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Research Report

TRIPS flexibilities and TRIPS-plus provisions in the RCEP chapter on intellectual property: How much policy space is retained?

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TRIPS Flexibilities and TRIPS-plus Provisions in the RCEP Chapter on Intellectual Property: How Much Policy Space is Retained?

Vitor Henrique Pinto Ido




SOUTH
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RESEARCH PAPER

131

**TRIPS FLEXIBILITIES AND TRIPS-PLUS
PROVISIONS IN THE RCEP CHAPTER ON
INTELLECTUAL PROPERTY: HOW MUCH POLICY
SPACE IS RETAINED?**

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SOUTH CENTRE

JUNE 2021

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ABSTRACT

The Regional Comprehensive Economic Partnership (RCEP) was signed on 15 November 2020 by 15 Asian-Pacific countries (ASEAN—Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam—, and China, Japan, South Korea, Australia and New Zealand), comprising about one third of the world's population and economy. India was a crucial party to the negotiations but opted out of the agreement. Ratification of the agreement is still pending, subject to more Parties ratifying it at the national level. This paper provides a broad overview of the RCEP agreement and discusses the details of the intellectual property (IP) Chapter. Significantly, it does not contain substantive TRIPS-plus provisions that undermine public health in developing countries—although it does contain such provisions in other areas such as copyrights, trademarks, and IP enforcement.

La Asociación Económica Integral Regional (RCEP) fue firmada el 15 de noviembre de 2020 por 15 países de Asia-Pacífico (ASEAN—Brunei Darussalam, Camboya, Indonesia, Laos, Malasia, Myanmar, Filipinas, Singapur, Tailandia y Vietnam-, y China, Japón, Corea del Sur, Australia y Nueva Zelanda), que comprenden aproximadamente un tercio de la población y la economía mundial. India jugó una parte crucial en las negociaciones, pero optó por no participar en el acuerdo. La ratificación del acuerdo sigue pendiente, a reserva de que más Partes lo ratifiquen a nivel nacional. Este documento ofrece una visión general del acuerdo RCEP y analiza los detalles del capítulo de propiedad intelectual (PI). Es significativo que no contenga disposiciones sustantivas del ADPIC-plus que socavan la salud pública en los países en desarrollo, aunque sí contiene disposiciones de este tipo en otras áreas como los derechos de autor, las marcas comerciales y la observancia de la PI.

Le partenariat économique global régional (RCEP) a été signé le 15 novembre 2020 par 15 pays d'Asie-Pacifique (ASEAN—Brunei Darussalam, Cambodge, Indonésie, Laos, Malaisie, Myanmar, Philippines, Singapour, Thaïlande et Vietnam-, ainsi que la Chine, le Japon, la Corée du Sud, l'Australie et la Nouvelle-Zélande), qui représentent environ un tiers de la population et de l'économie mondiales. L'Inde était une partie essentielle des négociations mais a choisi de ne pas adhérer à l'accord. La ratification de l'accord est toujours en cours, sous réserve de la ratification par les autres parties au niveau national. Le présent document donne un aperçu général de l'accord RCEP et examine les détails du chapitre sur la propriété intellectuelle (PI). Il est important de noter que l'accord ne contient pas de dispositions ADPIC-plus substantielles qui nuisent à la santé publique dans les pays en développement, bien qu'il contienne de telles dispositions dans d'autres domaines tels que les droits d'auteur, les marques de commerce et le respect des droits de la propriété intellectuelle.

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1 INTRODUCTION

Pursuant to eight years of negotiations, the Regional Comprehensive Economic Partnership (RCEP) was signed on 15 November 2020 by 15 Asian-Pacific countries (ASEAN—Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam—, and China, Japan, South Korea, Australia, and New Zealand), comprising about one third of the world's population and economy. India was a crucial party to the negotiations but opted out of the agreement.

This paper presents a short overview of RCEP, including different views on its economic and geopolitical significance. It then analyzes the provisions of the intellectual property (IP) Chapter in light of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its possible public health implications. Notably, while the IP Chapter does not contain substantive TRIPS-plus provisions that impact public health, such provisions can be found in other areas including copyright, trademarks, and enforcement of intellectual property rights (IPRs).

2 AN OVERVIEW OF RCEP AND ITS SIGNIFICANCE

RCEP has been lauded by the signing parties as a landmark free trade agreement that will further enhance trade relations and cooperation and to that aim, strong commitments to reduce tariffs and non-tariff barriers for trade have been included in the agreement.¹ It has also been described as a victory for multilateralism in times where unilateral pressures have recently seen a strong rise, particularly by the previous administration of the United States of America.²

Several all-encompassing “mega” regional trade agreements such as RCEP (i.e., including topics such as trade of goods, rules of origin, sanitary and phytosanitary measures, services, investments, competition policy, intellectual property, and e-commerce) have been negotiated over the last decade.³ One such example is the African Continental Free Trade Agreement (AfCFTA) signed in 2018 between all African countries (except Eritrea for the time being). Another example is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also signed in 2018 on the basis of the Trans-Pacific Partnership (TPP) after the opting out of the United States, although more limited than the original TPP.⁴ Others also took place, such as the Trade in Service Agreement (TiSA)⁵, and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.⁶ In this context, the signing of RCEP suggests that large regional trade agreements remain a policy alternative envisioned by many countries, and that they will continue to coexist with bilateral trade agreements and efforts to reshape the multilateral World Trade Organization (WTO).⁷ RCEP also further signals towards the relevance of Asia

¹ RCEP Secretariat, *Summary of the Regional Comprehensive Economic Partnership*, 2020, Available from <https://rcepsec.org/wp-content/uploads/2020/11/Summary-of-the-RCEP-Agreement.pdf>.

² See for instance, South China Morning Post, “15 Asian nations sign RCEP, world’s biggest free-trade deal, after eight years”, 15 November 2020. Available from <https://www.scmp.com/news/china/diplomacy/article/3109939/china-declares-victory-15-asian-nations-sign-worlds-biggest>; for an academic assessment of the importance of RCEP towards revamping multilateralism, see, among others: Hsieh, Pasha L. (2018). “Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law”, *Cornell International Law Journal*, vol. 51, No. 3, Article 4. Available from <https://scholarship.law.cornell.edu/cilj/vol51/iss3/4>.

³ The idea of “megaregulation” was applied to the (then) Trans-Pacific Partnership (TPP) because of a similar broad scope. See Kingsbury, Benedict and Mertenskötter, Paul and Stewart, Richard B. and Steinz, Thomas, *The Trans-Pacific Partnership as Megaregulation* (May 10, 2019). in Benedict Kingsbury, et al., *Megaregulation Contested: Global Economic Ordering After TPP* (OUP, 2019), IILJ Working Paper 2019/2 (MegaReg Series), NYU School of Law, Public Law Research Paper No. 19–46.

⁴ For an assessment of the issues of intellectual property and access to medicines in the TPP, see Correa, Carlos. *Intellectual Property in the Trans-Pacific Partnership: Increasing the Barriers for the Access to Affordable Medicines*, Research Paper No. 62R (Geneva, South Centre, July 2017). Available from <https://www.southcentre.int/research-paper-62r-july-2017/>.

⁵ TiSA was never concluded. For a critical assessment, see: <https://www.publiceye.ch/en/topics/trade-policy/plurilateral-trade-policy/tisa>.

