IP in the TPP: The New TRIPS?

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Against what standard should we assess the IP Chapter?

1. From a trade perspective
2. As a set of IP rules
Does Chapter 18 address barriers to trade in IP?

[laughs. moves on.]
But seriously, there are ways in which IP is a barrier to trade, and there are even international precedents for addressing those barriers, some of them local.

What would a real trade-in-IP chapter address?

1. Parallel importation
2. Cross-border licensing to facilitate cross-border (especially digital) services
3. The costs of acquiring and enforcing multi-jurisdictional IP rights

Who is actually doing this?

- **European Union**: intra-EU exhaustion; digital single market initiatives; community IPRs; European Patent Office; working towards EU patent court.
- **Australia-NZ CER**: working towards single examination; single patent and trade mark attorney profession.
And no, you can’t argue that the TPP at least harmonises IP law and is therefore helping businesses across borders.

Take copyright term. Trade problem: Copyright expires first in Aust and only later in NZ, then goods legitimate in Aust are not legit in NZ.

**Real harmonisation** that enables goods and services to flow across borders
- Set a fixed term
- Calculate it from the same date (life plus, or from date of publication, but a common basis, EU-wide)

**TPP style pretendy harmonisation** that does nothing to reduce difficulties offering goods/services across borders
- Minimum term only (so could be longer, and is in some places)
- Transition periods (I’m looking at you NZ)
- No common starting date, so stuff that fell out of copyright in Canada between 2005 and TPP start date is in © in Aust but not Canada
- Calculated on different start date (in US, employee works are calculated from creation/publication date)
The TPP is not a common set of IP rules. It is a common *baseline*, and from an economic integration perspective, that is a very different thing.
Apart from one bit

Wine, jamon. © Taco Ekkel CC-BY-SA; available on Flickr.
A third trade-related standard: does Chapter 18 contribute to, or detract from, regional aspirations for the TPP?

DFAT’s Summary:

Five defining features make the Trans-Pacific Partnership a landmark 21st-century agreement, setting a new standard for global trade while taking up next-generation issues. These features include…

– **Platform for regional integration.** The TPP is intended as a platform for regional economic integration and designed to include additional economies across the Asia-Pacific region…

For this to be true, Chapter 18 should be conducive to later expansions of the TPP’s membership.
An expandable framework?

– The TPP IP chapter includes provisions aimed at Chinese and Indian laws that the US does not like:
  – TPP art 18.37.2 cannot be reconciled with s3(d) of the Indian Patents Act; s3(d) is important not only to the Indian pharmaceuticals industry but was upheld by the Indian Supreme Court and grounded in that judgment in constitutional human rights.
  – TPP art 18.77 cannot be reconciled with the Chinese approach to the application of criminal liability for copyright infringement: an approach China went to the WTO to defend against US pressure.

– BUT
  – China is not likely to fear expanding IP rules and rights
  – Not clear what accession negotiations would be like, given the number of special deals, and special rules, in the annexes and side letters
  – In any event, there may be ways around the provisions for both China and India
What about from an IP perspective? Is Chapter 18 a ‘good’ set of IP rules?

1. A (reasonably) ‘balanced’ set of IP rules?
2. Flexible rules that will allow for IP law reform?
3. A set of rules that are clear, coherent, and not unnecessarily complex?
18.2 Objectives
The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

18.4: Understandings in respect of this Chapter
Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

– promote innovation and creativity
– facilitate the diffusion of information, knowledge, technology, culture and the arts; and
– foster competition and open and efficient markets;

through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including rights holders, service providers, users and the public.
Article 18.66: Balance in Copyright and Related Rights Systems

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.
Flexible?

In Australia, in the last twenty years, the Copyright Act has been amended on average once every 2 years; the Patents Act once a year.

How often do you think the TPP will be amended?

75 pages; 83 clauses; 161 footnotes; 6 annexes, dictating the form and substance of vast swathes of IP law.

Chapter 18 also seeks to lock in the current, particular system of national IP registered rights (albeit without getting to a level of detail that would allow for a single application for rights).
Another standard for judging Ch 18 as a set of IP rules

“Gold standard rules” (or even just good rules) should be clear, coherent, and not unnecessarily complex.

Chapter 18 of the TPP is a nightmarish quagmire of legalese.
Constructive Ambiguity?

Article 18.52: Biologics

1. With regard to protecting new biologics, a Party shall either:

   (a) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis*, for a period of at least eight years from the date of first marketing approval of that product in that Party; or, alternatively,

   (b) with respect to the first marketing approval in a Party of a new pharmaceutical product that is or contains a biologic, provide effective market protection:

      (i) through the implementation of Article 18.50.1 (Protection of Undisclosed Test or Other Data) and Article 18.50.3, *mutatis mutandis*, for a period of at least five years from the date of first marketing approval of that product in that Party,

      (ii) through other measures, and

      (iii) recognising that market circumstances also contribute to effective market protection.
Constructive Ambiguity?

