berne and
Paris Conventions, and TRIPS.\textsuperscript{31} A full discussion of the merits of the minimum
standards model is beyond the scope of this paper: what was appropriate for a global
treaty like TRIPS is arguably not the right model for an agreement aimed at closer
economic integration. At the very least, this brief discussion illustrates that when
DFAT talk about the TPP creating a ‘common set of [IP] rules’, this is not an accurate
description. The TPP creates a common baseline, and from the perspective of
promoting economic integration, that is a very different thing indeed.

I reaffirm that developments like those in the EU or between Australia and New
Zealand are obviously more straightforward in a context where the respective
countries already have well-developed systems for the registration of IP rights.
Developing a single application process is complex enough between two countries
that share a common language and legal history, it would be infinitely more complex
to negotiate similar arrangements between twelve different countries at differing
levels of development, with very different practices, and multiple languages. While
the European Union has differences in language and legal tradition, and even more
member countries, the countries of that Union seem likely have a greater sense of
common purpose and history than would be found among prospective TPP Member
States which range across Asia, Australia/New Zealand, and North and South
America. EU developments have also been facilitated by the existence of the Court of
Justice of the European Union which is in a position to develop a common
jurisprudence. I would certainly not advocate that anything so ambitious could be

\textsuperscript{30} For a full explanation of the differences see Robert Burrell and Kimberlee Weatherall, 'Exporting
Controversy? Reactions to the copyright Provisions of the US-Australia Free Trade Agreement:
259, ***[pin cite]. To summarise, the US calculates the copyright term of works written by
employees from the date of publication or creation. Many other countries follow the Berne
Convention rule which calculates term on the basis of the death of the author, even where that
author is an employee. We can debate which rule is more rational, but the result is that copyright
will expire at quite different times in different TPP countries – hampering trade.

\textsuperscript{31} ***cite to provisions in Berne, Paris, TRIPS, and TPP which state that the obligations in those
treaties are minimum standards.
attempted via the TPP, which is not attempting to create a common market. Nevertheless, a consideration of these alternative benchmarks, which directly target the difficulties of multi-jurisdictional rights, throw into sharp relief the very shallow nature of the harmonisation project in Chapter 18 of the TPP and its attempts to facilitate cross-jurisdictional acquisition of rights. Anyone who claims that the TPP will help businesses more readily acquire or enforce IP rights across the region is peddling a fantasy.

There is one part of Chapter 18 which addresses (threatened) trade barriers: the rules relating to geographical indications (GIs). This is an innovative section without precedent in existing trade agreements. GIs as defined in the TPP Article 18.1 are signs (words or logos) which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. The best known examples are European (Champagne, Parma Ham, Mozzarella Cheese), and the EU protects GIs aggressively. In the view of the EU, terms which in (many) TPP countries would be considered descriptive – Parmesan or Fetta cheese for example, or Parma ham – are GIs that should only be used on products originating from the relevant European region. This EU stance is reflected in a range of trade agreements which the EU has concluded with countries in the region, in which the EU trades access to its lucrative market in return for recognition of certain European-derived geographical terms as GIs, and legal prohibitions on their use (even descriptively and in a non-misleading context). The EU agreements have tended to append a list of terms that will be either immediately, or progressively, prohibited from use in the trading partner, in most cases with no grandfathering of existing uses or existing trade marks.

The GI provisions of the TPP seek to preclude this kind of deal, preventing TPP Member States from granting protection for GIs where those GIs might be confused with existing trade marks, or protection for the GI would prevent use of

32 TPP Chapter 18 Section E.
33 Although note that the definition of GIs in article 18.1 of the TPP, while echoing that in TRIPS art 22.1, could have the unintended consequence of excluding these European terms. The TRIPS definition (and the identical TPP definition) confines GIs to terms relating to members’ territory only. Excluding the European terms in this way could prevent the GI provisions doing their apparent job as discussed here. For criticisms of the TRIPS definition, and the way it departs from a pure requirement that goods originate within the geographical area designated, see Irene Calboli, ‘In Territorio Veritas: Bringing Geographical Coherence in the Definition of Geographical Indications of Origin under TRIPS’ (2014) 6(1) WIPO Journal 57; citing Dev Gangjee, Relocating the Law of Geographical Indications (Cambridge University Press, 2012).
34 ***cite to Calboli, Handler articles.
35 ***Cite to EU-Australia Wine Treaty. Other countries have also concluded agreements with the EU which preclude use within those countries of a range of term, including perhaps most recently Vietnam: ***cite to EU-Vietnam Agreement and relevant provisions. A press releases suggest that EU GIs protected under the Vietnam Agreement will include ‘Champagne, Parmigiano Reggiano cheese, Rioja wine, Roquefort cheese and Scotch Whisky’ http://europa.eu/rapid/press-release_IP-15-5467_en.htm (a list notably not confined to wines): [update to refer to specific provisions if text available***].
customary/generic terms, whether those GIs are recognised through an administrative process or via a trade agreement. The thinking reflected in the text is that primary producers from Australia face potential barriers, for example, to their meat and dairy export trade if a country, like Vietnam, concludes an agreement with the EU which includes extended protection of GIs for dairy and meat products. The Australian cheese industry can suddenly find markets for Australian parmesan or fetta blocked or subject to new barriers (the need to re-name products entails both loss of some accumulated goodwill, and costs to educate consumers regarding new terms). Thus, the TPP seeks to prevent trading partners concluding such an agreement with the EU (or elsewhere) unless that agreement protects existing trade mark or generic uses and allows challenges to proposed GIs on the basis of pre-existing rights or existing descriptive use. Ironically, it is possible that this one area where Chapter 18 does address trade barriers is simultaneously a section that could threaten the broader ambitions of the TPP and the potential of the chapter to be a ‘new TRIPS’, as GIs have some support even within the Asia-Pacific region.

