

# INTELLECTUAL PROPERTY IN THE TPP: NOT ‘THE NEW *TRIPS*’

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*The intellectual property (‘IP’) chapter in the Trans-Pacific Partnership (‘TPP’) was one of the most contentious during negotiations, and remains controversial in signatory countries. This article examines the background to, and content of, the TPP’s IP Chapter, and comments on its merits from two perspectives. First, it considers ch 18 as an IP chapter in a trade agreement, assessing the extent to which it is likely to promote trade and foreign investment, address trade-related issues in IP, reduce barriers to trade in IP or IP-intensive goods, facilitate economic integration, or promote or detract from broader trade goals of the TPP. Second, it considers the IP Chapter as a set of IP standards to be applied in TPP countries at a domestic level, arguing that ch 18 constitutes a backward-looking, incoherent and unbalanced set of standards that cannot be a model for future multilateral discussions. The IP Chapter is therefore a failure: it does not address the real issues in IP-intensive trade, and lacks merit as a set of IP standards. This conclusion provides further support for critics who characterise the chapter as merely the result of naked rent-seeking.*

## CONTENTS

I	Introduction.....	1
II	Evaluating Chapter 18 as Part of a Trade Agreement.....	5
	A Will the TPP Increase Trade or Technology Transfer by Raising (Domestic) IP Standards?.....	6
	B Does the IP Chapter Reduce Barriers to Trade or Facilitate Cross-Border Business?.....	9
	C Does the IP Chapter Contribute to or Detract from the Broader Trade Ambitions of the TPP? .....	17
III	Evaluating Chapter 18 as a Set of IP Standards.....	20
	A Does Chapter 18 Provide a Balanced Set of IP Rules? .....	21
	1 Does the Chapter Provide Sufficient Flexibility to Engage in Future Reform of IP Law, or Will It Hamper Law Reform Processes? .....	24
	2 Does Chapter 18 Provide a Clear, Coherent Set of IP Rules?.....	26
IV	Conclusions: Is Chapter 18 ‘the New <i>TRIPS</i> ’?.....	29

## I INTRODUCTION

The intellectual property (‘IP’) chapter in the *Trans-Pacific Partnership* (‘TPP’)<sup>1</sup> was one of the most contentious during negotiations.<sup>2</sup> Over the course of negotiations, it was the subject of multiple leaks and conspiracy theories and,

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<sup>1</sup> The *Trans-Pacific Partnership* was concluded between the government of Australia and the governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. See *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) (‘TPP’).

<sup>2</sup> See, eg, ‘Business Lobbyist Sees Strong Objections to US IPR Demands in TPP’ (2012) 30(21) *Inside US Trade* (online); ‘USTR Faces Resistance on Variety of Copyright Issues in TPP Talks’ (2012) 30(12) *Inside US Trade* (online).

in the later stages, a standoff over biologics data protection.<sup>3</sup> It remains controversial in signatory countries where ratification is being debated.<sup>4</sup> But at the 2016 Fordham IP Conference in New York, a senior government official and TPP negotiator likened ch 18 of the TPP to the World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS').<sup>5</sup> This is a grand claim indeed: TRIPS has been described as 'the most significant development in international intellectual property, certainly of the twentieth century';<sup>6</sup> one which ushered in 'a brand new era' in global IP regulation.<sup>7</sup>

Claims that ch 18 will play as central a role in international IP law as TRIPS are both overblown and premature. The TPP is no World Trade Organization and ch 18 is not, at least for now, the new global IP standard. The rather motley collection of countries that negotiated the TPP is first and foremost regional, and thus excludes both major IP owning and generating powers like Europe and swathes of the world's poorer countries. Indeed, the TPP group is sub-regional: it excludes key players, including most obviously China, but also India, South Korea and Indonesia.<sup>8</sup> The TPP would need to expand its membership to have even serious regional significance, let alone a global role.

Furthermore, at the time of writing — in September 2016 and in the heat of a controversial US presidential campaign — we do not know whether the TPP will ever come into effect. The international environment for trade liberalisation and for economic integration is in a state of flux, if not crisis. The European Union has been shaken by a British vote for Brexit; and major countries in the EU including Germany have turned against the *Transatlantic Trade and Investment Partnership* ('TTIP') negotiations with the US. In countries around the world, public opinion appears increasingly hostile to the projects of globalisation, free trade and free movement of goods and people. The Asian region has shown some

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<sup>3</sup> See, eg, 'TPP Faces Uncertain Future, with Lawmaker Objections, Elections Looming' (2016) 34(1) *Inside US Trade* (online).

<sup>4</sup> See, eg, New Zealand, *Parliamentary Debates*, House of Representatives, 11 May 2016 10982–3 (Dr Kennedy Graham); New Zealand, *Parliamentary Debates*, House of Representatives, 4 May 2016, 10765–6 (Fletcher Tabuteau). For examples from Canada, see Canada, *Parliamentary Debates*, House of Commons, 18 February 2016, 1083 (Irene Mathysen); Canada, *Parliamentary Debates*, House of Commons, 1 June 2016, 3915–16 (Tracey Ramsey). There is also an ongoing public consultation process on the implementation of the TPP in Canada: Parliament of Canada, Standing Committee on International Trade, 'Canadians Are Invited to Share Their Views on the Trans-Pacific Partnership (TPP)' (Press Release, 10 March 2016) <<https://perma.cc/WA8W-6PV9>>.

<sup>5</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) ('TRIPS').

<sup>6</sup> Ruth L Okediji, 'Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection' (2004) 1 *University of Ottawa Law and Technology Journal* 125, 127. See also Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP' (2011) 18 *Journal of Intellectual Property Law* 447, 448.

<sup>7</sup> Susan K Sell, 'Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS, and Post-TRIPS Strategies' (2002) 10 *Cardozo Journal of International and Comparative Law* 79, 79.

<sup>8</sup> For a general discussion of excluded countries, regions, and players and the impact of excluding them, see Peter K Yu, 'TPP and Trans-Pacific Perplexities' (2014) 37 *Fordham International Law Journal* 1129.

enthusiasm for trade agreements,<sup>9</sup> but the TPP is only one of a number of overlapping trade initiatives. Another is the *Regional Comprehensive Economic Partnership* ('RCEP') negotiation which involves both India and China.<sup>10</sup> The TPP could easily be eclipsed, or run aground on one or other of these reefs and never come into force.

Even assuming the TPP does come into force, it is not even clear what it means to assert that ch 18 of the TPP is, or has the potential to be, 'the new *TRIPS*'. The claim is classic political rhetoric: capable of being understood by the listener according to their own perspective on *TRIPS* itself. *TRIPS* has been intensely analysed and its substantive IP rules have been both criticised and praised.<sup>11</sup> *TRIPS*' place in the complex political economy of international IP has also been extensively debated: in particular its history as the result of the concerted efforts of rights-holders,<sup>12</sup> and its role in the history of bilateral and multilateral IP treaty-making.<sup>13</sup> Commentators have disputed whether *TRIPS*

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<sup>9</sup> On the proliferation of free trade agreements in Asia (the so called 'Noodle Bowl'), see Richard E Baldwin, 'The East Asian Noodle Bowl Syndrome' in Daisuke Hiratsuka and Fukunari Kimura (eds), *East Asia's Economic Integration: Progress and Benefit* (Palgrave MacMillan, 2008) 45. Note however commentators arguing that the Asian FTAs are low quality, having excluded sensitive areas and involved limited commitments to either trade liberalisation or economic integration: see, eg, John Ravenhill, 'The Move to Preferential Trade on the Western Pacific Rim: Some Initial Conclusions' (2008) 62 *Australian Journal of International Affairs* 129; Ann Capling, 'Australia's Trade Policy Dilemmas' (2008) 62 *Australian Journal of International Affairs* 229; Ann Capling and John Ravenhill, 'Multilateralising Regionalism: What Role for the Trans-Pacific Partnership Agreement?' (2011) 24 *Pacific Review* 553. It should also not be assumed that the opposition to trade liberalisation notable in the US or EU is absent in Asia: free trade negotiations have catalysed protests in a number of Asian countries, including Korea and Japan: see Christopher M Dent, *New Free Trade Agreements in the Asia-Pacific* (Palgrave Macmillan, 2006) 178–84; Aziz Choudry, 'Examining the Disconnect between Mass Mobilizations and International Trade Union/NGO Networks in Struggles over Bilateral Free Trade and Investment Agreements' (2014) 11 *Globalizations* 107; Mireya Solis and Saori N Katada, 'Unlikely Pivotal States in Competitive Free Trade Agreement Diffusion: The Effect of Japan's Trans-Pacific Partnership Participation on Asia-Pacific Regional Integration' (2015) 20 *New Political Economy* 155.

<sup>10</sup> For a discussion of competition between the TPP and RCEP, see Jeffrey D Wilson, 'Mega-Regional Trade Deals in the Asia-Pacific: Choosing between the TPP and RCEP?' (2015) 45 *Journal of Contemporary Asia* 345; Min Ye, 'China and Competing Cooperation in Asia-Pacific: TPP, RCEP and the New Silk Road' (2015) 11 *Asian Security* 206.

<sup>11</sup> The literature on *TRIPS*' merits as a set of IP standards is too numerous to cite. For book-length treatments, see, eg, Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007); Justin Malbon, Charles Lawson and Mark Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary* (Edward Elgar, 2014); Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell, 4<sup>th</sup> ed, 2012); Graeme B Dinwoodie and Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press, 2012).

<sup>12</sup> See, eg, Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003); Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures* (Routledge, 2010); Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan, 2002).

<sup>13</sup> See, eg, Okediji, above n 6; Graeme Dinwoodie and Rochelle Dreyfuss, 'TRIPS and the Dynamics of Intellectual Property Lawmaking' (2004) 36 *Case Western Reserve Journal of International Law* 95; Laurence R Helfer, 'Regime Shifting: The *TRIPS* Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1.

contributes to reducing barriers to IP-intensive trade, or promoting global trade and foreign investment flows and economic development.<sup>14</sup> In sum, *TRIPS* has both strong critics and strong supporters. In this context, comparing ch 18 to *TRIPS* could, depending on one's perspective, represent a claim that ch 18 is: the new global standard for IP protection; the next stage in the use of international trade agreements to cement the monopoly profits of certain multinational firms and/or the comparative advantage of advanced industrial economies in technological development at the expense of countries that are not (yet) major producers of innovation; a death warrant for poorer citizens in the Asia-Pacific region who will be denied access to life-saving medicines;<sup>15</sup> or an interesting data point in tracking the swinging pendulum of international IP lawmaking between bilateralism and consolidation.<sup>16</sup>

In this article, *TRIPS* is a reference point or precedent for understanding the sources, meaning and merits of ch 18. This article comments on the TPP chapter from two perspectives. First, I consider ch 18 as part of a trade agreement, assessing the extent to which it addresses trade-related issues in IP, reduces barriers to trade in IP or IP-intensive goods, facilitates economic integration from the perspective of IP-owning firms, and affects broader trade goals of the TPP. Second, I assess ch 18 as a set of IP rules,<sup>17</sup> arguing that the chapter is backward-looking, incoherent, inconsistent and unbalanced, and ought not become a multilateral standard. In short, this article shows that the IP Chapter demonstrably fails to meet the claims of its proponents and the negotiators responsible for it. This conclusion speaks 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.