Article 18.78: Trade Secrets

2. Subject to paragraph 3, each Party shall provide for criminal procedures and penalties for one or more of the following:
   (a) the unauthorised and wilful access to a trade secret held in a computer system;
   (b) the unauthorised and wilful misappropriation of a trade secret, including by means of a computer system; or
   (c) the fraudulent disclosure, or alternatively, the unauthorised and wilful disclosure, of a trade secret, including by means of a computer system.

3. With respect to the relevant acts referred to in paragraph 2, a Party may, as appropriate, limit the availability of its criminal procedures, or limit the level of penalties available, to one or more of the following cases in which:
   (a) the acts are for the purposes of commercial advantage or financial gain
   (b) the acts are related to a product or service in national or international commerce;
   (c) the acts are intended to injure the owner of such trade secret
   (d) the acts are directed by or for the benefit of or in association with a foreign economic entity; or
   (e) the acts are detrimental to a Party’s economic interests, international relations or national defence or national security.
The problem is that, in Chapter 18 of the TPP, the rules are not necessarily the rules, no matter how clear they look.
The rules are not the rules: 1

— First, on some issues, there are multiple rules. Consider intermediary liability/safe harbour provisions:

— **Four** separate regimes

  • Section J: TPP provisions on safe harbours/intermediary liability (notice & takedown);
  • Section J: TPP provisions but qualified by footnote 154;
  • Annex 18-E: Canada may keep Canadian notice/notice system system
  • Annex 18-F: provisions from US-Chile Agreement.

— **Plus** art 1.2 maintains existing agreements between Parties (so for Australia, must comply with AUSFTA and (less restrictive) TPP rules.
The rules are not the rules: 2

– First, read the footnotes. Sometimes the footnotes contradict the text, and sometimes footnotes in one part of the agreement qualify later provisions.

– Second, obligations depend heavily, not just on other treaties, but on what reservations countries have made to multilateral conventions (but you only know that if you can read the secret code and are obsessive, like me).

– Third, there are annexes, and they change the rules for some countries.

– Fourth, there are side letters. The side letters add obligations, interpret other agreements... but only between parties to side letter.

– Fifth, even if you’ve read the text and annexes and side letters, you still don’t know the rules, because the TPP adds to, rather than replacing existing international obligations.
  – AUSFTA still exists; Australia-Singapore; JAEPA; KAFTA

  – Except then you have to go back to side letters.
    – Australia-US side letter: replaces some bits of AUSFTA with TPP.

– Recall too that IP is subject to unqualified MFN (TRIPS art 4).
  – So, is AUSFTA still binding on Australia when dealing with Singaporean nationals? (is MFN treatment or rules? Are rules AUSFTA rules or AUSFTA as modified by US/Aus via side letter?)
## Different rules in the Annexes

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<thead>
<tr>
<th>Annex/[Article(s)]</th>
<th>Country</th>
<th>Concession</th>
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<tbody>
<tr>
<td>Annex 18-A [18.7.2]</td>
<td>New Zealand</td>
<td>- Treaty of Waitangi overrides UPOV 1991 and its application in NZ, ‘provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of another Party.’</td>
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<td>Annex 18-B [18.50.1]; [18.50.2] [18.52]</td>
<td>Chile</td>
<td>- Articles are overridden to the extent they are inconsistent with Article 91 of Chile’s Law No. 19.039 on Industrial Property as at entry into the TPP agreement.</td>
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<td>Annex 18-C [18.50.1]; [18.50.2] [18.52.1]</td>
<td>Malaysia</td>
<td>- Malaysia is explicitly allowed to set a time limitation for operation of 18.50.1-2 (Protection of Undisclosed Test or Other Data) of 18 months for marketing approval to be sought by an applicant for pharmaceutical products granted approval in other countries.</td>
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<td>Annex 18-D (Part 1) [18.46.3] [18.48.2]</td>
<td>Peru</td>
<td>- Recognition of domestic restrictions on application of TPP provisions and commitment to try to overcome them, failing which secondary obligations are created, which are less constractive than the provisions in the TPP?</td>
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| Annex 18-D (Part 2) [18.48.2] [18.50.1(b)] [18.50.2] [18.52] | Peru        | - Where it relies on 18.50.1(b), Peru can rely on the first marketing approval date in another country as the start time regarding the protection afforded to undisclosed test or other data/biologics where it grants marketing approval within 6 months of filing in Peru.  
  - Peru can apply a period of protection which is differed and specified in the United States – Peru Trade Promotion Agreement.
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This level of complexity was not inevitable.

It is explicable. But it was not inevitable and it is not excusable.

If you can’t do a deal, then don’t do a deal at all. And don’t do 12 different deals and call it an agreement or a “common set of rules”
Chapter 18 is the new TRIPS. In all the wrong ways.

Should have got a new model.

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