But beyond this one example of GIs, Chapter 18 does not reduce barriers to trade or facilitate cross-border business, and so fails by this measure of success.

2. Does the IP chapter contribute to, or detract from the broader trade ambitions of the TPP?

A second trade-related standard against which we can seek to assess Chapter 18 is to assess its contribution – or deleterious impact – on the overall trade-related ambitions held for the TPP itself. Here we are again not thinking about Chapter 18 as a set of IP rules. By this standard, if the IP chapter contributes to the TPP’s overall long-term goals, it can be deemed a success; if it detracts from those goals, it is a failure (or at least, there is a cost to weigh against any specifically IP-related gains). In reality, as will become clear, it is hard to imagine an IP chapter that would positively contribute to the TPP’s broader ambitions, so in fact this assessment is a negative one: an assessment of whether there are provisions included in Chapter 18 that detract from broader trade goals.

In order to make this assessment we must identify the goals of the TPP. This is controversial ground. There is a critique that characterises the TPP as intended to promote the interests of multinational corporations over and above the interests of populations within the TPP countries. If this is the goal of the TPP, arguably Chapter

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36 The key provision here is TPP art 18.36.
37 This involves a trade-off. A deal like the EU-Australia Wine Agreement involved a ‘payoff’ – in return for protection of EU GIs, better access to the EU wine market was secured for Australian producers. Thus if the TPP precludes such deals, it may prevent trade gains that, while involving some costs, are also beneficial to agricultural producers. The assumption must be that any potential gains to be made via agreements like the EU-Australia Wine Agreement are outweighed by the costs incurred when other markets preclude use of such terms.
38 Cite to Calboli work***.
18 contributes significantly to this goal, but plenty of other critics have explained how, both academic and non-academic. But the purpose of this paper is different: I am trying to assess the TPP on the terms used by its promoters to advocate its adoption, to assess whether arguments in its favour stand up. A second set of goals for the TPP are geo-political and security-related. As an IP scholar I am not in a position to assess the role of the TPP within the broader sweep of geo-political manoeuvrings in the Asia-Pacific region and beyond. In this context, any IP chapter is but a small part of a grand overall narrative. In any event I suspect that these security and geopolitical goals of the TPP are very much tied up with its economic goals.

What, then are the goals of the TPP? Beyond economic integration among the negotiating countries (considered above), another significant goal is to create a framework for economic integration in the broader Asia-Pacific region. The TPP has long been characterised as one possible step towards a free trade area of the Asia-Pacific (FTAAP). According to DFAT at least, these aspirations remains core to the purpose of the TPP, and Australia remains ‘committed to expanding the TPP membership over time.’ For present purposes, then, let us accept that the goal of the

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41 Ann Capling and John Ravenhill, ’Australia’s flawed approach to trade negotiations: and where do we sign?’ (2015) 69(5) Australian Journal of International Affairs 496. Various comments around the TPP made by key policymakers make reference to these goals. President Obama, for example, has commented that ‘TPP is more than just a trade pact; it also has important strategic and geopolitical benefits’, and stated that ‘TPP is a long-term investment in our shared security and in universal human rights’: New York Times ‘Obama Vows to Keep Doors Open for Refugees’ by Michael D. Shear [22 November 2015]. See also the Opening Statement by Chief Negotiator Elizabeth Ward before the Joint Standing Committee on Treaties Inquiry into the Trans-Pacific Partnership Agreement, 22 February 2016.

42 As Drahos notes, such a free trade area has been proposed and discussed in the Asia Pacific Economic Forum since at least the 1990s: Drahos, above n *** [China paper]. This characterisation is included, for example, in Australia’s White Paper on Australia in the Asian Century (2012), 187 and 208.

43 Department of Foreign Affairs and Trade, About the Trans-Pacific Partnership Agreement Trans-Pacific Partnership Agreement < http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx> (as viewed 13 May 2016). See also DFAT’s summary of ‘Key Features’ of the TPP, which states that ‘[t]he TPP is intended as a platform for regional economic integration and designed to include additional economies across the Asia-Pacific region’: Department of Foreign Affairs and Trade, Summary of the Trans-Pacific Partnership Agreement
TPP is to be a stepping stone towards creating a regional framework for the further economic integration of the Asia-Pacific region, extending beyond the existing countries who signed the TPP in February 2016. For the TPP to achieve this overarching goal, it should create a framework conducive to later expansions of its membership. For the IP chapter to contribute to (or not detract from) this goal, it ought not include provisions which increase barriers to accession, especially by important regional countries such as China, India, and South Korea.

Chapter 18 does not meet this standard: on the contrary, it includes provisions which have all the appearance of being targeted at both Indian and Chinese laws which the US does not like. For example TPP art 18.37.2 requires that patents be available for ‘at least one of the following: new uses of a known product, new methods of using a known product, or new processes of using a known product’. This is inconsistent with section 3(d) of India’s Patents Act, which states that the ‘mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus’ is not a patentable invention ‘unless such known process results in a new product or employs at least one new reactant.’