Some TPP critics might see much of the following discussion as beside the point. If ch 18 is simply the outcome of rent-seeking — that is, a projection of the economic interests of certain US firms via the mechanism of a trade deal negotiated by largely captured negotiators — there is little point in considering seriously any public policy ‘fig leaf’ which advocates use to justify the Chapter. It might seem that this article targets only straw men — political rationales of convenience bearing little relation to the actual reasons for the form and content of the TPP. I recognise that the political rhetoric surrounding the TPP has only a limited relationship with the deal itself. Like every trade agreement, it reflects a mix of policy, path dependence and politics. I believe, however, that serious analysis of the trade and IP credentials of ch 18 is still worthwhile. First, claims made regarding the alleged benefits of the TPP for trade and innovation with the

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<sup>14</sup> See, eg, Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21<sup>st</sup> Century* (Peterson Institute for International Economics, 2012); Joseph E Stiglitz, ‘Economic Foundations of Intellectual Property Rights’ (2008) 57 *Duke Law Journal* 1693.

<sup>15</sup> See Stiglitz, above n 14, 1701: ‘When the trade ministers signed the *TRIPS* agreement in Marrakesh in the spring of 1994, they were in effect signing the death warrants on thousands of people in sub-Saharan Africa and elsewhere in the developing countries’.

<sup>16</sup> Okediji, above n 6.

<sup>17</sup> As Dinwoodie and Dreyfuss have argued, *TRIPS* has been, but need not be interpreted as embodying a universal logic or as a ‘code’ of IP rules; implementation involves not just transposing trade rules from treaty into local law, but also making related adjustments to ensure the best chance of getting the desired results: Dinwoodie and Dreyfuss, above n 11, 1–20.

aim of garnering support can and should be refuted. Second, if we eliminate advocates' reasons in favour of ch 18, this supports other arguments that ch 18 ought to be rejected based on concerns about particular rules, such as those affecting access to medicines.<sup>18</sup>

## II EVALUATING CHAPTER 18 AS PART OF A TRADE AGREEMENT

Chapter 18 is but one part of a broader comprehensive trade agreement. As such, it can be assessed for its contribution to the trade and economic goals of the TPP. I note at the outset that it is uncontroversial that the TPP also has geopolitical and security-related purposes. It reflects an attempted US 'pivot towards Asia' and, on the part of other negotiating parties, the desire to keep the US engaged in the region.<sup>19</sup> I am not in a position to judge the role of the TPP within the broader sweep of geopolitical manoeuvrings in the Asia-Pacific region, or US–Japan–China relations: I leave detailed analysis of these issues to others. There is also a critical perspective that characterises the TPP as representing the capture of government purposes by corporate interests, with the agreement itself intended to promote the interests of multinational corporations over and above the interests of populations within the TPP countries. I will have reason to return to this criticism when I consider the merits of ch 18 as a set of IP standards.

My interest in this Part relates to the trade-related goals of the TPP including the immediate goals of reducing barriers to intra-TPP trade in goods and services, and creating a foundation for greater economic integration of the

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<sup>18</sup> United Nations Secretary-General's High-Level Panel on Access to Medicines, *Final Report: Promoting Innovation and Access to Health Technologies* (September 2016) <<https://perma.cc/FW29-P6UT>>; Brook K Baker, 'Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere' (2016) 13(3) *PLoS Med* <<https://perma.cc/68GB-PHYC>>; Laurence R Helfer, 'Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University, 2015) 311; Jing Luo and Aaron S Kesselheim, 'Protecting Pharmaceutical Patents and Test Data: How the Trans-Pacific Partnership Agreement Could Affect Access to Medicines in the US and Abroad' (2016) 18 *AMA Journal of Ethics* 727; Amy Kapczynski, 'The Trans-Pacific Partnership — Is It Bad for Your Health?' (2015) 373 *New England Journal of Medicine* 201.

<sup>19</sup> Ann Capling and John Ravenhill, 'Australia's Flawed Approach to Trade Negotiations: And Where Do We Sign?' (2015) 69 *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': Michael D Shear, 'Obama Vows to Keep Doors Open for Refugees', *The New York Times* (New York), 22 November 2015, A6. See also Michael Froman, 'The Strategic Logic of Trade' (Speech delivered at the Council on Foreign Relations, New York, 16 June 2014) <<https://perma.cc/DJ69-33GG>>. From an Australian perspective, see Elizabeth Ward, 'Opening Statement to the Joint Standing Committee on Treaties on the Trans-Pacific Partnership Agreement (TPP)' (Speech delivered before the Joint Standing Committee on Treaties Inquiry into the Trans-Pacific Partnership Agreement, 22 February 2016) <<https://perma.cc/56K8-3P65>>. For academic considerations of the 'pivot to Asia', see, eg, Georg Löfflmann, 'The Pivot between Containment, Engagement, and Restraint: President Obama's Conflicted Grand Strategy in Asia' (2016) 12 *Asian Security* 92; Jean Garrison and Marc Wall, 'The Rise of Hedging and Regionalism: An Explanation and Evaluation of President Obama's China Policy' (2016) 43 *Asian Affairs: An American Review* 47.

TPP economies. A longer-term trade-related 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').<sup>20</sup> This would require extending the membership of the TPP beyond the countries who signed the TPP in February 2016.<sup>21</sup> There are broadly four ways that the IP chapter could contribute to these trade-related goals of the TPP. It could: (i) impose domestic IP reforms within TPP countries that will encourage trade and investment flows by providing assurances to foreign firms; (ii) reduce IP-related obstacles to trade in goods or services among parties; (iii) promote economic integration by assisting businesses to operate across borders; and/or (iv) provide the conditions for future expansion of the TPP area.

A *Will the TPP Increase Trade or Technology Transfer by Raising (Domestic) IP Standards?*

The IP standards in the TPP do not appear on their face to be much concerned with trade as such. Certain isolated provisions reflect principles that are characteristically found in trade agreements, in particular the requirement that member states provide for equal treatment of foreign and national IP applicants and owners ('national treatment').<sup>22</sup> But most of this 75-page chapter is concerned with domestic IP law. The provisions of ch 18 require the creation, and enforcement, of proprietary rights in intangibles that are territorially-bounded (that is, limited to a single country). These provisions are very detailed. Chapter 18 outlines a broad range of subject matters to be protected by patents, copyright, trade marks, designs and systems for the protection of confidential information and trade secrets.<sup>23</sup> The Chapter also establishes standards for both the exclusive rights to be recognised in these subject matters and principles limiting the exceptions to such rights that can be

<sup>20</sup> The intention that the TPP should be 'a platform for regional economic integration ... designed to include additional economies across the Asia-Pacific region' is stated by the Office of the United States Representative: see Office of the United States Trade Representative, 'Summary of the Trans-Pacific Partnership Agreement' (Press Release, 4 October 2015) <<https://perma.cc/LZ8F-Y8L2>>. As Drahos notes, a free trade area of the Asia-Pacific ('FTAAP') has been proposed and discussed in the Asia-Pacific Economic Cooperation forum since at least the 1990s: Peter Drahos, 'China, the TPP and Intellectual Property' (2016) 47 *IIC: International Review of Intellectual Property and Competition Law* 1, 2.

<sup>21</sup> I am conscious of course that these longer-term goals are closely interrelated with the strategic goals of the TPP, especially from a US perspective: to the extent that the TPP rules, significantly influenced as they are by the US' preferences for open and 'liberal' trade rules, become the framework for a more general Asian free trade area, this is likely to assist the US to retain its influence in the region. More crudely, the TPP aims to write the 'rules of the road', rather than allowing other regional powers, in particular China, to do so and hence exercise greater influence: see Barack Obama, 'State of the Union Address' (Speech delivered in Washington DC, 20 January 2015) <<https://perma.cc/3CWM-5L5B>>. See also sources cited above n 19. This aspect of the strategic role of the TPP depends on the success of the desire to broaden the TPP membership, thus for present purposes we can focus on the trade goal, recognising that success may influence strategic aims.

<sup>22</sup> TPP art 18.8 (National Treatment).

<sup>23</sup> For collected analyses of the (final) TPP language, see Kimberlee G Weatherall, *Selected Works* <<http://works.bepress.com/kimweatherall>>. For an analysis of an earlier proposal, see Sean M Flynn et al, 'The US Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement' (2012) 28 *American University International Law Review* 105.

created by a TPP member state. Finally, ch 18 sets out detailed procedures and remedies each country must provide for owners seeking to enforce those rights. Territorially-bound rights of exclusion as required by the TPP can raise, rather than lower, barriers to entry of goods or services produced in other countries: local IP rights can prevent entry of foreign goods. It is legitimate therefore to ask why a trade agreement is concerning itself with the details of domestic economic regulation and supporting the creation of rights of exclusion that stop at the border.

In this respect, however, the TPP follows a pattern long-established in international economic relations. As Ruth Okediji has pointed out, requiring trading partners to legislate certain IP rights has been a part of trade negotiations for over a hundred years.<sup>24</sup> Countries with comparative advantages in the production of knowledge, technology and culture recognised that they would be at a trade disadvantage if these products could simply be copied;<sup>25</sup> convincing or coercing other countries to protect IP would promote the private interests of ‘their’ local firms.<sup>26</sup> And despite strong opposition from developing countries,<sup>27</sup> the *TRIPS* agreement concluded in 1994 as part of the establishment of the WTO expanded on this same basic model. *TRIPS* focuses almost entirely on establishing *national* standards for IP laws and *national* enforcement requirements, coupled with limited border-related enforcement provisions<sup>28</sup> and limited trade-oriented principles of non-discrimination.<sup>29</sup> This, it was said, would give firms confidence when investing in, or trading into, WTO countries and thus promote trade and development.