⁶ The CETA was concluded in 2016, but is not yet in force. However, most provisions are provisionally applicable between the Parties since 2017. See: <https://ec.europa.eu/trade/policy/in-focus/ceta/>.

⁷ For an analysis of the current WTO system and the proposals for its reform, as well as reframing the discussion based on “fairness, solidarity, social justice, inclusiveness and sustainability”, see Faizel, Ismail. *WTO Reform and the Crisis of Multilateralism – A Developing Country Perspective*, (Geneva, South Centre, 2020).

in the global economy, by creating what is considered to be the biggest free trade deal to date⁸ and without the participation of the United States nor the European Union.⁹

However, some have argued that, despite the big expectations and high-profile announcements surrounding RCEP, the agreement itself presents limited changes to trade policies in the region, given the fact that many Parties thereto already had between them various forms of free trade and preferential trade agreements.¹⁰ For countries that are part of CPTPP, such as Vietnam, the various obligations related to IP protection of RCEP were already largely contemplated. Also, its geopolitical impact as a basis for future agreements may be more limited than expected, as the United States and the European Union will likely continue to adopt their own policies in other forms of agreements, engagements, and unilateral action in international trade.

Still, it would be inaccurate to argue that RCEP presents no change at all to trade rules in the region. It contains multiple chapters that cover a wide array of areas, such as services, investment, e-commerce, competition policy and IP, which will also influence policies at the national and regional levels, as well as subsequent steps of economic integration. Some topics are more limited in scope than previous agreements, such as those on services and investment in relation to the CPTPP (which, as posited before, many RCEP Parties are also part of). In other areas, it may instead represent new standards for regional agreements, which some have argued to be the case of data governance rules under e-commerce.¹¹

⁸ See BBC, “RCEP: Asia-Pacific countries form world’s largest trading bloc”, 16 November 2020. Available from <https://www.bbc.com/news/world-asia-54949260>. Furthermore, it also creates the world’s second largest investment bloc, after the European Union: Dettoni, J. “RCEP seen from the prism of FDI”, 16 November 2020, Available from <https://www.fdiintelligence.com/article/79085>.

⁹ See Islam, Rumana. “The Geopolitical Impact of RCEP – Another Feather to the Chinese Crown?” *AfronomicsLaw*, 18 February 2021, Available from <https://www.afronomicslaw.org/index.php/category/analysis/geopolitical-impact-rcep-another-feather-chinese-crown>.

¹⁰ “While the size of RCEP is impressive, the coverage of the commercial flow promoting provisions of the Agreement is lacking the same ambition. RCEP is namely less comprehensive compared to the CPTPP. Therefore, the impact of the RCEP can be expected to be weaker in shaping international economic rules and global regulatory governance than it is the case for the CPTPP. For most of the following key issues of international economic law, RCEP sets a framework rather than the last word on the topic”. Makane Moïse Mbengue, Stefanie Schacherer, “Systemic Implications of the RCEP for the International Economic Law Governance”, *AfronomicsLaw*, 14 February 2021, Available from <https://www.afronomicslaw.org/category/analysis/systemic-implications-rcep-international-economic-law-governance>; see also: Olson, S. “Keep RCEP” in Perspective. The Hinrich Foundation, 17 November 2020, Available from <https://www.hinrichfoundation.com/research/article/ftas/keep-rcep-in-perspective/>.

¹¹ RCEP explicitly allows data localization measures subject to the pursuit of ‘legitimate public policy goals’, as per defined by the Party to the agreement. This provides more leeway than an outright ban on such policies, which has been advocated for by many developed countries at the WTO level. See “The treaty language on data governance that RCEP pioneered is likely to appear in future agreements whenever countries seek to combine a principal commitment to data mobility with largely unconstrained regulatory freedom. Whether this balance or abstaining from data governance provisions in international economic agreements altogether is desirable, depends on each country’s economic, social, and political calculus. Sound policy making is greatly inhibited by the dearth of data about data control, data flows, and data value, a problem that various International Organizations are trying hard to address. Smaller countries, in particular, might be better off by banding together instead of crafting independent data governance policies.” Streinz, Thomas. “RCEP’s Global Contribution to Global Data Governance”, *AfronomicsLaw*, 19 February 2021, Available from <https://www.afronomicslaw.org/category/analysis/rceps-contribution-global-data-governance-0>.

It should also be mentioned that other areas that have been previously included in many recent free trade agreements (FTAs), such as environmental protection, labor protection and gender equality, are absent from RCEP. Also, while the participation of India in RCEP would have represented a major shift for the broader trade architecture in the Asian region, this has not been concretized due to India's decision to opt out of the agreement at the latest phase of negotiations. India was particularly concerned about the effects of the new trade rules on its domestic producers, particularly in the area of agriculture¹².

More broadly, trade agreements have long raised multiple concerns in terms of their possible negative implications,¹³ inter alia, regarding the realization of human rights.¹⁴ The conventional strict trade liberalization agenda has failed to address issues of human rights, inequality and sustainable development issues; in fact, it has been itself a main channel of inequality and regulatory "race-to-the-bottom" in developing countries.¹⁵ In this context, provisions that limit industrial policies, impose labor market commitments, phytosanitary and other forms of regulatory obligations, set environmental standards, and protect human rights may be captured and turned into legitimizing tools of protectionist actions in favor of developed countries. At the same time, these provisions also aim at ensuring a minimum set of respect of rights and conditions that could potentially limit the detrimental impacts of the trade agreements themselves. Whether their inclusion in trade agreements can really have that role or not remains a matter of contested discussion.¹⁶ Importantly, in both cases, these issues always affect both low and middle-income countries more prominently. Therefore, although RCEP does not include for the most part "non-commercial" topics, it does not mean that a discussion on the very impacts of trade liberalization should not take place in the future.

For these reasons, it can be argued that RCEP remains in many senses ambiguous: on one hand, it maintains a relative policy space for the Parties, which is at least partly a result of developing countries' pressure and negotiation power,¹⁷ on the other hand, it represents the

¹² See Patnaik, Ila and Pandey, Radhika. "RCEP would've led to flood of imports into India. Reform is a better way to boost exports", *The Print*, 20 November 2020, Available from <https://theprint.in/ilanomics/rcep-wouldve-led-to-flood-of-imports-into-india-reform-is-a-better-way-to-boost-exports/548051/>. For an analysis that is critical of the decision by India, see Gupta, Surupa and Ganguly, Sumit. "Why India Refused to Join the World's Biggest Trade Bloc", *Foreign Policy*, 23 November 2020, Available from <https://foreignpolicy.com/2020/11/23/why-india-refused-to-join-rcep-worlds-biggest-trading-bloc/>.

¹³ Rodrik, Dani. "What do Trade Agreements Really Do?" *Journal of Economic Perspective*, volume 32, No. 2, Spring 2018, pp. 73–90.

¹⁴ Summers, Clyde. "The Battle in Seattle: Free Trade, Labor Rights, and Societal Values." *U. Pa. J. Int'l Econ. L.* 22 (2001): 61; Smith, Sanya Reid. *Intellectual Property in Free Trade Agreements*, Third World Network, 2008.