This part of Indian Patent Law is important for India’s economically and globally significant generic pharmaceutical industry. Or consider art 18.77.1, which requires that criminal penalties be available for single commercial infringements. This is difficult to reconcile with China’s rules relating to criminal copyright infringement, which require a certain number (in the hundreds) of infringements before criminal liability will arise. China’s current approach was the subject of a WTO Dispute between China and the US, in which China successfully defended its current approach.

The TPP’s provisions on GIs might also pose a challenge for countries in the Asia-Pacific region who see GIs as a potential source of protection for local products, both food products and non-food products. Also of note are the provisions relating to the relationship between patent law and pharmaceutical approvals and data protection, as well as the interaction between these provisions and pricing decisions. Past assessments of these

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44 **cite to India Patents Act. Note the following ‘explanation’ associated with s 3(d): ‘For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.’**

45 [citation needed]


47 Cite to Calboli work***.
rules in Australia have attached real and significant costs to the health system of some patent rules: likely similar calculations would arise for other countries. Given the length, breadth, and detail of the TPP’s IP chapter (discussed further below), there are likely other provisions that would put off potential Members.

I should note in passing that it might be argued without Chapter 18 in something close to its final form, there would have been no TPP to expand. Under US trade law, Congressional approval is required for trade agreements. Given long-standing protectionist tendencies and the difficulty of generating a consensus on trade in Congress, such approval cannot be assumed. The degree of criticism which the USTR has sustained over the data protection in relation to biologics gives some hint of the kinds of criticism that might have been leveled in response to a much less detailed, less prescriptive IP chapter. Still, it is hard to judge how seriously to take such political posturing, which echoes similar complaints following the conclusion of TRIPS; further, it is difficult to see current dummy spits in Congress around biologics as a debate over IP, so much as a debate over trade agreements more generally and their benefits and costs for the American population.

It seems unlikely that even the provisions cited above pose insurmountable barriers to the expansion of the TPP. First, IP rules will rarely be a true ‘deal-breaker’ for a country considering joining regional trade arrangements. As a result of the inclusion of the TRIPS Agreement as part of the World Trade Organization arrangements, international IP law is already very substantially harmonised, which means the impact of an IP chapter is the incremental impact of further changes required by the TPP. Further, the incremental impact of IP changes from a trade agreement must be very carefully assessed: often the appearance of impact is far greater than the reality. Consider for example China’s criminal copyright provisions. The laws which China defended before the WTO limited criminal liability to producers of a certain quantity of infringing copies. The TPP text would preclude this,

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51 [***cite to Inside US Trade articles on biologics debate post-November 2015]
52 Drahos, above n *** [China, the TPP and IP]
53 On one view, issues around Indian patent law and its support for generics might seem to be an exception to this, in that there is a powerful and important local industry for whom profitability or even survival might be at stake. However, further investigation would be needed to test this question: there has been some industry consolidation in the pharmaceutical industry, and it is clear how great the separation between generic and innovator companies now is. Further, the importance of s 3(d) to the Indian generic industry could change over time: if enough international markets for the generic companies’ products recognise patents, it may be that in the end, local patents law is only a small factor impacting profitability of the sector. Thus although it is worth noting the potential importance of this issue, I would not conclude that the patents provisions of the TPP are a deal-breaker sufficient to keep India out in the medium to long term.
54 This is, by the way, a very compelling argument against these kinds of Chapters. For a detailed explanation of just how little was achieved by Chapter 17 of the AUSFTA, and how significant the political cost of that agreement, see Burrell and Weatherall, above n.
but it is far from clear that it would preclude achieving a similar goal via different means. The TPP does not require universal prosecution –indeed it positively states that it ‘does not create any obligation… with respect to the distribution as between the enforcement of intellectual property rights and the enforcement of law in general’, nor does it ‘affect the capacity of each Party to enforce law in general’.\footnote{TPP art 18.71.4.} China could therefore adopt prosecution guidelines that prioritised infringements involving large quantities of infringing goods.\footnote{The fact that this result would not only fail to improve things for IP owners, but might even positively harm the interests of right holders by encouraging them to believe that criminal laws in this area are not required to be taken seriously, is one of the many by-products of the highly problematic approach of trying to dictate results through treaty text. See more generally Burrell and Weatherall, above n ***.} Thus although conceding this point might be politically unattractive, it is unlikely to have much real impact. More generally, we should not conclude that China is necessarily opposed to extending and strengthening IP rights. As Drahos has pointed out,

\begin{quote}
Tilting the metaphorical ‘balance’ in intellectual property protection even further in favour of owners no longer holds fears for China. China’s warm embrace of intellectual property systems continues to be revealed by the cold statistics: its patent office is the largest in the world in terms of applications and since 2010 it has accounted for more than half the annual increases in global trade mark filing activity.\footnote{Drahos, above n *** [China, the TPP and IP].}
\end{quote}

Further, the TPP’s various rules (including the IP rules) are likely to have local supporters within any potential acceding countries. As Drahos notes with respect to China (and similar reasoning could be apply in India), within China there is likely to be a ‘technocratic constituency that will see the TPP as a source of external pressure for improving its standards of domestic regulation’,\footnote{Ibid.} and there will be no shortage of consultants and lobbyists to argue in favour.