The marriage of international trade law and domestic IP standards embodied in *TRIPS* has been criticised, but it is also supported by quantitative evidence dating from the 1990s suggesting that increasing local patent protection has a positive impact on foreign direct investment and technology imports.<sup>30</sup> Keith Maskus points out that firms are loath to license complex technologies without assurance that IP rights can be protected;<sup>31</sup> importing patented

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<sup>24</sup> Okediji, above n 6. See also discussion of early bilateral agreements in Europe: Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer, 1987). On the negotiating history of *TRIPS* and arguments around the trade-IP nexus, see William Cornish and Kathleen Liddell, ‘The Origins and Structure of the *TRIPS* Agreement’ in Hans Ullrich et al (eds), *TRIPS Plus 20: From Trade Rules to Market Principles* (Springer 2016) 3 (and the many sources cited therein); Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer, 2001); Drahos and Braithwaite, above n 12.

<sup>25</sup> Okediji, above n 6, 131–6; Cornish and Liddell, above n 24, 15–20.

<sup>26</sup> Noting of course that, particularly as time has passed, and corporate structures have internationalised, it is questionable whether any large multinational firm, wherever founded, can appropriately be described as ‘American’ or ‘European’.

<sup>27</sup> Developing countries argued that any IP rules in the WTO ought only to deal with direct trade-related issues: see generally Watal, above n 24.

<sup>28</sup> *TRIPS* arts 51–60.

<sup>29</sup> *Ibid* arts 3–4 (National Treatment and Most-Favoured-Nation Treatment principles).

<sup>30</sup> For a summary of economic evidence relating to the trade-IP nexus, see Maskus, *Private Rights and Public Problems*, above n 14. See also Keith Maskus, ‘Intellectual Property Rights and Economic Development’ (2000) 32 *Case Western Reserve Journal of International Law* 471.

<sup>31</sup> Maskus, *Private Rights and Public Problems*, above n 14; Maskus, ‘Intellectual Property Rights and Economic Development’, above n 30.

technologies is a source of productivity growth and technology transfer.<sup>32</sup> Thus many commentators recognise the political and economic reality that IP rights are trade-related, and even agree that the inclusion of some minimum standards for domestic regulation in trade agreements can be beneficial for increasing international trade and technology transfer.

This does not, however, necessarily justify every detail of *TRIPS* or every further expansion in later agreements. Some commentators who support the inclusion of some domestic IP standards in trade agreements have criticised *TRIPS* for going too far. Economic theory and evidence suggest that levels of IP protection should vary with countries' level of development.<sup>33</sup> Commentators have argued that *TRIPS* failed to sufficiently accommodate the development needs of less-developed countries,<sup>34</sup> and imposed a 'one-size-fits-all' model of IP protection. *TRIPS* did allow for transition periods for less-developed countries, so there was a delay on the requirement to observe certain rights.<sup>35</sup> These transition periods 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. *TRIPS*' main mechanism for reflecting the different development needs of its members lies in its flexibilities: provisions that allow adjustment of the basic rules in order to tailor IP standards to local economic and social conditions.

Chapter 18 follows a pattern of many bilateral FTAs negotiated in the post-*TRIPS* era, by including 'TRIPS-plus' provisions (that is, provisions that grant longer, broader, and/or stronger IP rights than *TRIPS* requires, and limit *TRIPS* flexibilities).<sup>36</sup> Chapter 18, in other words, requires IP protection that significantly exceeds the standards established in *TRIPS*: copyright and patent rights must last longer; patents (and trade marks) must cover a broader range of subject matters; additional tools of enforcement must be provided, including very broad criminalisation.<sup>37</sup> Some of these rules — especially those relating to patent and trade secrets — are likely to constitute barriers to further development in less advanced TPP economies. To the extent that rules in the TPP extend the term or subject matter of IP rights, they constrain local follow-on innovation.<sup>38</sup> TPP rules that prohibit circumvention of access controls on copyright material restrict

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<sup>32</sup> Jonathan Eaton and Samuel Kortum, 'Trade in Ideas: Patenting and Productivity in the OECD' (1996) 40 *Journal of International Economics* 251.

<sup>33</sup> Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (September 2002); Maskus, *Private Rights and Public Problems*, above n 14, 133; United Nations Conference on Trade and Development, 'The *TRIPS* Agreement and Developing Countries', UN Doc UNCTAD/ITE/1 (1996).

<sup>34</sup> Maskus, *Private Rights and Public Problems*, above n 14.

<sup>35</sup> *TRIPS* pt VI.

<sup>36</sup> For discussion of (and critiques of) these bilateral agreements, see sources cited above n 13.

<sup>37</sup> For a full analysis of the 'TRIPS-plus' and 'TRIPS-plus-plus' aspects of the TPP, see my detailed analyses collected online at Bepress: Kimberlee G Weatherall, *Selected Works* <<http://works.bepress.com/kimweatherall>>. Those analyses cover copyright and trade mark as well as the general enforcement provisions. For a discussion of the *TRIPS*-plus aspects of the TPP as they relate to patents and pharmaceuticals, see United Nations Secretary-General's High-Level Panel on Access to Medicines, above n 18.

<sup>38</sup> TPP arts 18.37 (patentable subject matter; including new uses of a known product, new methods of using a known product, or new processes of using a known product), 18.48.2, 18.46.4 (patent term extensions), 18.63 (copyright term extension).

access to knowledge.<sup>39</sup> Increased trade secret protection limits knowledge spillovers.<sup>40</sup> Reducing access to medicines has effects on the local population health and the government's budget, and could shrink government's ability to invest in other innovations.<sup>41</sup> And it is highly unlikely that changes of this kind will have positive effects such as increased technology transfer or productivity gains in TPP countries. As Maskus noted in early 2016, there is *no hard evidence that TRIPS-plus rules increase technology flows, technology transfer or information spillovers any more than the simple TRIPS standards*.<sup>42</sup> In short, there is little justification for saying that the domestic IP reforms required by ch 18 will promote economic development or trade.

#### B *Does the IP Chapter Reduce Barriers to Trade or Facilitate Cross-Border Business?*

Another way that a chapter could 'earn its place' in a trade agreement would be by reducing barriers to trade in goods or services, or otherwise improving prospects for economic integration.<sup>43</sup> Arguably an IP chapter within a trade agreement ought to address barriers to trade in IP-intensive goods or trade in IP services, such as difficulties in licensing IP across borders, or otherwise respond to IP-related challenges for businesses engaged in international trade.<sup>44</sup>

In order to reduce barriers to trade in goods, an IP chapter could tackle the rules which enable IP rights to interfere with the free movement (that is, import) of non-counterfeit, authorised goods. This raises the question of parallel importation: that is, importation of goods which have been authorised by the relevant IP owner in their place of manufacture, but which are not authorised by the local IP owner or exclusive licensee.<sup>45</sup> Prohibitions on parallel importation

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<sup>39</sup> Ibid art 18.68 (anti-circumvention rules).

<sup>40</sup> Ibid art 18.78 (trade secret rules).

<sup>41</sup> See sources cited above n 18.

<sup>42</sup> Keith Maskus, 'Patents and Technology Transfer through Trade and the Role of Regional Trade Agreements' (Working Paper, East-West Center Workshop on Mega-Regionalism — New Challenges for Trade and Innovation, 1 March 2016).

<sup>43</sup> Note in this respect art 24 of the *General Agreement on Tariffs and Trade* ('GATT'). Article 24 allows the formation of customs unions and free trade areas without triggering the WTO's most-favoured nation clauses. Article 24 defines a free trade area as a group of territories in which duties and other restrictive regulations of commerce 'are eliminated on substantially all the trade between the constituent territories in products originating in such territories': art 24(8). Thus the parts of a free trade agreement formed in reliance on art 24 of the *GATT* ought to reduce barriers to trade or at least not raise them.

<sup>44</sup> It is arguable that other parts of the TPP more directly address barriers to trade for IP-intensive industries, particularly in services industries. The E-Commerce Chapter, for example, restricts data localisation rules, and contains a number of other provisions aimed at promoting e-commerce and data flows across borders. These provisions have their own critics: see Burcu Kilic and Tamar Israel, *The Highlights of the Trans-Pacific Partnership E-Commerce Chapter* (5 November 2015) Public Citizen <<https://perma.cc/KA5T-GL8T>>.

<sup>45</sup> Abdulqawi Yusuf, 'TRIPS: Background, Principles and General Provisions' in Carlos María Correa and Abdulqawi Yusuf (eds), *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International, 2008) vol 2, 17–18. See also Vincent Chiappetta, 'Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things' (2000) 21(3) *Michigan Journal of International Law* 333. For a detailed discussion of the potential of parallel importation and the economic evidence on its effects, see Maskus, *Private Rights and Public Problems*, above n 14, 172–88.

can serve to maintain price differentials within a free trade area.<sup>46</sup> *TRIPS* allows member states to choose whether to allow parallel importation,<sup>47</sup> and countries adopt a range of positions. The most trade-restrictive approach is a rule of national exhaustion: that is, the right-holder only ‘exhausts’ their rights once exercised within the state, meaning the right-holder can prevent importation. The least trade-restrictive rule is international exhaustion, under which once the IP right has been exercised legitimately somewhere in the world, then the right-holder no longer has any right to control on-sale of the item.<sup>48</sup> Another possible approach is regional exhaustion: once a good has been legitimately produced in, sold or imported into, one country within the region it can be freely on-sold anywhere within the region.

Chapter 18 of the TPP sets no rules in relation to parallel importation:<sup>49</sup> it does not adopt regional exhaustion and allows, but does not mandate, international exhaustion.<sup>50</sup> It also explicitly preserves restrictions on parallel importation that apply between particular countries within the TPP from earlier treaties.<sup>51</sup> In this respect ch 18 fails to remove or reduce one important barrier to the movement of goods. Further, other rules in the IP Chapter will make it *easier* to stop goods at the border, because the border measures in ch 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 goods merely alleged to infringe registered trade marks: a broad set of goods which would include those where infringement is seriously disputed.<sup>52</sup>

We can contrast the TPP with developments in 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 20 years. The European goal of a Europe-wide common market lies at the extreme end of the same continuum of

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<sup>46</sup> For a discussion of the potential business impacts see House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) 45–7.

<sup>47</sup> *TRIPS* art 6.