¹⁵ Chang, Ha-Joon and Gershman, John. *Kicking Away the Ladder: The 'Real' History of Free Trade*, Foreign Policy in Focus, 30 December 2003, Available from https://fpif.org/kicking_away_the_ladder_the_real_history_of_free_trade/; Hickel, Jason. *The Divide: A Brief Guide to Global Inequality and its Solutions*, Penguin Random House, 2017.

¹⁶ For a positive view of the inclusion of reporting mechanisms related to human rights, see Zerk, Jennifer. *Human Rights Impact Assessment of Trade Agreements*. Chatham House, Research Paper, February 2019, Available from <https://www.chathamhouse.org/sites/default/files/2019-02-18HumanRightsTradeAgreements.pdf>; for a comparative analysis of FTAs and labor regulation, see James Harrison, Mirela Barbu, Liam Campling, Ben Richardson, and Adrian Smith, *Free Trade Agreements and Global Labour Governance: The European Union's Trade-Labour Linkage in a Value Chain World* (Routledge 2020).

¹⁷ As described by Kelsey: "A number of RCEP countries had withdrawn from bilateral investment treaties or committed not to include ISDS in future agreements. Their resistance resulted in a rendezvous clause to begin discussions within two years of RCEP's entry into force, but the outcomes were subject to consensus. In the later stages, there was growing recognition that TPPA-style e-commerce rules could prevent countries from regulating

continuation of a certain economic liberalization model in the region without strong commitments to support developing countries and LDCs.¹⁸ As such, the impact of trade integration on certain domestic industries, as in any other free or preferential trade agreement, is yet unclear in many aspects. For the lower-income Parties, how technical assistance and transition periods will operate and whether they will create an opportunity for countries to catch-up are still open, yet crucial, questions. For these reasons, in the absence of strong financial mechanisms or commitments on technology transfer, it can be reasonably expected that such countries will need to carefully implement the RCEP provisions so as to avoid possible detrimental consequences for their economies.

However, low- and middle-income countries Parties to RCEP, as noted, will not be confronted with the need of complying with so-called TRIPS-plus provisions that may negatively affect access to medicines and other health products, as included in numerous previous similar free trade deals.¹⁹ This topic has gained particular attention during the COVID-19 pandemic, where the issue of access to health products has gained central stage at the global policy agenda.²⁰ The importance of safeguarding the possibility to fully utilize TRIPS flexibilities cannot therefore be understated.²¹ In this context, RCEP imposes less obligations than the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and some bilateral deals previously signed by certain Parties. The content of the IP Chapter of RCEP is examined in the next section in the light of the standards set out by the TRIPS Agreement.

Big Tech companies, including their control over data, anti-competitive practices and taxation. That saw provisions on source code omitted, the inclusion of a self-judging security exception for the obligation to allow data transfer, and the chapter was unenforceable. Undoubtedly China played an important role in that outcome, but countries like Indonesia, India and Vietnam were already facing challenges over moves to regulate the digital domain.” Kelsey, Jane. RCEP: Nothing to See and Everything to See, Afronomics, 15 February 2021, Available from <https://www.afronomicslaw.org/index.php/category/analysis/rcep-nothing-see-and-everything-see>.

¹⁸ In this sense, as noted by Jane Kelsey: “For years UNCTAD has argued that hyperglobalisation, and the free trade agreements that promote it, has created unsustainable levels of instability, inequality, insecurity and ecological harm and called for a new paradigm of trade rules that is participatory and development-friendly, recognizes the role of regulation and local political oversight, and can promote a level playing field and prosperity for all. The final RCEP argument is a symptom of that malaise - a step back from the excesses of the TPPA, but is a long way from a new paradigm.” Kelsey, J. *op cit*.

¹⁹ Examples include patent linkages, patent term extensions, data exclusivity provisions and stringent enforcement and border measures that may limit the availability of generic products and lead to higher prices. See: Correa, C., *Intellectual Property in the Trans-Pacific Partnership: Increasing the Barriers for the Access to Affordable Medicines*. Research Paper No. 62 (Geneva, South Centre, September 2015); Correa, C., *Mitigating the Regulatory Constraints Imposed by Intellectual Property Rules under Free Trade Agreements*, Research Paper No. 74 ((Geneva, South Centre) February 2017. Available from <https://www.southcentre.int/research-paper-74-february-2017/>.

²⁰ See Muñoz Tellez, Viviana, “The COVID-19 pandemic: R&D and intellectual property management for access to diagnostics, medicines and vaccines”, Policy Brief No. 73, South Centre, April 2020; Menezes, Henrique Zeferino de Menezes, *The TRIPS Waiver Proposal: An Urgent Measure to Expand Access to the COVID-19 Vaccines*, Research Paper No. 129 (Geneva, South Centre, March 2021), available from <https://www.southcentre.int/research-paper-129-march-2021/>; Boru, Zeleke Temesgen. *Equitable Access to COVID-19 Related Health Technologies: A Global Priority*, Research Paper No. 114 (Geneva, South Centre, June 2020). Available from <https://www.southcentre.int/research-paper-114-june-2020/>.

²¹ For more on the issue, see: <https://ipaccessmeds.southcentre.int/>.

3 ANALYSIS OF RCEP IP CHAPTER IN LIGHT OF TRIPS STANDARDS

The negotiations of the RCEP IP Chapter were surrounded by major controversy as multiple TRIPS-plus provisions were contained in a leaked draft version of October 2015.²² The secrecy under which the negotiations were conducted raised concerns on whether such provisions would be included in the final text and brought criticism for not enabling comments by different stakeholders.²³ Given the fact that among RCEP Parties there are longstanding advocates of a strong protection of IP rights in the global arena— particularly Japan and South Korea, but also Australia, New Zealand, Singapore—, TRIPS-plus provisions were without a question an area of contentious debate.

In general terms, the IP Chapter does not contain significant TRIPS-plus measures in relation to public health. This means that the preliminary proposals to include, among others, pharmaceutical data exclusivities, patent linkages or even requiring specific judicial IP systems to be introduced, were removed in the final version of the treaty. However, there are a series of TRIPS-plus measures in other IP areas, particularly copyrights and trademarks with the expansion of scope of protection related rights, such as broadcasting and performers' rights, and non-traditional trademarks. The IP Chapter, however, largely reproduces the TRIPS Agreement on patents, industrial designs and undisclosed information (with some exceptions, such as the reference to country code top-level domain names and their dispute settlement). For geographical indications, the focus is on ensuring coherence and transparency between divergent national legal systems. It includes the obligation for a *sui generis* protection for plant varieties. The Chapter contains a broad section on the protection of traditional knowledge, genetic resources and folklore (traditional cultural expressions), but without any strong means for their enforcement.

IP enforcement measures do contain TRIPS-plus provisions, but ultimately their scope and effectiveness will depend on their implementation in national laws and interpretation by the courts. Measures on transparency, procedural matters and cooperation are general and do not contain specific obligations – however, work sharing mechanisms and technical assistance requirements may in the future be used to de facto harmonize laws and policies without prior agreement to it. The IP Chapter and its Annexes include transitional measures and technical assistance to be provided upon request for certain Members, but they are exclusively focused on enhancing IP protection. All in all, the chapter has been described as

²² This was also the last version of the IP Chapter which leaked to the public prior to the conclusion of the negotiations: <https://www.keionline.org/23060>.