The accession provisions allow for third countries to apply for TPP membership.\footnote{TPP art 30.4.} If an application is made, a Working Group is formed to negotiate the terms and conditions for accession. Membership of the Working Group is open to any interested TPP party, and every member of the Working Group gets an effective veto over terms and conditions.\footnote{The Working Group must produce a report setting out the terms and conditions to be applied to the applicant and a recommendation that the commission accept it/invite the applicant to become a party and submit this to the commission: Art 30.4(3)(b). For there to be a valid decision of the working group, (i) all parties to the working group must indicate agreement or (ii) failing this, none of the parties which have not indicated agreement object ‘in writing within 7 days of the working group’s consideration’: [Art 30.4(3bis)(b)].} This might seem to be an opportunity to negotiate still more stringent IP rules for late joiners.\footnote{The US has a history of not accepting other countries’ implementation of trade agreements, and has in the past used a process known as ‘certification’ to require countries to make changes to implementing legislation before the US will bring a trade agreement into effect: See S. 995:} But it is worth noting that already in the text
of the TPP and its annexes are many derogations from the strict rules of Chapter 18. It is entirely possible that, in order to promote accession and expansion of other TPP disciplines, even the *demandeurs* behind the stronger provisions of Chapter 18 might be prepared to negotiate away specific rules.

Overall, it is important not to overstate the importance of Chapter 18 on decision-making by a prospective acceding Member of the TPP. A sober assessment of the realistic impact of many of the IP provisions in Chapter 18 could well conclude that apparent difficulties with the provisions could be overcome. However, as we have seen in the past, and as we also saw as the TPP negotiations reached their final stages, IP rules, if sufficiently controversial, can be a barrier to conclusion of an agreement.62 Either way, we are left concluding that Chapter 18 does not positively contribute to the expansionary aims of the TPP and, if anything, detracts from those goals by including provisions that are, on the face of it, problematic for key countries in the region.

B. **Standard 2: “A Gold Standard for IP Protection”**

The other main way to assess the impact, and the merits or otherwise, of Chapter 18 is to assess the chapter as a set of IP rules. One way the TPP or the aspiration for the TPP has been described, at various times, is as a ‘gold standard’ trade agreement.63 By this logic, one could also suggest that the aspiration would be that the IP chapter, too, would be ‘gold standard’.

Whether a set of IP rules is a ‘good’ set of rules depends very much on your perspective and how those rules impact on your economic and other interests. There is very little agreement on the underlying goals of IP rules, or how they should be achieved: debates in this policy space tend to be highly polarised. In the case of rules around patents and pharmaceuticals, there is, quite literally, billions of dollars at stake.64 It is therefore somewhat challenging to undertake an assessment of Chapter

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**Bipartisan Congressional Trade Priorities and Accountability Act of 2015**

For one discussion of this in my earlier work, see Kimberlee Weatherall, *The TPP as a case study of changing dynamics for international intellectual property negotiations* in Tania Voon (ed), *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013) 50.

62 For one discussion of this in my earlier work, see Kimberlee Weatherall, *The TPP as a case study of changing dynamics for international intellectual property negotiations* in Tania Voon (ed), *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013) 50.


64 See some of the detailed analysis by Harris, Gruen and Nicol, above n ***.
18 as a set of IP rules, without adopting a particular perspective: as rights holder, or consumer, or public access-facilitating institution (library, or archive), or intermediary. The purpose in this part of this paper, however, is not to offer an assessment from any one of these perspectives: rather, this paper is focused on (a) the arguments raised in favour of the Chapter by its advocates, as well as (b) arguments that a range of stakeholders could agree with – the overall purpose is to point out that whatever your standard, and whatever your perspective, Chapter 18 is a failure.

My project is somewhat hampered by the complete absence of substance in some of the statements by advocates. According to Australia’s Department of Foreign Affairs and Trade:

*The TPP establishes a common set of rules on intellectual property protection and enforcement which aim to encourage investment in new ideas, support creative and innovative industries, address and prevent piracy and counterfeiting, and promote the dissemination of information, knowledge and technology. These rules will help streamline intellectual property transactions, increase transparency and lower the costs of doing business, and support Australia’s creative and innovative industries by promoting certainty and opportunities for trade and investment in the region.*

This is mere fluffy rhetoric: the language does not provide any kind of standard for judging Chapter 18: these statements reflect the high level goals that all IP laws intended to serve, that all would likely agree on, and is incapable of proving or disproving (in other words, it is perfect political rhetoric). Perhaps more useful is the following claim made by DFAT, that one outcome of the TPP is:

*Ensuring balanced intellectual property rules which aim to encourage investment in new ideas, support creative and innovative industries, address and prevent piracy and counterfeiting, and promote the dissemination of information, knowledge and technology.*

I end up with three standards against which to judge Chapter 18 as a set of IP rules:

1. Is Chapter 18 in fact a balanced chapter?
2. Does the Chapter provide sufficient flexibility to engage in future reform of IP law, or will it hamper law reform processes? and
3. Does Chapter 18 provide a clear, coherent set of IP rules?

1. **Does Chapter 18 provide a balanced set of IP rules?**

No. Chapter 18 resoundingly fails this test. First, because the claim of ‘balance’ is largely meaningless as a standard: it seems to assume there is some objectively

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65 National Interest Analysis, Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam (Auckland, 4 February 2016) [2016] ATNIA 4

determinable perfect balance of rights.\(^67\) It makes no sense to expect that IP law will
give equal ‘rights’ to creators and users of IP, given that IP is a system built on
exclusive rights. At risk of giving meaning to a meaningless phrase, however, I
assume that what is intended, by references to ‘balanced’ IP rules, is that the rules
recognise the legitimate interests of creators and innovators through the conferral of
exclusive rights enabling exploitation of IP in the market, and protect other
stakeholders in the IP system including through limits on rights, and through the
recognition of appropriate exceptions where a user ought not be required either to
seek permission, or pay for use, or either. If that is the standard, then a more accurate
way to characterise the chapter than DFAT’s description would be: ‘not as
unbalanced as other recent international IP instruments, but still a very long way from
showing equal concern for all IP stakeholders’.