<sup>48</sup> For detailed discussions arguing that a rule of international exhaustion is trade-promoting (albeit it is a necessary, rather than sufficient condition for free movement of goods across borders), see Irene Calboli, ‘Market Integration and (the Limits of) the First Sale Rule in North American and European Trademark Law’ (2011) 51 *Santa Clara Law Review* 1241; Maskus, *Private Rights and Public Problems*, above n 14. The latter includes a detailed discussion of the evidence on the impact of regional exhaustion in the EU.

<sup>49</sup> TPP art 18.11.

<sup>50</sup> Thus, for example, it would be possible under ch 18 for Australia and New Zealand to adopt Trans-Tasman exhaustion rules.

<sup>51</sup> 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) arts 17.9.4 (patent), 17.4 (copyright) (‘*AUSFTA*’).

<sup>52</sup> Compare *TRIPS* art 51 and TPP art 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 significantly extends 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’. Even assuming this is the reasoning, the legal rules have been extended to a much broader set of infringements, including those under serious dispute.

economic integration upon which the TPP also lies,<sup>53</sup> and thus provides for an interesting contrast with the approach in the TPP.<sup>54</sup> In the EU, parallel importation was an 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.<sup>55</sup> This helps promote free movement of legitimate goods within the EU.

Services across borders are also an issue that trade agreements could try to address. One difficulty with offering global or 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 (limited) legislative action, in the EU.<sup>56</sup> But the TPP includes no rules that will promote either region-wide licensing or cross-border trade in legitimate goods embodying IP. Indeed, the TPP does not even include aspirational statements or principles 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 art 18.70 which recognises ‘the important role of collective management societies for copyright and related rights in collecting and distributing royalties’. The non-inclusion of any such principles suggests that reducing IP-related barriers to trade in services was not a priority for the negotiators.

Another way the TPP might have helped promote trade among the member states would have been to address IP-related challenges for businesses engaged in international trade by reducing regulatory compliance costs, in particular,

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<sup>53</sup> The spectrum of economic integration ranges from preferential trade agreements and free trade areas, through customs unions, common markets, and economic and monetary unions: Giancarlo Gandolfo, *International Trade Theory and Policy* (Springer, 2<sup>nd</sup> ed, 2014) 265–6. Arrangements between countries may deal only with tariffs and other restrictions on imports, or involve harmonisation or unification of other economic policies. The TPP addresses tariffs and barriers but also a range of other policies. The European Union goes further, involving the creation of a common market and (among some but not all EU countries) monetary union.

<sup>54</sup> The European Union is not the only system aimed at regional integration which could be looked to for comparisons. Other regions have taken different approaches to unifying or harmonising IP rules. One interesting example is the system in the Andean Community, examined in detail in Laurence R Helfer, Karen J Alter and M Forencia Guerzovich, ‘Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community’ (2009) 103 *American Journal of International Law* 1.

<sup>55</sup> See generally Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4<sup>th</sup> ed, 2014) 12–15; Christopher M Stothers, ‘The European Internal Market: Exhaustion Plus’ in Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar, 2016) 169.

<sup>56</sup> See *Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market* [2014] OJ L 84/72. For resources which outline the particular benefits of a Digital Single Market for the Telecommunications industry in Europe, see European Telecommunications Network Operators’ Association and Boston Consulting Group, ‘Reforming Europe’s Telecoms Regulation to Enable the Digital Single Market’ (2013) <<https://perma.cc/XW7S-VETD>>; Wolfgang D Bock et al ‘Reforming Europe’s Telecoms Regulation to Enable the Digital Single Market’ (2014) 93 *DigiWorld Economic Journal* 17.

costs of obtaining and enforcing IP rights in multiple jurisdictions.<sup>57</sup> Again the TPP does little of significance in this area. It incorporates a range of provisions on registration of IP rights aimed at ensuring that trade marks and patents can be applied for electronically, and that registers are available online.<sup>58</sup> The text also includes provisions on application and opposition processes in both trade mark<sup>59</sup> and patent.<sup>60</sup> But if anything, such a proliferation of processes, while it may assist in transparency (and help IP owners fight attempts to register trade marks similar or identical to their own), is likely to increase the cost of acquiring rights. Furthermore, much of the cost of acquiring rights across countries arises from the application process. Each IP office has different rules about how IP applications must be drafted: what must be disclosed in a patent application, and how claims are worded; how many claims a patent application may have; or what diagrams must be included in design and trade mark applications. To acquire effective rights in a range of countries, therefore, a business must engage skilled advisers to analyse the requirements and redraft. Most likely, businesses would like to take a trade mark application from one country and use it regionally or globally. Notably, the TPP does *not* require members to join existing treaties which streamline multi-jurisdictional applications and hence get closest to this ideal.<sup>61</sup>

Again, it is interesting to compare developments in Europe, where the EU has developed a series of systems for Europe-wide registered IP rights in trade mark (EU trade marks or ‘EUTMs’),<sup>62</sup> patent<sup>63</sup> and designs (Community designs).<sup>64</sup> Initial validity of these rights is determined by the European Patent Office (‘EPO’) (patents) and the European Union Intellectual Property Office (‘EUIPO’) (trade marks and designs). These systems facilitate the acquisition of

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<sup>57</sup> The National Interest Analysis tabled in Parliament by the Australian Government alongside the TPP claimed that ch 18 ‘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’: *National Interest Analysis: Trans-Pacific Partnership Agreement* [2016] ATNIA 4, [37].

<sup>58</sup> TPP art 18.9 (general provision on transparency). See also TPP art 18.24 (trade marks).

<sup>59</sup> *Ibid* arts 18.23–6. Relatedly the text deals with processes relating to geographical indications: at art 18.31.

<sup>60</sup> *Ibid* arts 18.38–9, 18.42–5.

<sup>61</sup> 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, referring to *Geneva Act of the Hague Agreement concerning the International Registration of Industrial Designs*, opened for signature 2 July 1999, 2279 UNTS 156 (entered into force 23 December 2003). 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 n 1, referring to *Protocol Relating to the Madrid Agreement concerning the International Registration of Marks*, opened for signature 27 June 1989, WIPO Lex No TRT/MADRIDP-GP/001 (entered into force 1 December 1995, as amended on 12 November 2007) (‘*Madrid Protocol*’) and *Singapore Treaty on the Law of Trademarks*, opened for signature 27 March 2006, [2012] UKTS 32 (entered into force 16 March 2009) (‘*Singapore Treaty*’).

<sup>62</sup> *Council Regulation 40/94/EC of 20 December 1993 on the Community Trade Mark* [1994] OJ L 11/1.

<sup>63</sup> *European Patent Convention*, opened for signature 5 October 1973, 1065 UNTS 199 (entered into force 7 October 1977).

<sup>64</sup> *Council Regulation No 6/2002/EC of 12 December 2001 on Community Designs* [2002] OJ L 3/1.

EU-wide rights and reduce costs for business. Mechanisms exist for EU-wide enforcement of EUTMs<sup>65</sup> and Community designs.<sup>66</sup> EU-wide enforcement of European patents is not yet possible, but Europe is moving in that direction in patent with plans for the creation of a Unified Patent Court,<sup>67</sup> although this has been complicated by the popular UK vote in favour of leaving the European Union (Brexit).

There have also been some interesting, albeit halting, developments in the Antipodes, evolving out of the *Australia New Zealand Closer Economic Relations Trade Agreement* of 1983 ('ANZCERTA' or 'CER').<sup>68</sup> ANZCERTA aimed at the eventual development of a common market between Australia and New Zealand. ANZCERTA itself does not include an IP chapter,<sup>69</sup> but as part of the recent single economic market program, Australia and New Zealand have recognised the desirability of reducing the cost of acquiring rights in the two jurisdictions. In 2011, the two countries announced their intention to work towards a single regulatory framework for patent attorneys, a single application and examination process for patents, a unified trade mark regime through alignment of registration practice and a single register and a unified plant variety rights regime.<sup>70</sup> Apart from the regulatory framework for attorneys, these ambitions appear to have foundered, with a New Zealand parliamentary committee recently rejecting New Zealand legislation designed to allow single patent examination to go forward to implementation, seeing little prospect of time or cost savings, and better prospects via the development of systems at the World Intellectual Property Organization; these proposals were removed from the recently passed New Zealand Act.<sup>71</sup> But one of the most interesting features of the work program was that it originally proposed streamlining applications *without* harmonising IP laws.<sup>72</sup> The program would have allowed differences in

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<sup>65</sup> Council Regulation No 207/2009/EC of 26 February 2009 on the European Union Trade Mark [2009] OJ L 78/1, arts 96–8.

<sup>66</sup> Council Regulation No 6/2002/EC of 12 December 2001 on Community Designs [2006] OJ L 386/14, arts 80–3.

<sup>67</sup> See generally Unified Patent Court <<http://www.unified-patent-court.org>>.

<sup>68</sup> *Australia New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983 [1983] ATS 2 (deemed entry into force 1 January 1983) ('ANZCERTA'). For a discussion of developments between Australia and New Zealand, see Susy Frankel and M Richardson, 'Trans-Tasman Intellectual Property Coordination' in Susy Frankel (ed), *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, 2011) 527; Susy Frankel et al, 'The Challenges of Trans-Tasman Intellectual Property Coordination' in Susy Frankel and Deborah Ryder (eds), *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, 2013) 101.

<sup>69</sup> Given the substantial shared heritage and history of Australian and New Zealand IP laws, such a chapter would have been superfluous in 1983: see Kimberlee Weatherall, 'The Emergence and Development of Intellectual Property Law in Australia and New Zealand' in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, forthcoming).

<sup>70</sup> Frankel and Richardson, above n 68.

<sup>71</sup> *Patents (Trans-Tasman Patent Attorneys and Other Matters) Amendment Act 2016* (NZ); compare the original Patents Amendment Bill 2016 (83-2) (NZ).

<sup>72</sup> In the period after 1983, Australian and New Zealand IP laws have diverged, most significantly in the ways that the respective regimes recognise indigenous interests in intellectual and cultural property: see Weatherall, 'The Emergence and Development of Intellectual Property Law in Australia and New Zealand', above n 69.

the law regarding patentability and registrability of trade marks to continue,<sup>73</sup> and preliminary work by the offices seemed to suggest this would be possible to implement in practice.