²³ Townsend, Belinda, Gleeson, Deborah, and Lopert, Ruth, "RCEP: The trade agreement you've never heard of but should be concerned about", *The Conversation*, 8 June 2018, Available from <https://theconversation.com/rcep-the-trade-agreement-youve-never-heard-of-but-should-be-concerned-about-42885>.

a good precedent for FTAs with respect to TRIPS flexibilities,²⁴ but also as a “hodge-podge” that is broad, but not deep.²⁵

In the following sub-sections, a more thorough analysis of the specific provisions ensues.

Section A – General Provisions and Basic Principles

Objectives

The RCEP IP Chapter contains as part of its Objectives to “reduce distortion and impediments to trade and investment by promoting deeper economic integration and cooperation through the effective and adequate creation, utilization, protection, and enforcement of IPRs” (Article 11.1.1). It also explicitly notes, mirroring the TRIPS Agreement, that the protection and enforcement of IP should “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations” (Objectives, Article 11.1.2).

This relates to the fact that the protection of IP, as per the architecture of the TRIPS Agreement and as acknowledged in Article 11.1 of RCEP (Objectives) requires a careful balance between the rights of IPR holders and “the legitimate interests of users and the public interest” (Article 11.1.1, c), which include access to knowledge, health, culture, food, among others. It also contains recognizes the “different levels of economic development and capacity, and differences in national legal systems” (Article 11.1.1, a), which could be interpreted as a reaffirmation of the policy space for implementing RCEP’s obligations according to the country’s capacity. It also refers to the importance of “facilitating the diffusion of information, knowledge, content, culture, and the arts” (Article 11.1.1.d), which also could be used as inputs for the interpretation of RCEP in the context, for example, of exceptions and limitations to copyrights to ensure access to knowledge, such as for educational and research purposes. At the same time, said article also recognizes the need of “establishing and maintaining a transparent intellectual property system and promoting and maintaining adequate and effective protection and enforcement of IPRs provide confidence to right holders and users.” (Article 11.1.1, e). A general reference to the need to “promote innovation and creativity” (Article 11.1.1.b) is also mentioned. Balancing these different provisions will be crucial for ensuring that the IP Chapter will not unduly restrict the policy space of the Parties in implementing their national laws and policies.

Scope of Intellectual Property

²⁴ “The RCEP represents the interests of states that have traditionally acted as norm-takers in global IP governance. This fact alone should be taken into account when reading the IP Chapter and interpreting its provisions. Moreover, while little innovation in terms of norm-making is offered, there are aspects worth highlighting. Some of these are the particular language regarding the TRIPS flexibilities offered in the IP Chapter”, Callo-Müller, María Vásquez, and Upreti, Pratyush Nath, *RCEP IP Chapter: Another TRIPS-Plus Agreement?* Forthcoming in *GRUR International* 70 (7) (2021) Oxford University Press, p. 10.

²⁵ Cohen, Mark, “RCEP and Phase 1: Strange Bedfellows in IP”, *China IPR*, 3 December 2020, Available from <https://chinaipr.com/2020/12/03/rcep-and-phase-1-strange-bedfellows-in-ip/>.

The Scope of Intellectual Property (Article 11.2) is defined as per the TRIPS Agreement's definitions, without addition of new forms of IP (e.g., utility models or *sui generis* rights that may exist in other jurisdictions, such as the *sui generis* database rights by Directive 96/9/EC, which are not covered by the TRIPS Agreement). It includes therefore only "copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, protection of plant varieties, and protection of undisclosed information". It is also to be noted that in case of inconsistencies, the provision of the TRIPS Agreement should prevail (Article 11.3).

Principles

Importantly, the IP Chapter also expressly recognizes as part of its Principles, also following the TRIPS Agreement, that the Parties may, "in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to its socio-economic and technological development, provided that such measures are consistent with this Chapter" (Article 11.4.1) and that "appropriate measures, provided that they are consistent with this Chapter, may be needed to prevent the abuse of IPRs by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology" (Article 11.4.2). Both these clauses are important reaffirmations of the legitimate right of States to adopt public health-oriented, as well as broadly development-oriented measures, in their IP laws and practices, no less important than the need to ensure a competitive environment by repressing abusive conducts and undue restrictions to technology transfer. It also notes in addition a general clause on the need to "foster competition" (Article 11.4.3). In principle, this provision does not curb the implementation of any appropriate measures to prevent and sanction the abuse of IP and restrictions on transfer of technology, especially since sanctioning anti-competitive conducts and structures is a task that enhances competition. On the other hand, it might be utilized as an argument against measures that restrict access to technology (e.g., refusal to deal). In addition to this, a footnote to Article 11.4.2 states that Parties "recognize that IPRs by themselves do not necessarily confer market dominance". This is in line with the majority of competition law and policies around the world, which note the complementarity between IP and competition, IP being a temporary exception to the general competition rule. This very same understanding, however, does **not** imply that IP cannot be used in an anti-competitive manner, nor that IP may not in itself confer market dominance **in certain cases and under certain circumstances**. It is important to stress, therefore, that this footnote does not prevent RCEP Parties from investigating and sanctioning IP-based conducts and/or excessive concentration of IP in one single market player that may be deemed anti-competitive due to its market dominance.²⁶

Obligations

²⁶ For a broader overview, with examples and highlighting the policy space by countries to adopt policies and measures at the interface between IP and competition law, particularly for access to medicines, see UNDP, *Using Competition Law to Promote Access to Medicines*, 2015; Ido, Vitor Henrique Pinto, *Designing Pro-Health Competition Law in Developing Countries*, Research Paper No. 125 (Geneva, South Centre, December 2020).

Article 11.5 notes that Parties may – but also explicitly clarifies that parties “shall not be obliged to” adopt more extensive protections than those mandated by the IP Chapter. Once again, this should be interpreted as an assurance of the policy space of Parties, which are *not* obliged to adopt more stringent forms of protection and enforcement of IP than those mandated by RCEP, which is a framework agreement with minimal set of obligations (similar to the TRIPS Agreement), and not a harmonizing agreement.

Exhaustion of IPRs

Article 11.6 refers to exhaustion of IP rights. It provides that Parties are free to establish their own regimes on the matter. This legal doctrine is at the basis of the possibility for countries to allow for parallel imports or not. Depending on the adopted regime—a flexibility which is also provided for by the TRIPS Agreement—, countries may open more competition and import products that have been already lawfully put into markets abroad (if an international or regional exhaustion of rights is adopted) or restrict that avenue. A public health-oriented policy, that will be in line with the Objectives and Principles of RCEP, will be the adoption an international exhaustion of rights for pharmaceutical products at least. The Parties that are part of RCEP do apply divergent criteria in this area, and this article therefore mandates no changes to the existing regulatory setting.

National Treatment

Article 11.7 deals with national treatment. This provision largely mirrors the TRIPS Agreement on ensuring “to the nationals of other Parties treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions provided in the TRIPS Agreement and in the multilateral agreements administered by the World Intellectual Property Organization (hereinafter referred to as “WIPO” in this Chapter)” (Article 11.7.1). “Protection” is a broad concept that is clarified in a footnote as “matters affecting the availability, acquisition, scope, maintenance, and enforcement of IPRs as well as matters affecting the use of IPRs specifically covered by this Chapter”, as well as “(a) effective technological measures set out in Article 11.14 (Circumvention of Effective Technological Measures); and (b) rights management information set out in Article 11.15 (Protection for Electronic Rights Management Information)”. Some exceptions are accounted for in judicial and administrative procedures that include “requiring a national of another Party to designate an address for service of process in its territory, or to appoint an agent in its territory”, as long as these exceptions are necessary for compliance of laws and regulations that are not inconsistent with the Chapter (Article 11.7.2.a) and are not applied as constituting a disguised restriction on trade (Article 11.7.2.b). This provision mainly enables countries to keep existing IP procedures. Since Parties may in the future deem some practices as “disguised restrictions on trade”, this topic should be considered with caution.