The chief difficulty, leaving to one side the patent provisions which are not the
focus of my work, is that Chapter 18 embodies extensive, detailed, and strong rights
for IP owners, most of which are stated in mandatory terms:

- A broad conception of the kinds of subject matter that can be claimed
  exclusively (especially in the area of patent, but also in trade mark and in
  relation to designs);
- A broad scope of rights for IP owners;
- Long-enduring rights (especially in copyright, where the completely excessive
  ‘life plus 70’ term is mandatory); and
- A cornucopia of enforcement procedures, remedies, and other procedural
  advantages (such as presumptions in their favour in litigation).

On the other hand Chapter 18 merely ‘recognises’ other the interests of users or the
broader public without obliging Member States to protect those interests. For example:

- Articles 18.2–18.4, which state various balancing principles, are all expressed
  in optional terms, and in some cases merely ‘recognise’ (without doing
  anything about) the need to promote access to and dissemination of IP-
  protected material. Art 18.15 merely ‘recognises’ the importance of the public
  domain (while doing nothing to enhance or promote it);
- While Parties are required to ratify and implement a series of treaties for the
  protection of rights holders, they are not required to ratify the multilateral
  Marrakesh Treaty to Facilitate Access to Published Works for Persons who
  are Blind, Visually Impaired or Otherwise Print Disabled, which addresses the
  long-standing book famine suffered by the visually disabled.\(^68\)

\(^67\) See discussion in [Burrell & Coleman; get cite***].

\(^68\) ‘The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO’ (Max
September 2011). The Marrakesh VIP Treaty is mentioned elsewhere in the text: see footnote 77
page 37. However, the mention there is optional: it comes as one form of ‘balance’ which Parties
‘shall endeavour to achieve’ (art 18.66) and even then Marrakesh is merely mentioned as one way
such interests are recognised rather than as something that Parties should implement. The fact that
Marrakesh is not even a treaty that Parties are exhorted to ‘make reasonable efforts’ or ‘endeavour’
to implement is a strong sign that user interests are not valued equally in this chapter.
Much has been made too of this provision in copyright, which represents an innovation not found in previous IP chapters of trade agreements, but which still only requires effort, not accomplishment:

*Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, inter alia by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.*\(^6^9\)

The inclusion of positive language on exceptions in copyright is obviously a step towards a more balanced system, in that it recognises the legitimate interests of people beyond right holders. By making explicit the need for balance in IP systems such provisions can (in conjunction with other provisions, in particular Articles 18.2–18.4) support an interpretation of the purposes of the agreement as a whole that reinforces the importance of a range of interests and is not confined to strengthening IP rights.\(^7^0\) The existence of provisions reflecting broader societal interests in IP beyond those of rights holders is of course welcome in the sense that it is better than nothing: they might help in interpretation of the text so as not to be completely unreasonable.

Overall, it would be fair to say that Chapter 18 is not so ludicrously unbalanced as some past trade agreements (notably, the US’ bilateral trade agreements, which have failed to include any significant references to, or protections for, the interests of anyone but right holders.\(^7^1\) But we should be under no illusions that this is a balanced chapter.

2. **Does the Chapter provide sufficient flexibility to engage in future reform of IP law, or will it hamper law reform processes?**

IP law is intended to promote innovation and creativity. It operates in a policy space where it needs, at times, to be responsive to shifting technology and changing business models. As a result, the details of IP law evolve at a rapid rate: since 1968

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\(^6^9\) Trans-Pacific Partnership Agreement, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam, negotiations concluded 5 October 2015 (not yet in force) Article 18.66. Underlining is my emphasis.

\(^7^0\) ***citations needed.

\(^7^1\) For one detailed exploration of this issue in relation to safeguards for defendant interests and rights in the context of IP enforcement, see my forthcoming article, Kimberlee Weatherall, ‘Safeguards For Defendant Rights and Interests in International Intellectual Property Enforcement Treaties’, *American University International Law Review* (forthcoming 2016). In that article, I have a table that strikingly shows the complete absence of most defendant safeguards from US FTA texts compared to TRIPS or the TPP.
our Copyright Act has been amended in a substantive way at an accelerating rate. The Patents Act 1990 (Cth) act has been amended 25 times since enactment, and twenty times since TRIPS came into effect in 1995 (i.e. once a year). And Australia’s immediate past experience with the Australia-US Free Trade Agreement proves that detailed text in trade agreements causes problems for everyone: for governments wanting to reform rules; for users and for the very IP owners such texts purport to benefit. By contrast, if the TPP is designed to be a framework for regional economic integration, it is designed to stand for decades. It would therefore make no sense to include detailed, inflexible IP rules in the TPP.