This last point is significant because it might be argued that addressing trade barriers by reforming parallel importation or integrating systems for the grant of IP rights requires, as a necessary precondition, a high level of legal harmonisation. Australia and New Zealand share a legal heritage and already have quite similar (although far from identical) IP laws;<sup>74</sup> Europe's initiatives in parallel importation and licensing coexist with an extensive program of IP law harmonisation (or even centralisation).<sup>75</sup> On this basis, it might seem premature to argue that the TPP ought to have aimed at these barriers to trade. Instead, ch 18 could be characterised as making the legal systems more similar, with further integration of systems a potential future goal. The program of work between Australia and New Zealand raises some doubt whether countries must have the same IP law before IP systems can be better integrated.

However, the TPP does not harmonise IP law in a way that will enable direct barriers to be addressed. There is a difference between focusing on reform to rules posing the most significant barriers to cross-border trade (as has happened in the EU), and treaty rules that seek to 'raise' standards of protection without focusing directly on ensuring changes that will, in practical terms, ensure that a product legitimately manufactured in one country can be sold throughout the region.

To illustrate the difference, consider copyright term. The EU recognised that trade across borders would be facilitated by the existence of a common copyright term. If material protected in one country is also protected in others, and material in the public domain in one country is in the public domain in others, this helps ensure that material legitimately sold in one country can be legitimately sold throughout the region. The EU directive on copyright term therefore *fixes* the term of copyright, ensuring that copyright expires throughout the EU on the same day. By contrast, the TPP: (a) sets a *minimum* term only; and (b) does not fix the basis on which term is to be calculated. The result is to leave considerable differences between actual copyright terms throughout the TPP region.<sup>76</sup>

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<sup>73</sup> For a discussion, see sources cited above at n 68. 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.

<sup>74</sup> Weatherall, 'The Emergence and Development of Intellectual Property Law in Australia and New Zealand', above n 69.

<sup>75</sup> Harmonisation of trade mark law in the EU preceded the creation of the Community trade mark: for a history, see Timothy W Blakely, 'Beyond the International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection' (2000) 149 *University of Pennsylvania Law Review* 309, 311.

<sup>76</sup> 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*: Lessons for US Trade Policy' (2008) 2 *University of Illinois Journal of Law, Technology and Policy* 259. 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.

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*.<sup>77</sup> Thus when negotiators 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 and reducing costs for business, that is a very different thing.

There is one part of ch 18 which addresses (threatened) trade barriers: the rules relating to geographical indications (‘GIs’).<sup>78</sup> This is an innovative section without precedent in other existing trade agreements. GIs as defined in TPP art 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. Many of the best known examples are European (champagne, Parma ham, parmesan cheese),<sup>79</sup> 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 Bologna preserved meat — are GIs that should only be used on products originating from the relevant European region.<sup>80</sup> This stance is reflected in trade agreements which the EU has concluded with countries in the TPP region,<sup>81</sup> in which the EU trades access to its lucrative market in return for recognition of certain European-derived GIs, and legal prohibitions on their use (even descriptively and in a non-misleading context). The EU agreements append a list of terms that will be either immediately, or progressively, prohibited from use in the trading

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<sup>77</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, WIPO Lex No TRT/BERNE/001 (as amended 28 September 1979, entered into force 19 November 1984) arts 7(6) (Term of Protection), 19 (Protection Greater than Resulting from Convention), 20 (Special Agreements among Countries of the Union); *Paris Convention for the Protection of Industrial Property*, opened for signature 14 July 1967, WIPO Lex No TRT/PARIS/001 (as amended 28 September 1979, entered into force 3 June 1984) arts 19 (Special Agreements), 25(1) (Implementation of the Convention on the Domestic Level); *TRIPS* art 1 (Nature and Scope of Obligations); TPP arts 18.5 (Nature and Scope of Obligations), 18.51(2) (Biologics), 18.77(4) (Criminal Procedures and Penalties), 18.78(1) (Trade Secrets).

<sup>78</sup> TPP ch 18 arts 18.30–6 (Section E: Geographical Indications).

<sup>79</sup> Although note that the definition of GIs in TPP art 18.1, 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 *WIPO Journal* 57, 62, citing Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2012) 183.

<sup>80</sup> Irene Calboli, ‘Expanding the Protection of Geographical Indications of Origin under *TRIPS*: “Old” Debate or “New” Opportunity?’ (2006) 10 *Marquette Intellectual Property Law Review* 181, 203; Michael Handler, ‘The EU’s Geographical Indications Agenda and Its Potential Impact on Australia’ (2004) 15 *Australian Intellectual Property Journal* 173.

<sup>81</sup> See, eg, *Agreement between Australia and the European Community on Trade in Wine*, signed 1 December 2008, [2010] ATS 19 (entered into force 1 September 2010) (‘*EU-Australia Wine Agreement*’). Other countries have also concluded agreements with the EU which preclude use within those countries of a range of terms, including perhaps most recently Vietnam: *Free Trade Agreement between the European Union and the Socialist Republic of Vietnam* (not yet in force) ch 12 art 6, annex GI – I pt A (Geographical Indications) (‘*EU-Vietnam Trade Agreement*’).

partner, often with no grandfathering of existing uses or trade marks.<sup>82</sup> Primary producers 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 European 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 rename products, entailing both loss of some accumulated goodwill and costs to educate consumers regarding new terms).

The GI provisions of the TPP seek to preclude this kind of deal, by preventing TPP member states from granting protection, whether through an administrative process or via a trade agreement, for GIs which might be confused with existing trade marks, or where protection would prevent use of customary/generic terms.<sup>83</sup> Under the TPP, any new GI agreement would need to protect existing trade mark or generic uses and allow challenges to proposed GIs on the basis of pre-existing rights or existing descriptive use.<sup>84</sup> Ironically, it is possible that this one area where ch 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 within the Asia-Pacific region.<sup>85</sup>

The TPP does not aim to create a common market, so we would not have expected to see ambition on the same level as we see in either the EU or between Australia and New Zealand. Further, the fact that the Australia–New Zealand developments appear now to be on hold, and that European initiatives like the Unified Patent Court are in turmoil following Brexit, may suggest that full integration along these lines is not possible (although the popularity of European patents, EUTMs and Community designs should not be too heavily discounted). 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 12 different countries at differing levels of development, with very different practices and multiple languages. 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.

Nevertheless, these examples, which directly target the difficulties of multi-jurisdictional rights, throw into sharp relief the very shallow nature of the harmonisation project in ch 18 of the TPP and its attempts to facilitate

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<sup>82</sup> See annex immediately after ch 12 art 6 of the text of the *EU–Vietnam Trade Agreement*, which lists the GIs that are to be protected. Note that ch 12 art 6.5a (Exceptions) *inter alia* specifies a 10-year transition period for 'champagne'.

<sup>83</sup> The key provision here is TPP art 18.36.

<sup>84</sup> 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.

<sup>85</sup> Calboli, above n 80. See also William Van Caenegem, Peter Drahos and Jen Cleary, *Provenance of Australian Food Products: Is There a Place for Geographical Indications?* (Technical Report, Rural Industries Research and Development Corporation, July 2015) (arguing that from a regional development perspective, greater recognition of Australian GIs for food might make sense).

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. Achieving those goals would require sustained hard work at both a bureaucratic and political level.

C *Does the IP Chapter Contribute to or Detract from the Broader Trade Ambitions of the TPP?*

A final trade-related standard against which we can assess ch 18 is its contribution to — or deleterious impact on — the longer-term intention that the TPP will expand its membership. Given the structure of international intellectual property law<sup>86</sup> and the very different levels of development of the TPP negotiating parties and countries in the region, it is hard to imagine an IP chapter that would act as a positive incentive for countries to join the TPP, so the real question is whether there are provisions in ch 18 that detract from the TPP's expansionary ambitions. From this perspective, the IP Chapter ought not include provisions which increase barriers to accession, especially by important regional countries such as China, India and South Korea.<sup>87</sup> I acknowledge that the TPP may never have been finalised if it did not include something close to ch 18. Under US trade law, Congressional approval is required for trade agreements,<sup>88</sup> which is no mere formality given long-standing protectionist tendencies and the difficulty of generating a consensus on trade in Congress.<sup>89</sup> The degree of criticism which the United States Trade Representative sustained from US business groups over allegedly 'inadequate' data protection in relation to biologics gives some hint of the probable response to a less prescriptive IP chapter,<sup>90</sup> although it is hard to judge how seriously to take such political posturing, which echoes similar complaints following the conclusion of *TRIPS*.<sup>91</sup>

Because ch 18 includes such detailed, expansive IP protections it could, at least in theory, place obstacles in the way of TPP expansion. 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 would be inconsistent with s 3(d) of India's *Patents Act 1970*, which states that the 'mere discovery of a new form of

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<sup>86</sup> In particular, the unqualified most favoured nation obligation in *TRIPS* art 4 which requires parties to *TRIPS* to extend the benefit of any new or expanded IP rights to nationals of *all* TPP members. This rule means that even if the TPP IP standards *were* seen as somehow beneficial, no other country in the region needs to join the TPP in order to benefit from those rules.

<sup>87</sup> There is a significant literature developing around China's attitude towards the TPP. See, eg, Min Ye, 'China and Competing Cooperation in Asia-Pacific: TPP, RCEP, and the New Silk Road' (2015) 11 *Asian Security* 206; Ming Du, 'The Case against China's Joining the Trans-Pacific Partnership (TPP)' [2015] (1) *Transnational Dispute Management* (online).

<sup>88</sup> *Trade Act of 2002*, 19 USC § 3805(a)(1)(D).

<sup>89</sup> I M Destler, *American Trade Politics* (Institute for International Economics, 4<sup>th</sup> ed, 2005), 305.

<sup>90</sup> See, eg, 'Business to Begin Initial TPP Push on Hill, but Faces Difficult Dynamics' (14 January 2016) *Inside US Trade* (online); 'Thune Calls on USTR to Step Up Efforts to Address Problems with TPP' (12 January 2016) *Inside US Trade* (online); 'USTR Sees Implementation Plans as One Way to Address TPP Objections' (21 January 2016) *Inside US Trade* (online); 'Brady: Administration Must Work Harder to Engage, Address TPP Objections' (1 February 2016) *Inside US Trade* (online).

<sup>91</sup> Drahos, above n 20.

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'.<sup>92</sup> This part of Indian patent law is important for India's economically and globally significant generic pharmaceutical industry.<sup>93</sup> Article 18.77.1 requires that criminal penalties be available for single commercial infringements of copyright. This would be difficult to reconcile with China's rules relating to criminal copyright infringement, which require a certain quantity (in the hundreds) of infringements be established before criminal liability will arise. China successfully defended this rule in a WTO dispute brought by the US.<sup>94</sup> The TPP's provisions on GIs might also challenge countries in the Asia-Pacific region which see GIs as a potential source of advantage for local food and other products.<sup>95</sup> Also of note are provisions governing the relationship between patent law, pharmaceutical approvals and data protection. Similar rules brought into effect by the *Australia–US Free Trade Agreement* ('AUSFTA') have cost Australia's health system:<sup>96</sup> the threat of such costs could make other prospective TPP members baulk. These are striking examples, but given the length, breadth, and detail of the TPP's IP Chapter, there are likely other provisions that would put off potential members.