TRIPS Agreement and Public Health

Article 11.8 makes express reference to the Doha Declaration on IP and Public Health, *in verbis*:

“The Parties reaffirm the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001. In particular, the Parties have reached the following understandings regarding this Chapter:

- (a) the Parties affirm the right to fully use the flexibilities as duly recognized in the Doha Declaration on the TRIPS Agreement and Public Health;
- (b) the Parties agree that this Chapter does not and should not prevent a Party from taking measures to protect public health; and
- (c) the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party’s right to protect public health and, in particular, to promote access to medicines for all.”

It is particularly relevant that the wording refers to “affirm the right to fully use the flexibilities” (a right that requires therefore an obligation by Parties not to prevent others from using them), that the Chapter “does not and should not prevent a Party from taking measures to protect public health” (a negative obligation whereby nothing in the Chapter should be interpreted as construing any form of limitation towards adopting measures necessary to protect public health), and that “this Chapter can and **should** be interpreted and implemented in a manner supportive of each Party’s right to protect public health and, in particular, to promote access to medicines for all” (a *positive* obligation whereby RCEP **ought to** be interpreted and implemented in a pro-public health perspective).

The reference to the Doha Declaration to “interpret and implement” RCEP can be considered to be particularly positive in comparison with more general references to the Doha Declaration in other FTAs, as argued by Henning Grosse Ruse-Khan and Teemu Alexander Puutio.²⁷ A recent WTO report also notes that the RCEP IP Chapter should not and does not prevent Parties from adopting measures towards ensuring the protection of public health, including to determine what are situations of national emergency or other circumstances of extreme urgency.²⁸ Although in principle this reflects a correct

²⁷ “Given the reference to interpretation and implementation as the means for ensuring the right to protect public health in the United States FTA quote above, the latter option appears preferable. Also, for the European Union EPA provision, its title (“Nature and Scope of Obligations”) speaks for an interpretative function of that provision: The nature and scope individual IP obligations in the EPA must be so that they allow the protection of public health and nutrition and must not impair access to medicines. In sum, the various types of Doha-references in FTAs can go a certain way to safeguard TRIPS flexibilities. The extent to which they can perform such a safeguarding function depends on the type of reference at hand. In general, the main feature of the Doha Declaration is to create policy space within TRIPS mainly by interpretation and implementation. This equally affects the role Doha-references can play in TRIPS-plus FTAs: they primarily function as a tool which demands an interpretation and implementation of FTA provisions that does not undermine the flexibilities listed in the Doha Declaration. Doha references thus guide the general notion of ‘harmonious interpretation’ amongst different rules of international (IP) law towards an understanding which recognizes TRIPS flexibilities. The more specific the TRIPS-plus obligations in FTAs are however, the fewer are the options for such an interpretative approach. On the other hand, the more specific and demanding a clause refers to the Doha Declaration, the more effective it is in safeguarding TRIPS flexibilities. Countries should therefore carefully consider which type of Doha reference may be most suitable in the specific FTA context they are negotiating”. Henning Grosse Ruse-Khan and Teemu Alexander Puutio, *A Handbook on Negotiating Development Oriented Intellectual Property Provisions in Trade and Investment Agreements*, UN ESCAP & ARTNeT, 2017.

²⁸ “Section A of Chapter 18 contains general provisions. It includes provisions on objectives and principles related to the protection and enforcement of IPRs, drawing from the WTO TRIPS Agreement. It also affirms the Parties’ commitments to the WTO Doha Declaration on the TRIPS Agreement and Public Health, including an affirmation that the Chapter can and should be interpreted and implemented in a manner supportive of each Party’s right to

understanding of the obligations imposed under the TRIPS Agreement as interpreted by the WTO case law,²⁹ developing countries have been consistently pressured to limit the use of TRIPS flexibilities for public health. Interpretation of FTAs has also long been marred by the fact that:

“Since a deliberate objective of FTAs, as proposed by developed countries, has been to increase IP protection beyond the levels required by the TRIPS Agreement, there is also the risk that dispute settlement bodies under FTAs tend to give primacy to IP rules in case of conflict with national measures adopted pursuant to public interests such as the protection of public health or the environment. Notwithstanding that the interpretive rules of the Vienna Convention on the Law of Treaties (VCLT) may be applied under the FTAs dispute settlement systems, such bodies may be prone to expansive interpretations of the adopted obligations, for instance, through the principle of “evolutionary interpretation” based on new developments or subsequent agreements. This may generate broader understandings of the obligations than those that should be admissible under the WTO dispute settlement mechanism.”³⁰

For this reason, the reference to the Doha Declaration is particularly important and should be the basis for the implementation and interpretation of RCEP. It also preventively safeguards Parties from potential undue claims for alleged violation of the commitments of RCEP in this field – e.g., if a country issues a compulsory license and another Party understands the practice not to be in accordance with RCEP, the reference to the Doha Declaration and the principles of the TRIPS Agreement may be invoked to dismiss the claim.

Article 11.8 also refers to Article 31bis of the TRIPS Agreement regarding the export of medicines to countries that lack or have insufficient manufacturing capacity. Article 11.8.2 notes, firstly, the “Parties’ commitment to access to medicines and public health” (which again entails both a negative and positive obligations for Parties) and, subsequently, states that “this Chapter does not and should not prevent the effective utilization of Article 31bis of the TRIPS Agreement, and the Annex and Appendix to the Annex to the TRIPS Agreement.” It also promotes a more positive obligation towards ensuring its effective implementation: “The Parties recognize the importance of contributing to the international efforts to implement Article 31bis of the TRIPS Agreement, and the Annex and Appendix to the Annex to the TRIPS Agreement.” (Article 11.8.3). While, in summary, Article 11.8 does not substantively create any effective mechanisms for the implementation of the TRIPS flexibilities with respect to public health, it provides guidance for the implementation and interpretation of the RCEP IP Chapter consistently with the public health objectives of the Parties.

protect public health and in particular to promote access to medicines for all. Moreover, Chapter 18 does not and should not prevent the effective utilization of the “TRIPS/health solution” and affirmed that each Party has the right to determine what constitutes a national emergency or other circumstances of extreme urgency (Article 18.6).” (WT/REG395/1)

²⁹ Correa, Carlos, “Interpreting the flexibilities under the TRIPS Agreement”. In *Access to Medicines: Implementing Flexibilities Under International Intellectual Property Law*, Correa, C.; Hilty, Reto, eds. Springer, forthcoming.

³⁰ Correa, C., *Mitigating the Regulatory Constraints Imposed by Intellectual Property Rules under Free Trade Agreements*, Research Paper No. 74 (Geneva, South Centre, February 2017).