And yet Chapter 18 is extraordinarily detailed. At 75 pages; 83 clauses; 161 footnotes; 6 annexes, it dictates the form and substance of vast swathes of IP law:

- In copyright, it sets out who should be protected by copyright; a copyright owner’s rights in a great deal of detail; (some of it technology specific); sets a very long minimum term of protection; and detailed rules relating to enforcement including a prescriptive model for anti-circumvention law;

- In trade mark law, it sets out what kinds of things can be trade marks; what rights trade mark owners must have, and detailed requirements for trade

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72 Based on a review of available Commonwealth legislative activity 1973–2011 as reflected in online databases, including legislation referring to copyright in the title and other significant legislation: Copyright Amendment Act 1980 (Cth); Copyright Amendment Act 1983 (Cth); Copyright Amendment Act 1984 (Cth); Copyright Amendment Act 1986 (Cth); Copyright Amendment Act 1989 (Cth); Copyright Amendment Act 1991 (Cth); Copyright Amendment (Re-enactment) Act 1993 (Cth); Copyright (World Trade Organization Amendments) Act 1994 (Cth); Copyright Amendment Act (No 1) 1998 (Cth); Copyright Amendment Act (No 2) 1998 (Cth); Copyright Amendment (Computer Programs) Act 1999 (Cth); Copyright Amendment (Digital Agenda) Act 2000 (Cth); Copyright Amendment (Moral Rights) Act 2000 (Cth); Copyright Amendment (Parallel Importation) Act 2003 (Cth); US Free Trade Agreement Implementation Act 2004 (Cth); Copyright Legislation (Amendment) Act 2004 (Cth); Copyright Amendment (Film Directors’ Rights) Act 2005 (Cth); Copyright Amendment Act 2006 (Cth); Therapeutic Goods Legislation Amendment (Copyright) Act 2011 (Cth); Intellectual Property (Raising the Bar) Act 2012 (Cth); Copyright Amendment (Online Infringement) Act 2015 (Cth). This may be an incomplete list.

73 Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd (2013) 253 CLR 284, Crennan and Kiefel at [280] 382 (the judgment says 24, but in 2015 Australia legislated to implement the TRIPS Protocol: Intellectual Property Laws Amendment Act 2015 (Cth)).


75 Art 18.62 (performers and producers of phonograms).

76 Art 18.58 (right of reproduction); 18.59 (right of communication); 18.60 (right of distribution); 18.62 (rights in performances and phonograms).

77 Art 18.62.3 in particular (distinguishing between analogue and digital transmissions).

78 Art 18.63.

79 Art 18.68.

80 Art 18.18, 18.19

81 Art 18.20; 18.22.
mark application and revocation systems;\textsuperscript{82} with similarly detailed requirements regarding geographical indications;\textsuperscript{83}

- In patent law, there are detailed rules regarding patentable subject matter, including some very detailed rules regarding certain kinds of inventions that must be patentable;\textsuperscript{84} rules about when something is sufficiently inventive;\textsuperscript{85} and includes rules regarding extensions of patent term that have already proved expensive for Australia;\textsuperscript{86}

- It requires an extensive array of enforcement procedures and remedies\textsuperscript{87} including factors that courts should consider in setting damages, and very, very broad requirements for criminal liability, many of which, while currently present in Australian law, are completely untested.

Chapter 18 does not just lock in substantive IP rules: it also seeks to lock in the current, particular system of national IP registered rights (albeit without, as noted earlier in this paper,\textsuperscript{88} getting down to a level of detail that would allow for a single application for rights to be used by an applicant without considerable amendment for each jurisdiction). In addition to detailed provisions on the registration system for patents, trade marks and geographical indications,\textsuperscript{89} there are provisions requiring that patents and trade marks be presumed valid in court.\textsuperscript{90} If we are presuming that registered rights are valid, we are assuming a particular system, namely, local substantive examination by an IP office, leading to presumptively valid marks and patents. But systems of local examination are under strain from the sheer number of patents and trade marks now being sought. Sometime in the next few decades we may want to move away from local substantive examination, and experiment with more streamlined processes or reliance on overseas examination.\textsuperscript{91} Locking in a particular kind of assumption about the way that grant processes work, will at least complicate, and may preclude attempts to introduce more efficient and coordinated processes.

Obviously there is flexibility in Chapter 18. The chapter explicitly leaves local implementation to domestic legislatures.\textsuperscript{92} Chapter 18 leaves untouched many aspects of local implementation of thresholds for protection (such as originality in copyright;
or inventiveness, novelty, and usefulness in patent, or distinctiveness in trademark) and standards for infringement. Ownership rules and initial allocation of rights are also untouched. The enforcement provisions require the existence of procedures or remedies, but leave to local legislatures and courts the actual circumstances in which they will be imposed. States retain the right to introduce exceptions subject to fulfilling certain standards. These flexibilities should not be underestimated. But nevertheless, many structural aspects of the IP system are locked in by this chapter. As a result, Chapter 18 erects barriers to IP reform, and this should be acknowledged as a cost of the TPP.

3. **Does Chapter 18 provide a clear, coherent set of IP rules?**

A final standard against we can judge Chapter 18 as a set of IP rules is to consider the coherence of those rules. One thing that perhaps any stakeholder in the IP system could agree on is that the rules ought at least to be reasonably clear, and not unnecessarily complex. According to Australia’s Department of Foreign Affairs and Trade, Chapter 18 ‘establishes a common set of rules on intellectual property protection and enforcement … These rules will help … support Australia’s creative and innovative industries by promoting certainty’. Contrary to this assertion, however, the TPP does not create a common standard of IP rules. It is impossible to read Chapter 18 and understand what a Member Country’s IP obligations would be. Even for the most expert reader, it is a nightmarish quagmire of legalese. While a degree of ‘constructive ambiguity’ is to be expected in the drafting of treaties, so as to leave room for the exercise of sovereignty, the problems with the TPP go beyond constructive ambiguity. The problem is that the rules, in the TPP, are not necessarily the rules, no matter how clear they look.