The barriers to TPP expansion posed by ch 18 may be surmountable. As a result of *TRIPS*, the impact of an IP chapter is incremental even if significant.<sup>97</sup> Further, the TPP's various rules (including the IP rules) are likely to have local

<sup>92</sup> See *Patents Act 1970* (India) s 3(d). 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'.

<sup>93</sup> See Andrew Q Leba, 'Lowering the "Efficacy" Threshold for Section 3(D) of the Indian *Patents (Amendment) Act* of 2005: A Case for a Broader Scope' (2014) 28 *Emory International Law Review* 649, 653–5, 663 (briefly outlining economic significance of pharmaceutical industry in India and the significance of *Patents Act 1970* (India) s 3(d)). But see Susan Fyan, 'Pharmaceutical Patent Protection and Section 3(D): A Comparative Look at India and the US' (2010) 15 *Virginia Journal of Law & Technology* 198, 217 (describes India's policy towards generic manufacturers as 'protectionist').

<sup>94</sup> Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (26 January 2009).

<sup>95</sup> Calboli, above n 80.

<sup>96</sup> Tony Harris, Nic Gruen and Dianne Nicol, 'Pharmaceutical Patents Review Report' (Commonwealth of Australia, 2013). See *Australia–US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('AUSFTA').

<sup>97</sup> In other words, ch 18 of the TPP does not ask countries to suddenly adopt patents, or trade marks, where such rights have never previously been recognised. 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 unclear 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.

supporters within any potential acceding countries. As Peter Drahos notes, 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’,<sup>98</sup> and there will be no shortage of consultants and lobbyists to argue in its favour. More generally, China is not necessarily opposed to extending and strengthening IP rights. As Drahos has pointed out:

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.<sup>99</sup>

In addition, there may be ways to comply with the TPP and yet keep the substance of apparently inconsistent rules.<sup>100</sup> Consider for example China’s criminal copyright provisions. The TPP would preclude *legislation* limiting criminal liability to people who produce hundreds of infringing copies. But 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’.<sup>101</sup> A TPP country might therefore be entitled to adopt prosecution guidelines that prioritised infringements involving large quantities of infringing goods.<sup>102</sup>

Finally, the dynamics of accession — that is, the process whereby additional countries can join the TPP at a later stage — could be interesting.<sup>103</sup> If a state makes an application to accede, 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

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<sup>98</sup> Drahos, above n 20, 3.

<sup>99</sup> Ibid 2.

<sup>100</sup> 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 ch 17 of the *AUSFTA*, and how significant the political cost of that agreement, see Burrell and Weatherall, above n 76.

<sup>101</sup> TPP art 18.71.4.

<sup>102</sup> 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 people 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 76. Note however that the dispute resolution provisions of the TPP allow a state to initiate a dispute in the case of nullification as well as straightforward non-implementation of treaty text. The potential application of nullification arguments in IP cases is untested. But in the particular context being discussed here, I would submit it would be difficult to sustain a nullification argument in the face of provisions specifically recognising the right of states to determine the distribution of enforcement resources.

<sup>103</sup> TPP art 30.4 sets out the relevant process.

effective veto over terms and conditions.<sup>104</sup> This might seem to be an opportunity to negotiate still more stringent IP rules for late joiners.<sup>105</sup> But the text of the TPP and its annexes are replete with country-specific derogations from the strict rules of ch 18 (discussed in the next Part). It is entirely possible that, in order to promote accession and expansion of other TPP disciplines (such as restrictions on state-owned enterprises, sanitary and phytosanitary (quarantine) rules or labour standards), even *demandeurs* behind stronger provisions of ch 18 might be willing to negotiate qualifications in a side letter or annex.

In summary, a sober assessment suggests that ch 18 may pose obstacles to TPP expansion, but those obstacles are not insurmountable. But ch 18 does not positively contribute to the expansionary aims of the TPP and may detract from those goals because certain provisions are problematic for key regional players.

The overall conclusion of this Part nevertheless is that it is not possible to make an evidence-based claim that ch 18 will reduce barriers to trade or promote economic integration. Key IP-related barriers to trade remain untouched.

### III EVALUATING CHAPTER 18 AS A SET OF IP STANDARDS

The other main way to assess the merits of ch 18 is to assess the chapter as a set of IP standards. The TPP has been described, at various times, as a ‘gold standard’ trade agreement.<sup>106</sup> By this logic, the aspiration would be that the IP Chapter, too, would be ‘gold standard’.

Determining whether a set of IP standards is ‘good’ is not straightforward. Debates around IP law tend to be highly polarised both within and between countries. There is very little agreement on the underlying goals of IP rules, or how they should be achieved. In the case of rules around patents and pharmaceuticals, there are literally both human lives and billions of dollars at stake.<sup>107</sup> These disagreements are evident in academic and public debate around

<sup>104</sup> 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: TPP 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(4)(b) (emphasis added).

<sup>105</sup> 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 Bipartisan Congressional Trade Priorities and Accountability Act of 2015, HR Res 1890, 114<sup>th</sup> Congress (2015). Processes of this kind were used to force Australia to make changes to copyright laws implementing *AUSFTA* in 2005. Certification does not apply in the case of accession, but past certification processes are indicative of the attitude the US might take during accession discussions. Nevertheless, as Drahos notes, China has been through WTO accession — it knows what to expect: Drahos, above n 20, 2.

<sup>106</sup> Notably, as secretary of state, Hillary Clinton used this terminology frequently: ‘The Trans-Pacific Partnership: TPP, RIP?’ *The Economist* (online), 20 June 2015 <<https://perma.cc/V4ZR-Q5EL>>. See also Bill Tweddell (Ambassador of Australia to the Philippines), ‘Presentation to the Trans Pacific Partnership Round Table’ (25 September 2012) <<https://perma.cc/KYL9-EELR>>; Leon Berkelmans, ‘Gold Standard Trade Deal Is Littered with Pitfalls’, *The Sydney Morning Herald* (online), 15 April 2015 <<https://perma.cc/8CVA-L5VL>>; Florence Chong, ‘The TPP: Where Will Growth Come from?’, *Asia Today* (online), 15 October 2005 <<https://perma.cc/A7XC-8258>>.

<sup>107</sup> See some of the detailed analysis by Harris, Gruen and Nicol, above n 96.

ch 18.<sup>108</sup> This article attempts to focus on judging ch 18 by reference to standards that emerge from the negotiating parties' own summary of the TPP.<sup>109</sup> Thus this Part considers first whether ch 18 is a balanced chapter. This goal for the IP Chapter emerges from a number of statements in the Ministers' *Summary of the Trans-Pacific Partnership Agreement*; in particular the assertion that the TPP seeks to ensure that economies at all levels of development and businesses of all sizes can benefit from trade, and the description in that statement regarding the IP chapter.<sup>110</sup> The Australian Department of Foreign Affairs and Trade has been even more explicit, asserting that the 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.<sup>111</sup>

I recognise however that not all IP commentators would agree with my views on what constitutes a 'balanced' chapter. Therefore, this Part also assesses ch 18 by reference to two benchmarks that I hope a range of stakeholders could agree with: (i) does the Chapter provide sufficient *flexibility* to engage in future reform of IP law, or will it hamper law reform processes; and (ii) does ch 18 provide a clear, coherent set of IP rules? The overall purpose is to point out that whatever your perspective, and even if you are a supporter of strong, expansive IP laws, ch 18 is an out-and-out bad text.

#### A Does Chapter 18 Provide a Balanced Set of IP Rules?

I turn first to the question whether ch 18 provides a balanced set of IP rules, acknowledging immediately the legitimate criticism that 'balance' is largely meaningless as a standard: it seems to assume there is an objectively determinable perfect balance of rights.<sup>112</sup> 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 proprietary rights. We can, however, treat 'balance' as a shorthand

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<sup>108</sup> See, eg, Thomas Faunce, 'Australia's Embrace of Investor State Dispute Settlement: A Challenge to the Social Contract Ideal?' (2015) 69(5) *Australian Journal of International Affairs* 595. For some non-academic perspectives, see Electronic Frontier Foundation, *Trans-Pacific Partnership Agreement* <<https://perma.cc/9KZQ-JVJM>>; Rodrigo Estrada Patiño, 'Greenpeace Response to the Trans-Pacific Partnership Text' (Media Release, Greenpeace) <<https://perma.cc/74ZA-KFLZ>>; Sierra Club, *Trans-Pacific Partnership* <<https://perma.cc/H2WB-VPZ2>>; Australian Council of Trade Unions, *Trans Pacific Partnership Agreement* <<https://perma.cc/QNF7-FCCE>>; Anna Patty, 'TPP: Unions Fear Impact on Australian Workers', *The Sydney Morning Herald* (online), 7 October 2015 <<https://perma.cc/DGQ6-P6QV>>. From an alternative perspective, there are also comments from corporate interests suggesting the failure of the TPP by this standard: Lee Branstetter, 'Is Big Pharma on Drugs?' *CNBS* (online), 9 December 2015 <<https://perma.cc/932Y-3ZAF>>; John Castellani, 'Statement on the Trans-Pacific Partnership Negotiations' (Press Release, Pharmaceutical Research and Manufacturers of America, 5 October 2015) <<https://perma.cc/VAU9-BVR8>>.

<sup>109</sup> Office of the United States Trade Representative, above n 21.

<sup>110</sup> *Ibid.*

<sup>111</sup> Australian Government, Department of Foreign Affairs and Trade, 'Trans-Pacific Partnership Agreement: Outcomes at a Glance' (Fact Sheet, 18 July 2016) 7 <<https://perma.cc/YBC8-JEB2>>.

<sup>112</sup> Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 188–9.

for the legitimate public policy goal of ensuring that IP law accommodates a range of concerns. IP law should promote the legitimate interests of creators, innovators, and distributors and commercialisers through the conferral of exclusive rights which enable exploitation of IP in the market. But IP law should also protect other stakeholders, such as members of the public, public institutions, and follow-on innovators. These broader interests are promoted by appropriately limiting exclusive rights, and allowing some use of copyright content without permission, or payment. Perhaps we could say that the Chapter ought to show equal concern for all IP stakeholders, even if the result is not equal 'rights'.