Multilateral Agreements

The Parties agree in Article 11.9 to ratify or accede to a number of multilateral agreements: the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Patent Cooperation Treaty, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (Article 11.9.1). The purpose of all these treaties is to increase the level or facilitate the protection of IP, with the exception of the Marrakesh Treaty, which deals with an exception to the protection of copyrights in order to facilitate access of books and other published works for persons who have visual disabilities, thereby actually broadening access to knowledge and culture.

Article 11.9 also contains an “endeavor to ratify or accede” to the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (Article 11.19.2). Finally, it contains a broad provision by which if a Party “intends to ratify or accede to any of the following multilateral agreements, it may seek to cooperate with other Parties to support its ratification or accession to and its implementation of that multilateral agreement”. This refers to the 1991 Act of International Convention for the Protection of New Varieties of Plants (UPOV 1991), the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), and the Singapore Treaty on the Law of Trademarks (Article 11.9.3).

Strictly, there is no legal obligation for Parties to ratify or accede to any of the agreements mentioned by Articles 11.9.2 and 11.9.3. The endeavor to ratify or accede is fulfilled with general activities related to knowing more about the treaty, providing clarity, etc., but should not be utilized against other Parties as non-compliance. For the agreements related to Article 11.9.3, the norm simply predicts a broad mechanism to seek cooperation in case of potential intention.

Section B – Copyrights and Related Rights

The section on Copyrights and Related Rights contains a number of TRIPS-Plus provisions, particularly aiming at the expansion of the protection for related rights (also known as “neighboring rights”), based on the provisions of WIPO-administered Agreements. As noted in the previous section, RCEP Parties are mandated to ratify or accede to the following copyright treaties: the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled. Some of the provisions set forth by Section B of the IP Chapter effectively implement the provisions of such treaties. The implementation of RCEP will require therefore, although in the future, compliance with norms of the respective new treaties a Party will eventually ratify/accede.

Exclusive Rights of Authors, Performers, and Producers of Phonograms

Article 11.10 refers to the exclusive rights of authors, performers and producers of phonograms. For authors, it provides the “exclusive right to authorize any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. (Article 11.10.1); for performers and producers of phonograms (understood as authors of sound recordings): “exclusive right to authorize the making available to the public of their performances fixed in phonograms and phonograms, respectively, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.” (Article 11.10.2). This means that not only the author of a work, but also the performers and the producers of phonograms have exclusive rights to give authorization or prohibit reproduction “in any manner or form” (Article 11.10.3).

Broadcasting Rights

Article 11.11 establishes the right to a “single equitable remuneration” or the right to receive royalties, for the direct or indirect use of phonograms published for commercial purposes for broadcasting. This provision is related to WIPO Performances and Phonograms Treaty (WPPT), to which Parties agree to ratify. Article 11.12 deals with the “Protection of Broadcasting Organisations and Encrypted Programme-Carrying Satellite Signals”, which provides an exclusive right to prohibit re-broadcasting by “at least wireless means, the fixation of their broadcasts, and the reproduction of fixations of their broadcasts”. However, a footnote to the article clarifies that for Parties that do not provide for broadcasting rights as such (a form of related rights not mandated by TRIPS), the obligation is to ensure protection under copyrights (including broadcast in the copyright subject matter). This is a positive obligation. Another footnote clarifies that Parties **may** provide conditions, limitations, exceptions and reservations to the extent allowed by the Rome Convention, not mentioning, however, whether the Party wishing to apply such provision is part of the Rome Convention in the first place. The Rome Convention is not one of the agreements to which Parties are mandated to join under Article 11.9. As such, the footnote is unclear as to the applicability of the treaty to non-Parties. This could be better clarified in the future. Furthermore, article 11.12.2 deals with endeavors to provide measures to protect programme-carrying signals that have been decoded without authorization of the lawful distributor (hence, at least one of the following should be protected: willful reception, willful distribution or willful reception and further distribution of a programme-carrying signal that originated as an encrypted programme-carrying satellite signal) (Article 11.12.2).

Collective Management Organizations

Article 11.13 does not impose strong obligations regarding the establishment of collective management organizations for copyrights, but includes an endeavor thereof (Article 11.13.1), including encouraging such organizations to operate “in a manner that is fair, efficient, publicly transparent, and accountable to their members, which may include open and transparent record keeping of the collection and distribution of royalties” and recognizing the “importance of fostering cooperation between their respective collective management organizations for the purposes of mutually ensuring easier licensing of content among the

Parties” (Article 11.13.2). This article does not oblige any Parties to establish national or private-led collective management organizations.

Circumvention of Effective Technological Measures

Article 11.14 requires Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, or producers of phonograms in connection with the exercise of their rights referred to in this Section and that restrict acts, in respect of their works, performances, or phonograms, which are not authorized by the authors, the performers, or the producers of phonograms concerned or permitted by the laws and regulations of that Party”. This is a TRIPS-plus measure also provided for in the WIPO Copyright Treaty (which RCEP Parties commit to ratify or accede to). Nonetheless, the article does not specify what “adequate legal protection”, or “effective legal remedies” mean, providing certain policy space for its implementation. In this sense, the existence of mechanisms to adequately sanction circumvention of technological measures is sufficient for compliance with this article; Parties are not obliged to adopt or replicate the regulations and laws of other countries, which may require costly technologies and be excessively restrictive.

Protection Exceptions for Electronic Rights Management Information (RMI)

Another clear TRIPS-plus measure contained in Article 11.15 establishes the obligation to “provide adequate and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies with reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights referred to in this Chapter: (a) removing or altering any electronic rights management information (RMI); or (b) distributing, importing for distribution, broadcasting, communicating, or making available to the public copies of works, performances fixed in phonograms, or phonograms, knowing that electronic RMI has been removed or altered without authority”.

Limitations and Exceptions for Technological Measures and RMI

Article 11.16 deals with the exceptions and limitations for providing protection and remedies for technological measures and RMI. These are important instruments to implementing the IP Chapter in a balanced manner so as not to negatively affect access to knowledge. The article stresses that, regarding technological measures, Parties may provide for appropriate limitations and exceptions. One example would be to allow the use of circumventing technologies (or at least not sanctioning their use) when this is used for personal use or for research and educational purposes. With respect to RMI, the provision notes that the obligations of Article 11.15 are “without prejudice to the rights, limitations, exceptions, or defenses to infringement of any copyright or related right”.

Government Use of Software

Article 11.17 deals with the topic of government use of software, with an aim to limit instances of public authorities utilizing non-authorized software (i.e., without a license).

However, it does not incorporate strong obligations. Its wording consists of a confirmation of the Parties' "commitment" to maintaining appropriate laws, regulations or policies to provide for its central government to use only non-infringing computer software, and to encourage regional and local governments to do the same.