A first problem is that Chapter 18, despite its length and complexity, is an incomplete statement of IP rules because it *adds to*, rather than replacing existing international obligations. The TPP creates a range of IP standards that interact in complex ways with side letters, annexes, and other treaties, to establish different

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93 For example, the degree of similarity which would lead to infringement of a trademark or of copyright is not dictated by Chapter 18.

94 National Interest Analysis, Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam (Auckland, 4 February 2016) [2016] ATNIA 4, [37].

95 This appears to be a result of a negotiating stance adopted by many parties to the TPP negotiations, that the best kind of agreement would be one that required no changes to local IP law. The implication of this negotiating stance is, of course, that since there are relatively few changes to IP law anywhere, there are few areas where any IP owner will get any concrete benefit from Chapter 18 at all.
rules for different TPP members. The TPP parties chose to be cagey and inconsistent regarding how the TPP text is intended to interact with other existing treaties.  

In some cases, obligations are contracted or expanded as between two parties to the TPP via a side letter. So you can read the text of the TPP and still, apparently, be in the dark. In Australia’s case:

- A side letter between Australia and the US singles out three articles in the TPP which the Parties “understand” ‘shall govern the relationship between Australia and the United States’ in substitution for equivalent provisions in the Australia-US Free Trade Agreement (AUSFTA);
- Another side letter with the US that purports to interpret AUSFTA provisions on government use;
- A side letter between Australia and Japan acknowledges difficulties regarding copyright term which will have to be addressed through industry dialogue; and
- Side letters between Australia and Peru, and Australia and Malaysia address questions of traditional knowledge (to what effect is hard to work out).

At other times, Chapter 18 has footnotes which flatly contradict the text, and provisions which appear to mean one thing until some other article much later in the chapter is considered, and provisions that are utterly incomprehensible unless detailed research is done on other treaties and reservations to those treaties. In other cases, the TPP text itself creates multiple (mutually exclusive) options. One example relates to the provisions on intermediary liability. These rules govern the

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96 Article 1.2 of the TPP is not clearly drafted. It is not clear to me that anyone has fully thought through how any of the multiple overlapping sets of rules that Australia has now negotiated in the Japan-Australia Economic Partnership Agreement, AUSFTA, the Korea-Australia Free Trade Agreement and the TPP as well as TRIPS are intended to interact as a matter of international law.

97 ***check whether anyone has analysed the legal status of ‘side letters’?

98 I say ‘apparently’ because the legal effect of side letters is not entirely clear.

99 Other side letters pertain between other countries: the US has side letters with a number of countries, for example, requiring those countries to act in good faith and not undermine the intent of the provisions in Chapter 18 regarding geographical indications.

100 These areas are the regulatory review exception in relation to patents for pharmaceuticals (TPP art 18.49); the anti-circumvention provisions (TPP art 18.68) and patent term adjustment for granting authority delays (art 18.46.3–18.46.4). Exactly what this means for Australia’s relationships with other TPP countries and indeed other non-TPP countries is unclear. Under Article 4 of TRIPS, other members of the WTO are entitled to Most Favoured Nation treatment. Does that treatment relate to the text of AUSFTA, or does the Annex between the US and Australia govern Australia’s obligations to other WTO Members? It is also unclear exactly what this means in relation to other provisions in AUSFTA: presumably the intention is that both govern. This could get very complex.***

101 ***include key text from Malaysia or Peru side letter with short comment on whether it binds to anything at all.

102 For example, footnote 89 to article 18.68.

103 For example, Art 18.9 (transparency) interacts with art 18.7 and 18.24 (converts exhortation to obligation to publish).

104 See in particular here the provisions on national treatment. I have analysed these in some depth in Kimberlee G Weatherall, ‘Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 1 - General Provisions, Trade mark, GIs, Designs’ (2015) available at: http://works.bepress.com/kimweatherall/31/.
extent to which online service providers – search engines, content hosts, and ISPs – are protected from liability for copyright infringement in return for cooperating with copyright owners to act against infringers. Online service providers operate globally and digitally – consistent rules could assist the flow of digital trade. The TPP however sets out at least four different sets of rules, even before quirks of local implementation kick in. These are not, however, four different options from which countries can choose the one which works best – Annex 18-E, for example, is only open to Canada, and other countries may be bound to a particular model by a prior trade agreement with the US.

Complexity at this level was not inevitable, nor is it necessary to achieve an appropriate level of IP protection in TPP countries. The usual way to accommodate differing systems in treaties is to write the rules at a sufficient level of generality that all systems are accommodated, and/or state goals to be aimed for rather than specific rules meant to achieve the goals. Rules written that way have the advantage of being more likely to stand for decades rather than a few short years. Such extraordinary, needless complexity creates unnecessary costs: for government, and for anyone interested in the current scope of Australia’s international IP law obligations, including any stakeholder wishing to suggest needed reforms. It also contributes to legal uncertainty. Further contributing to uncertainty are a number of provisions where the negotiators adopted a kind of ‘constructive ambiguity’: a compromise where the meaning of treaty terms remain intentionally unsettled in order to reach

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105 Section J sets up one set of rules, broadly similar to article 17.11.29 of AUSFTA, but with some different wording. Note too that Section J is not one of the provisions singled out in a side letter as superseding the Australia-US Free Trade Agreement, meaning presumably Australia is required to comply with both sets of rules. Section J in conjunction with footnote 155 contemplates a different system, where notices alleging infringement are sent to an independent organization for verification before being sent on to ISPs for action (albeit this would not be open to Australia, owing to AUSFTA). Annex 18-E allows Canada to maintain its system of notice and notice (rather than notice-and-takedown) and statutory secondary liability (but appears not to apply to anyone else, since to take advantage of annex 18-E, such a system would have to be in effect at the date of in principle agreement of the TPP – ie back in October 2015). Annex 18-F allows a Party may implement Article 17.11.23 of the US-Chile FTA instead of Section J (this appears to be general – ie other countries could also choose to use the Chile model).