By this standard, ch 18 is a resounding failure. Chapter 18 may not be as 'unbalanced' as other recent international IP instruments, but it remains a very long way from showing equal concern for all IP stakeholders. This is particularly striking in the area of patents and pharmaceuticals: a set of provisions that has been extensively analysed elsewhere.<sup>113</sup> But more broadly, ch 18 fails this test because it embodies extensive, detailed and strong rights for IP owners. Most of these rights are mandatory. TPP member states may also 'provide more extensive protection for, or enforcement of, intellectual property rights' than is required by the chapter, meaning that exclusive rights could expand still further in the future.<sup>114</sup> On the other hand, ch 18 merely 'recognises' the interests of users or the broader public without obliging member states to protect those interests in many concrete ways.

The clearest statements of a desire for balanced IP laws is found in arts 18.2–4. These however 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. Article 18.15 merely 'recognises' the importance of the public domain (while doing nothing to enhance or promote it). Notably too, 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 print disabled.<sup>115</sup> Much has been made too of art 18.66, a provision promoting balance in copyright, an innovation not found in previous IP chapters of trade agreements:

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,

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<sup>113</sup> See sources cited above at n 18.

<sup>114</sup> TPP art 18.5.

<sup>115</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, opened for signature on 27 June 2013, [2014] ATNIF 15 (not yet in force). The *Marrakesh Treaty* is mentioned elsewhere in the text: see TPP art 18.66 n 78. 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.

research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.<sup>116</sup>

Article 18.66, however, still only requires that states make an effort to achieve a balance of interests, not that they should succeed in that endeavour, and requires no particular exceptions be embodied in domestic law. Further, while very few constraints are put on creation or expansion of IP rights in the future,<sup>117</sup> new exceptions and limitations are constrained to those which, broadly, are limited, do not unreasonably conflict with a normal exploitation of the relevant IP rights and which do not unreasonably prejudice the legitimate interests of the IP owner.<sup>118</sup> While it is true that these limits reflect similar limits found in other treaties such as *TRIPS*, nothing in *TRIPS* would have prevented the parties from requiring certain exceptions to be recognised in domestic IP laws, or imposing other ‘ceilings’ on rights to prevent further expansion of IP owners’ rights at the expense of other stakeholders.<sup>119</sup>

The inclusion of positive language on exceptions in copyright is a step towards a more balanced system. By making explicit the need for balance in IP systems such provisions can support an interpretation of the purposes of ch 18 as a whole that reinforces the importance of a range of interests and is not confined to strengthening IP rights.<sup>120</sup> So all these provisions reflecting broader societal interests in IP are welcome, and better than nothing. Nevertheless, these very non-committal provisions stand in stark contrast to the strong, extensive rights of IP owners.

Overall, therefore, it would be fair to say that ch 18 is not so ludicrously unbalanced as some past US trade agreements which have failed to include any significant references to, or protections for, the interests of anyone but

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<sup>116</sup> Emphasis added.

<sup>117</sup> Article 18.5 does state that expansions of IP rights or enforcement must not contravene the provisions of ch 18. This does create some room for arguing, for example, that extensions of mechanisms for enforcement create barriers to trade in contravention of art 18.71.1. But because ch 18 embodies so few positive rights for anyone other than IP owners, it seems likely that few extensions of rights would *contravene* the provisions of ch 18 (however inconsistent they might be with principles like those embodied in arts 18.2–4).

<sup>118</sup> TPP arts 18.40 (patent), 18.65 (copyright). In relation to trade mark, the limits are less strict: art 18.21 allows a party to create ‘limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that those exceptions take account of the legitimate interest of the owner of the trademark and of third parties’.

<sup>119</sup> For a discussion of the idea that IP treaties should impose some ‘ceilings’ on IP rights, see Annette Kur and Henning Grosse Ruse-Khan, ‘Enough is Enough — The Notion of Binding Ceilings in International Intellectual Property Protection’ in Annette Kur (ed), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) 359.

<sup>120</sup> The *Vienna Convention on the Law of Treaties* requires that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31. In the context of unclear language elsewhere in the chapter, objectives text can help ensure that the rest of the chapter is interpreted in line with negotiators’ intentions; it can ‘add colour, texture and shading to our interpretation’: Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [153].

right-holders.<sup>121</sup> But we should be under no illusions that this is a balanced chapter.

1 *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 which 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. For example, in Australia, the *Patents Act 1990* (Cth) has been amended 25 times since enactment, and 20 times since *TRIPS* came into effect in 1995.<sup>122</sup> 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. Australia's immediate past experience with *AUSFTA* 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.<sup>123</sup> And yet ch 18 is even more extraordinarily detailed. At 75 pages, 83 clauses, 161 footnotes and 6 annexes, it dictates the form and substance of vast swathes of IP law:

- In copyright, it sets out who should be protected;<sup>124</sup> what rights they get in detail<sup>125</sup> (some of it technology specific);<sup>126</sup> a very long minimum term;<sup>127</sup> and detailed rules relating to enforcement including a prescriptive model for anti-circumvention law.<sup>128</sup>
- In trade mark, it sets out what kinds of things can be trade marks;<sup>129</sup> what rights trade mark owners must have;<sup>130</sup> and detailed requirements for trade mark application and revocation systems;<sup>131</sup>

<sup>121</sup> For one detailed exploration of this issue in relation to safeguards for defendant interests and rights in the context of IP enforcement, see Kimberlee Weatherall, 'Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties' (2016) 32 *American University International Law Review* 211. Annexure 1 to that article is a table which shows the absence of most defendant safeguards from US FTA texts compared to *TRIPS* or the TPP.

<sup>122</sup> *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284, 382 [280] (Crennan and Kiefel JJ) (the judgment says 24, but in 2015 Australia legislated to implement the *TRIPS Protocol: Intellectual Property Laws Amendment Act 2015* (Cth)).

<sup>123</sup> See Kimberlee Weatherall, 'The *Australia-US Free Trade Agreement's* Impact on Australia's Copyright Trade Policy' (2015) 69(5) *Australian Journal of International Affairs* 538, which gives examples of difficulties encountered in proposing reform consistent with *AUSFTA*, even where considered desirable by IP stakeholders.

<sup>124</sup> TPP art 18.62 (performers and producers of phonograms).

<sup>125</sup> *Ibid* arts 18.58 (right of reproduction), 18.59 (right of communication), 18.60 (right of distribution), 18.62 (rights in performances and phonograms).

<sup>126</sup> *Ibid* art 18.62.3 in particular (distinguishing between analogue and digital transmissions).

<sup>127</sup> *Ibid* art 18.63.

<sup>128</sup> *Ibid* art 18.68. The model for anti-circumvention law is less prescriptive than past US FTAs dating from the period 2003–12: cf, eg, *AUSFTA* art 17.4.7.

<sup>129</sup> TPP arts 18.18–19.

<sup>130</sup> *Ibid* arts 18.20, 18.22.

<sup>131</sup> *Ibid* arts 18.23–5, plus the TPP requires members to sign either the *Singapore Treaty* or the *Madrid Protocol* — both of which have rules regarding administrative systems.

with similarly detailed requirements regarding geographical indications.<sup>132</sup>

- In patent law, there are detailed rules regarding what can be patented, including regarding patentable subject matter;<sup>133</sup> a standard for when something is sufficiently inventive;<sup>134</sup> the Chapter also includes extensions of patent term.<sup>135</sup>
- It requires an extensive array of enforcement procedures and remedies; dictates factors that courts must be able to consider in setting damages; and extends criminal liability very broadly.<sup>136</sup>

Chapter 18 locks in not only substantive IP rules but also the current, particular system of national IP registered rights (albeit without, as noted earlier,<sup>137</sup> getting down to a level of detail that would allow for a single application for rights to be used by an applicant across jurisdictions). There are a series of procedures that must be provided for in domestic registration systems for patents, trade marks and geographical indications.<sup>138</sup> There are also provisions requiring that patents and trade marks be presumed valid in court,<sup>139</sup> which necessarily assumes local substantive examination by an IP office leading to presumptively valid marks and patents. This is unfortunate because systems of local examination are under strain from the sheer number of patents and trade marks now being sought, and sometime in the future we may want to move away from local substantive examination in order to experiment.<sup>140</sup> Chapter 18 will at least complicate, if not preclude, policy experimentation to solve these increasing practical problems within the region.

Obviously there is flexibility in ch 18. Treaties do not dictate all the details of legislation, and art 18.5 explicitly leaves local implementation to domestic legislatures. 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 trade mark and standards for infringement). Ownership rules and initial allocation of rights are also mostly 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

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<sup>132</sup> TPP arts 18.30–6 (Section E). See at arts 18.31–5 for detailed rules regarding administration.

<sup>133</sup> Ibid art 18.37. Article 18.37.1 is detailed on the kinds of things that must be recognised as inventions.

<sup>134</sup> Ibid arts 18.37.1, 18.38, although note that there is room for interpretation of provisions of this kind.

<sup>135</sup> Ibid arts 18.46, 18.48. For information regarding the expense of patent term extension rules, see Harris, Gruen and Nicol, above n 96.

<sup>136</sup> TPP arts 18.71–9 (Section I).

<sup>137</sup> See discussion above in Part II.

<sup>138</sup> TPP arts 18.23–5 (trade mark), 18.38–9, 18.42–6 (patent), 18.31 (geographical indications).

<sup>139</sup> Ibid art 18.72.

<sup>140</sup> Indeed this is suggested also by TPP art 18.14 on work sharing. But there has been little attempt to think through how exhortations for more work sharing (in art 18.14) interact with the obligations for patent administration in arts 18.38–46.

underestimated. Nevertheless, many *structural* aspects of the IP system are locked in by this chapter.

As a result, ch 18 erects barriers to IP reform, and this should be acknowledged as both imposing costs, and storing up problems for the future.