Limitations and Exceptions

Article 11.18 replicates the three-steps step for copyrights from the Berne Convention (Article 11.18.1): "Each Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder", but does clarify that this wording should not prevent Parties from adopting limitations and exceptions available in the TRIPS Agreement, Berne Convention, Rome Convention, WCT or WPPT. It thus prioritizes the norms set forth by these other conventions in case of potential conflicts. Parties "shall endeavor to provide an appropriate balance in its copyright and related rights system", including exceptions and limitations for legitimate purposes that include "education, research, criticism, comment, news reporting, and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled" (Article 11.18.3), and may adopt them for fair use (Article 11.18.4), a more general provision. The reaffirmation of the possibility of exceptions and limitations and the explicit mentioning of fair use expands the policy space of countries beyond what is usually found in other FTAs. At the same time, it only creates endeavors for such utilization, which means that countries should apply them at the national level for themselves.³¹

Section C – Trademarks

The section on trademarks expands the scope of protection towards various forms of "non-traditional" trademarks which are not required to be protected under the TRIPS Agreement, such as sound trademarks and three-dimensional shaped trademarks. In fact, their protection has been for the most part controversial in many jurisdictions, with clashing interpretations on each topic.³² Article 11.9, however, expands to the following: "Each Party shall ensure that any signs or any combination of signs capable of distinguishing the goods and services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements, three-dimensional shapes, and combinations of colors, as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, a Party may make registrability depend on distinctiveness acquired through use. No Party shall require, as a condition of registration of a trademark, that signs be visually perceptible, nor deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound".

³¹ Callo-Müller, María Vásquez; Upreti, Pratyush Nath. *Op. cit.*, p. 5–7.

³² For a very comprehensive overview, see Calboli, Irene, and Senftleben, Martin, *The Protection of Non-Traditional Trademarks: Critical Perspectives* (Oxford, Oxford University Press, 2019).

Other topics in this section are: the protection of collective marks and certification marks (Article 11.20) – noting that signs that may be protected by geographical indications may also be protected under trademarks (solving a longstanding clash between the United States' model based on trademarks and the EU model based on a *sui generis* protection of geographical indications, both of which influenced several legal systems including those that are Parties to RCEP) –; trademarks classification system (Article 11.21) – requiring adoption or maintenance of a trademark classification system of the Nice Agreement (notably, by doing so, the IP Chapter creates an obligation to follow another international treaty without requesting that it should be joined); registration and applications of trademarks (Article 11.22) – including opposition and revocation/cancellation/invalidation mechanisms, electronic application and publicly accessible databases (Article 11.22); rights conferred (Article 11.23) – preventing use of identical or similar signs, with the confusion being presumed for the cases of identical trademarks (using wording from TRIPS) –, exceptions (Article 11.24) – including fair use of descriptive terms (also mirroring the TRIPS Agreement); protection of trademarks that predate geographical indications (Article 11.25); protection of well-known trademarks (Article 11.26) – referring to TRIPS language but going further in noting its importance; bad faith trademarks (Article 11.27), and noting that one and the same trademark application may relate to several goods or services (Article 11.28).

Section D – Geographical Indications

This section addresses geographical indications (GI), noting that protection may be provided through a trademark system, a *sui generis* system or other legal means (Article 11.29). The chapter further includes the following: domestic administrative procedures for the protection of GI (Article 11.30); grounds for opposition and cancellation (Article 11.31); multi-component terms (Article 11.32); date of protection of GIs – no earlier than the filing date (Article 11.33); protection or recognition of GI pursuant to international agreements (Article 11.34) – this provision deals with the specific case where one Party recognizes GI under another international agreement which enters into force after RCEP, and such GI is not protected under 11.30. In this case, it establishes obligations to making information available on such a protection and on the existence of an opposition mechanism –; recognition of GIs under concluded international agreements (Article 11.35) – no obligation for Parties to protect or recognize GI if it stems from another international agreement between a Party and a non-party.

The TRIPS Agreement itself provides limited solutions to the issues addressed by this RCEP IP Chapter section, particularly the protection and recognition of GIs originally recognized by a Party and a non-Party (e.g., via another agreement). The IP Chapter's option to explicitly acknowledge that Parties may adopt different approaches to the protection of GIs seems to suggest the intent of internalizing various previous commitments by RCEP Parties on the matter rather than seeking to find a common position.

Section E – Patents

Article 11.36 largely replicates the rules on patentable subject matter as per the TRIPS Agreement: “Subject to paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step, and are capable of industrial application.” It also states that “Subject to paragraph 3 and Section M (Transition Periods and Technical Assistance), patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology, and whether products are imported or locally produced”.

Also in accordance with the TRIPS standards, it makes reference to exclusions from patentability based on *ordre public* or morality, or to avoid serious prejudice to the environment (Article 11.36.2), as well as the exclusions from patentability for diagnostic, therapeutic, and surgical methods for the treatment of humans or animals and plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes (Article 11.36.3). However, also in line with the TRIPS Agreement, it makes reference to each party being mandated to provide a form of protection to plant varieties – either by patents, a *sui generis* regime or any combination thereof (Article 11.36.3, second part).

The IP Chapter also replicates the wording of the TRIPS Agreement with respect to rights conferred (Article 11.37) and exceptions to rights conferred (Article 11.38). A provision not included in TRIPS Agreement on the experimental use of patents is contained in article

11.40 – leaving Parties to determine how uses for experimental purposes do not infringe a patent.

Importantly, it reaffirms the provisions on compulsory licensing (other use without authorization of the right holder), noting that “For greater certainty, nothing in this Agreement shall limit a Party’s rights and obligations under Article 31 and Article 31bis of the TRIPS Agreement, and the Annex and Appendix to the Annex to the TRIPS Agreement.” (Article 11.39). This provision should be read in conjunction with the reference to the Doha Declaration on IP and Public Health (Article 11.8) and the Objectives and Principles mentioned above. In practice, this means, for example, that the Parties have full leeway to define what constitutes a situation of “national emergency” or “public order” for the purposes of issuing a compulsory license, not being restricted to a certain set of grounds.

In terms of procedural aspects of examination and registration (Article 11.41), there is a recognition to the importance of “improving the quality and efficiency of their respective patent systems as well as simplifying and streamlining the procedures and processes of their respective competent authorities for the benefit of all users of their respective patent systems and the public as a whole” (Article 11.41.1). However, this does not create *per se* an obligation of streamlining patent procedures. Article 11.41.2 sets elements that patent procedures should provide for, including a communication in writing in case of patent application’s refusal, opportunity to make amendments and observations, opportunity to at least file an opposition or provide information that could influence patentability criteria, opportunity to at least oppose a grant, seek revocation, seek cancellation or seek invalidation, and a requirement for decisions to be reasoned and in writing. The pre-grant opposition is an important flexibility not generally included in FTAs.

Article 11.42 deals with grace period for patents (disregarding certain public disclosures of inventions when determining if an invention is novel), but not providing any specific obligations. Article 11.43 encourages Parties to adopt electronic patent applications, but again not obliging them. Article 11.44 refers to the period of 18 months for publication from the filing date – safeguarding the protection of national security or public order/morality for non-publication. Article 11.45 relates to using information available to the public on the internet as prior art (similar to the provision in industrial designs in the next section). Article 11.46 notes that each Party shall endeavor to provide for domestic procedures to expedite patent examination, without requiring any specific measures, and Article 11.47 deals with endeavors to use the patent classification system of the Strasbourg Agreement (this entails adopting a criterion coming from a treaty that RCEP Parties are not necessarily part of, neither are committed to joining).