106 It is, of course, explicable. It is a result of the firm commitment of many TPP countries to change as little as possible about their local IP laws, and the determination of the US (it seems) not to give up anything gained in previous bilateral agreements, leading to many qualifications of the apparent rules. It is notable that Australia’s trade minister made much of the fact that ‘the TPP will not require any changes to Australia’s intellectual property laws or policies, whether in copyright, pharmaceutical patents or enforcement: http://www.malcolmturnbull.com.au/media/historic-trans-pacific-partnership-tpp-agreement [6 October 2015]. See similar statements by Trade Minister Andrew Robb; eg http://www.andrewrobb.com.au/Portfolio/PortfolioMediaReleases/tabid/71/articleType/ArticleView /articleId/1939/Trans-Pacific-Partnership-TTP-PACT-TO-DRIVE-JOBS-GROWTH-AND-INNOVATION-FOR-AUSTRALIA.aspx [6 October 2015].

107 See Weatherall, above n 74. In that paper I discuss the way that TRIPS (which is drafted at a much more general level) did not cause difficulties for IP reform for some time, whereas AUSFTA (which is much more detailed) was causing difficulties for reform and standing in the way of ideas even proposed by right holders within a decade.
agreement. 108 Obvious examples of this approach are the provision on data protection for biologics, 109 and the provision on trade secret protection, 110 both of which have already generated debate regarding their meaning. 111

Provisions of this kind should cause us seriously to question the TPP IP chapter. How can we assert that a chapter represents a ‘gold standard’ for IP rules for the 21st Century, when (a) it in fact is not one standard but a multitude of standards, and (b) it is hard even to work out what that standard is?

III. CONCLUSIONS: IS THE TPP CHAPTER 18 “THE NEW TRIPS”?

At the 2016 Fordham IP Conference in New York, a senior government official described Chapter 18 of the TPP as ‘the new TRIPS’. At the time I recall thinking that this was a big claim, and not a justified one, for all the reasons already outlined in the this paper. I remain of the view that as a set of IP rules, and when judged for its contribution to the TPP as a trade agreement, Chapter 18 does not stand up well compared to the TRIPS Agreement negotiated in the 1990s. Chapter 18 is infinitely more complex, less coherent, and less balanced than TRIPS. It adds in significant ways to the rights which a State must confer on right holders, and although it contains new text recognising a range of other interests in the IP system, the text notably fails to give mandatory status to rights or interests beyond those of (existing kinds of) IP owners.

But in another way, Chapter 18 of the TPP is indeed ‘the new TRIPS’, because it precisely follows the model set by TRIPS. It focuses on requiring certain minimum standards of IP protection in domestic law. It does very little to actually address IP-related barriers to movement of goods or the provision of services across borders. It recognises the differentiated interests of countries at different stages of development and with very different economies and economic models only in the most problematic way: namely, by allowing for transition periods so there is a delay on the requirement to observe certain rights. 112 Transition periods of this kind were also included in TRIPS – and have been extended, again and again, as the parties to TRIPS have recognised the pointlessness of seeking to impose full TRIPS standards on Least Developed Countries.

109 TPP art 18.51.
110 TPP art 18.78.
111 [***get refs]
112 These two are complex. The transitional provisions, which set up different times for different rules coming into effect for different countries, go on for 6 pages and set up transitional periods but also rules for what happens if a country drags its feet too much.
This is precisely the problem with Chapter 18 of the TPP. It is ‘the new TRIPS’, but that is not what the TPP ought to have had. While I have criticised the TPP for not addressing trade issues, and for focusing on dictating domestic IP standards, a similar criticism could be (and was\textsuperscript{113}) leveled against the TRIPS Agreement, which similarly focused on substantive IP law, although it also included extensive measures on border seizures of counterfeit and pirated goods. As an instrument of economic integration, TRIPS had serious weaknesses. But TRIPS was a document of its time. It could justified on the basis that the absence of IP protection at a basic level (and the copying such absence enabled) was a barrier to trade faced by IP-intensive exporting industries. Beyond a certain point, however, attempts at further harmonisation or reduction of differences between legal systems cease to look like the reduction of barriers to trade, and start to look instead like the erection of barriers to reform.

To some extent, the limits of legal harmonisation have been recognised in both the EU and in the CER+ plans of Australia and New Zealand, which have both shifted significant attention towards addressing the difficulties around acquisition of region-wide rights and, in the case of Europe, with the creation of the European Patent Court, the difficulties of multi-jurisdictional enforcement. The US, on the other hand, and US-led initiatives like the TPP, appear to be stuck in this pattern of endless renegotiation of the finer details of TRIPS. Far from being a 21st Century trade agreement, it seems, the TPP looks backwards. The Asia-Pacific deserved better.

\textsuperscript{113} Fill in with key criticisms of TRIPS dating from mid-1990s.