## 2 Does Chapter 18 Provide a Clear, Coherent Set of IP Rules?

A final standard against which we can judge ch 18 is to consider its qualities as a reasonably clear and coherent set of rules. This is important, because IP rights absolutists might see ch 18 as perfectly balanced in giving no effective rights to non-owners, and might even argue that innovation is promoted by clear, ‘certain’ and detailed rules established at the level of treaty. But *any* stakeholder in the IP system ought surely to agree that the rules or principles should at least be reasonably clear, and not unnecessarily complex. Chapter 18 does not meet this standard. In fact, the TPP does not even create a common standard of IP rules: it is not possible to read ch 18 and understand what a member country’s obligations are. Even for the most expert reader ch 18 is a nightmarish quagmire of legalese. A degree of deliberate ambiguity is to be expected in the drafting of treaties, so as to enable conclusion of agreements and the exercise of sovereignty into the future.<sup>141</sup> Such ‘constructive ambiguity’<sup>142</sup> is evident in the provision on data protection for biologics,<sup>143</sup> and the provision on trade secret protection.<sup>144</sup> However, problems with the text of the TPP go beyond mere constructive ambiguity. Even when they appear clear, the rules in the TPP are not necessarily the rules. This requires some explanation.

Chapter 18, despite its length and complexity, is an incomplete statement of IP standards because it *adds to*, rather than *replaces*, existing international obligations — despite the fact that there are many pre-existing FTAs between the various parties to the TPP negotiations, which include IP chapters with, in some cases, more prescriptive provisions. According to art 1.2, ‘the Parties’ intention [is] for this Agreement to coexist with their existing international agreements’.<sup>145</sup> In other words, even in the case of, say, Singapore and the US, which are parties to a bilateral trade agreement *and* prospective TPP parties, *both* the IP Chapter of that FTA *and* the IP Chapter of the TPP will continue to apply. This means that where the bilateral agreement is more prescriptive, the TPP does not in fact state the legal obligations of Singapore or the US.

The TPP IP standards also interact in complex ways with side letters, annexes and other treaties, to establish different rules for each TPP member. This appears

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<sup>141</sup> Fred Charles Iklé, *How Nations Negotiate* (Harper & Row, 1964) 14–15.

<sup>142</sup> Miriam F Weismann, ‘Regulating Unlawful Behavior in the Global Business Environment: The Functional Integration of Sovereignty and Multilateralism’ (2010) 45(3) *Journal of World Business* 312, 313.

<sup>143</sup> TPP art 18.51. For discussions regarding this provision, see Matthew Schewel, ‘Administration Takes First Step Toward Engaging Hatch on TPP Worries’ (2015) 33(45) *Inside US Trade*; Belinda Merhab, ‘FED: Fears TPP Will Put Medicines Out of Reach’, *AAP General News Wire* (Sydney), 6 November 2015. See also, highlighting stakeholder concerns over vague text in TPP trade secrets provisions: Jesse Marx, ‘A Trans-Pacific Partnership Guide’, *The Desert Sun* (Palm Springs, California), 14 February 2016, 13.

<sup>144</sup> TPP art 18.78.

<sup>145</sup> A number of side letters are to similar effect: for example, a side letter between Australia and New Zealand states that ‘nothing in the TPP Agreement shall be construed to derogate from any rights or obligations of New Zealand or Australia under *CER* or *AANZFTA*’.

to be a result of a negotiating stance adopted by many parties, that the best kind of agreement would be one that required no changes to local IP law.<sup>146</sup> 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 as to any given state's obligations.<sup>147</sup> In Australia's case, for example,<sup>148</sup> a side letter with 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 *AUSFTA*.<sup>149</sup> Another side letter between Australia and the US 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. Side letters have been negotiated by both Peru and Malaysia with some TPP partners addressing questions relating to traditional knowledge (to what effect is difficult to ascertain).<sup>150</sup>

Nor are the derogations from the obligations in the TPP a closed list: New Zealand reserves to itself, via annex 18-A, the power to adopt 'measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the *Treaty of Waitangi*, provided that such measures are not used as a means of arbitrary or unjustified discrimination against a person of

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<sup>146</sup> 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 ch 18 at all. See, eg, Australia's prime minister emphasising that 'the TPP will not require any changes to Australia's intellectual property laws or policies, whether in copyright, pharmaceutical patents or enforcement': Malcolm Turnbull, 'Historic Trans-Pacific Partnership (TPP) Agreement' (Media Release, 6 October 2015) <<https://perma.cc/XWN9-5RVD>>. See also Andrew Robb, 'Trans-Pacific Partnership (TPP) Pact to Drive Jobs, Growth and Innovation for Australia' (Media Release, 6 October 2015) <<https://perma.cc/DN8H-HF3L>>.

<sup>147</sup> Note too that these 'side letters' are only reproduced on the relevant parties' websites: in other words, if you read the text of the TPP on New Zealand's website you will not find the text of any side letters not involving New Zealand: New Zealand, Ministry of Foreign Affairs and Trade, *Trans-Pacific Partnership* <<https://www.tpp.mfat.govt.nz>>. Thus to the extent that the Australia-US side letter impacts on what IP laws Australia must enact, this might not be readily ascertainable to a New Zealand company which would, naturally enough, turn to its own government's information sites.

<sup>148</sup> 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.

<sup>149</sup> 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 (TPP arts 18.46.3-4). Exactly what this means for Australia's relationships with *other* TPP countries and indeed other non-TPP countries is unclear. Under art 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 (consistent with TPP art 1.2).

<sup>150</sup> The letters exchanged between Australia and Malaysia, Australia and Peru, for example, state that the parties 'recognize that access to traditional knowledge associated with genetic resources from providers, as well as the equitable sharing of benefits that may result from the utilization of that traditional knowledge, may be addressed through contracts that reflect mutually agreed terms between users and providers'. This would not appear to qualify the TPP's provisions relating to traditional knowledge (art 18.16), which do little more than 'recognise' the potential relevance of traditional knowledge to IP systems, and commit the parties to 'endeavouring to cooperate' on 'enhancing understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources'.

another Party': an assertion that is, moreover, not subject to ordinary dispute settlement. Annex 18-A may qualify New Zealand's obligations in ways that are not yet predictable.

At times, footnotes to provisions in ch 18 change the meaning of the text.<sup>151</sup> Other provisions appear to mean one thing until some other article much later in the Chapter is considered.<sup>152</sup> Still other provisions are incomprehensible without detailed research on other treaties and even what reservations states might have made to those treaties (and when they made them).<sup>153</sup> In other cases, the TPP text itself sets out multiple (mutually exclusive) options, for example, the provisions on intermediary liability, which govern the extent to which online service providers — search engines, content hosts and internet service providers — are protected from liability for copyright infringement in return for cooperating with copyright owners seeking to enforce their rights. 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.<sup>154</sup> 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 use the treaty text to identify goals to be achieved rather than specific means for achieving them: such an approach also has the advantage of being more likely to stand for decades rather than a few short years. The extraordinary, needless complexity of ch 18 creates avoidable costs: for government, and for anyone interested in the current scope of Australia's international IP law obligations, including any

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<sup>151</sup> See, eg, TPP art 18.68 n 89. This footnote states that a party may treat 'financial gain' (in arts 18.68, 18.69 and 18.77) as 'commercial purposes'. But the *text* extends liability to activities undertaken 'for the purposes of commercial advantage *or* financial gain'. Interpreting 'financial gain' as 'commercial purposes' effectively reads the terms out of the text, since 'commercial purposes' adds nothing to 'for purposes of commercial advantage'.

<sup>152</sup> For example, art 18.9 (transparency) interacts with arts 18.7 and 18.24 (converts exhortation to publish (art 18.9) to an obligation to publish (arts 18.7, 18.24)).

<sup>153</sup> See in particular here the provisions on national treatment discussed in Kimberlee G Weatherall, 'Section by Section Commentary on the TPP Final IP Chapter Published 6 November 2015 — Part 1 — General Provisions, Trade Mark, GIs, Designs' (2015) <<https://perma.cc/7DKG-5YSS>>.

<sup>154</sup> Section J of TPP ch 18 sets up one set of rules, broadly similar to art 17.11.29 of *AUSFTA*, but with different wording. Section J is *not* one of the provisions singled out in a side letter as superseding the *AUSFTA*, 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 organisation 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 — that is, back in October 2015). Annex 18-F allows a party to implement art 17.11.23 of the US–Chile FTA instead of Section J (this appears to be general — that is, other countries could also choose to use the Chile model).

stakeholder wishing to suggest needed reforms. It also contributes to legal uncertainty.

In summary, ch 18 cannot be a ‘gold standard’ for IP rules for the 21<sup>st</sup> 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*.

#### IV CONCLUSIONS: IS CHAPTER 18 ‘THE NEW *TRIPS*’?

This article has set out a range of criticisms of ch 18 of the TPP. Chapter 18 is not justifiable for its impact on reducing barriers to trade or promoting economic integration, and even the most ardent supporter of strong IP rights ought to find much to criticise in the prescriptive but incoherent IP standards it seeks to establish. It is vehemently to be hoped, then, that ch 18 is *not* ‘the new *TRIPS*’ — not the new global standard of IP protection or the next great global ‘bargain’ on IP. Although *TRIPS* itself has its problems, as described in the literature, ch 18 does not stand up well even 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.

Chapter 18 does, however, follow, expand upon, and perhaps pursue to its ultimate conclusion, the logic of *TRIPS*, conceptualised as a ‘a code, a one-size-fits-all regime that imposes a single globally optimal set of incentives to innovate’.<sup>155</sup> It pursues an agenda of harmonisation of laws in a context where there is no serious evidence that harmonising IP laws beyond the standards of *TRIPS* has any benefits in terms of improving technology transfer or foreign direct investment flows. This is particularly disappointing because we should, by now, know better. We know already, based on ample evidence, that IP laws ought not to be the same in countries at different levels of development. We also know that there are other issues of importance to IP owners that we could be paying attention to. The limits of legal harmonisation have been recognised in both the EU and in the discussions 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 difficulties of multi-jurisdictional enforcement. Beyond a certain point, attempts at further harmonisation or reduction of differences between legal systems cease to reduce barriers to trade, and instead start to erect barriers to reform, in an area of law singularly in need of adaptability and flexibility.<sup>156</sup> It is hard to avoid the conclusion that when the only arguments advocates make in favour of ch 18 do not stack up, the Chapter is nothing more than naked rent-seeking and the projection of the preferences of a small set of industries on a region encompassing some 36 per cent of global GDP and 11 per cent of the world’s population. We deserved better.

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<sup>155</sup> Dinwoodie and Dreyfuss, above n 11, viii. This is not the only way *TRIPS* can be conceived. In their book, Dinwoodie and Dreyfuss argue for a ‘neofederalist vision’: one which I cannot possibly do justice to here, but which recognises the flexibility built in to *TRIPS* for states to promote their own interests and culture within a broad set of principles.

<sup>156</sup> *Ibid.*