Finally, Article 11.48 refers to the protection of new varieties of plants through an “effective *sui generis* plant variety protection system”, without specifying its details – it should also be reminded that, in accordance with Article 11.9 (Multilateral Agreements), there is no obligation by the Parties to join the UPOV treaty. Still, this provision does create the obligation to craft a *sui generis* regime, in case the Party does not yet have one, while recognizing an important flexibility in the TRIPS Agreement.³³

³³ See Correa, Carlos, *Patent Protection for Plants: Legal Options for Developing Countries*, Research Paper No. 55 (Geneva, South Centre, November 2014); see also Carlos Correa et al., *Plant Variety Protection in Developing*

Section F – Industrial Designs

This section refers to industrial designs. On the protection of industrial designs (Article 11.49), the IP Chapter largely reproduces as well the wording and content of the TRIPS Agreement: it notes that protection should be provided to industrial designs that are new or original (Article 11.49.1), that requirements to obtain protection should not impair opportunity to seek protection and that this can be done under design law or copyright law (Article 11.49.2), provides the right to prevent third parties from making, selling or importing a copy or substantially a copy of a protected design (Article 11.49.3), and that limited exceptions can be provided (Article 11.49.4). These norms do not deviate from the TRIPS Agreement. The chapter then confirms that protection is available for a design “embodied in a part of an article” or “having a particular regard, where appropriate, to a part of an article in the context of the article as a whole, in accordance with its laws and regulations” (Article 11.49.5), which is not contained in the TRIPS Agreement. It also includes a recognition that information available on the Internet may form part of the prior art for designs (Article 11.50), elements for a system for registration or grant of an industrial design, including opportunity to seek cancellation/invalidation and opportunity to respond to communications, contest, challenge and appeal a refusal to register an industrial design (Article 11.51), and that Parties shall endeavor to use the classification of the Locarno Agreement (Article 11.52)—again, a form of internalizing a treaty without the commitment to ratify or accede to it.

Section G – Genetic Resources, Traditional Knowledge, and Folklore

In this section, the IP Chapter makes reference to how Parties **may** establish appropriate mechanisms to ensure the protection of genetic resources (GR), traditional knowledge (TK) and folklore³⁴ (Article 11.53.1). It further notes that countries which have disclosure requirements of the source of origin of a GR shall endeavor to make it available as to other Parties to “become acquainted with them” (Article 11.53.2). It also includes that each Party shall endeavor to pursue quality patent examination, which means in this context that relevant public documented information is taken into account in determining prior art, an opportunity for third parties to cite prior art disclosures that may affect the analysis of patentability, and the use of databases or digital libraries (if applicable and appropriate) with relevant information on TK associated to GRs (Article 11.53.3).

This is an area of particular relevance for developing countries, which have for a long time advocated for more protection of GRs, TK and folklore within the IP system. Many countries have national laws that incorporate means of protection, including via the creation of *sui generis* rights, the obligation of a mandatory disclosure requirement for patent applications

Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991. APBEBES, Berne Declaration, Development Fund, SEARICE and TWN, 2015, Available from <https://www.apbrebes.org/news/new-publication-plant-variety-protection-developing-countries-tool-designing-sui-generis-plant>.

³⁴ “Folklore” is however no longer utilized in the context of other negotiations, including the WIPO Intergovernmental Committee on GR, TK and Folklore (IGC) and the Convention on Biological Diversity; instead, it is referred to as traditional cultural expressions (TCE).

that utilize GR and/or TK associated to a GR, among others.³⁵ This is a novel inclusion in FTAs, although there are other precedents.³⁶

However, it is very clear that the wording utilized in Section G is extremely limited. It refers to only endeavors, efforts for other Parties to “become acquainted with” existing legislations, and that Parties **may** establish adequate mechanisms for the protection. The information that can be used as prior art and to inform patent applications and impede certain applications from being granted (therefore preventing misappropriation of GR and TK via the patent system) is referred to in very general and limiting terms.

The developed countries that are part of RCEP are also opponents of the creation of a mandatory disclosure requirement in the context of negotiations for a treaty for the protection of GRs, TK and folklore in WIPO. In this sense, the agreement on the inclusion of the topic in RCEP is a positive step.

Section H – Unfair Competition

Section H deals with unfair competition, referring to the Paris Convention’s terms (Article 11.54). It does not mandate the ways in which such protection ought to be done, only providing generally that each Party “shall provide for effective protection against acts of unfair competition”.

Internet domain names, which are administered by ICANN and not covered in the TRIPS Agreement, are referred to under Article 11.55. With respect to country code top-level domain (ccTLD), such as .cn (China), .th (Thailand) or .nz (New Zealand), it creates obligations—which may be extended to “administrator policies regarding protection of privacy and personal data”. A procedure for dispute settlement, which should be modelled along the lines of the Uniform Domain-Name Dispute-Resolution Policy (UDRP) is provided for.³⁷ The intent of Article 11.55 therefore is to provide measures akin to the WIPO administered UDRP for disputes related to ccTLD. The growing importance of domain names, as well as issues in e-commerce and increased cases of cybersquatting, have led to increased interest in this field.³⁸ This is a TRIPS-Plus measure, not related to IPRs. In addition, Article 11.55 requires “appropriate remedies” to be available, which may include (although are not required to be) revocation, cancellation, transfer, damages or injunctive relief.

³⁵ For a comprehensive analysis, see Syam, Nirmalya and Thamara Romero, *Misappropriation of Genetic Resources and Associated Traditional Knowledge: Challenges Posed by Intellectual Property and Genetic Sequence Information*, Research Paper No. 130 (Geneva, South Centre, April 2021). Available from <https://www.southcentre.int/wp-content/uploads/2021/04/RP-130.pdf>.

³⁶ For an analysis of the inclusion of TK and GR in FTAs, see Ortega Sanabria and Françoise Diego. *Trend on the protection of traditional knowledge associated with genetic resources within intellectual property chapters of Free Trade Agreements: the Peruvian experience*, *Journal of Intellectual Property Law & Practice*, volume 14, Issue 9, September 2019, pp. 728–738.

³⁷ WIPO administers the UDRP for all top-level domain names (e.g. .com and .org) and some ccTLD as well. For a simple overview, see <https://www.wipo.int/amc/en/center/faq/domains.html>.

³⁸ For example, see WIPO Arbitration and Mediation Center (administering UDRP) on the large increase of cases of cybersquatting, also denoting its economic importance: https://www.wipo.int/pressroom/en/articles/2020/article_0026.html.

Article 11.56 contains a general clause on the protection of undisclosed information, referring to the content of the TRIPS Agreement and further recognizing the importance of its protection as per the IP Chapter's objectives. Unlike the previous case of domain names, or even the other forms of IPRs covered in the chapter, this article makes a simple reference to the TRIPS Agreement. Hence it does not bring any additional obligations nor interpretative elements on undisclosed information (which includes trade secrets) apart from the TRIPS Agreement itself.

Section I – Country Names

A novel discussion in the IP system is the effort to protect country names from misuse in the IP system. In this context, Article 11.57 mandates Parties to “provide the legal means for interested persons to prevent commercial use of the country name of a Party in relation to a good in a manner that misleads consumers as to the origin of that good”. It does not provide specific obligations on how to do it, but Parties should address the issue in their national laws and policies. Countries have the freedom to determine the best approaches for this.³⁹

Section J – Enforcement of IPRs

This section contains a very large number of obligations with respect to the enforcement of IPRs. Some of them retain policy space for countries to best craft enforcement details according to their needs (e.g., decision on creating specific enforcement judicial system, quantum of damages, etc.); many explicitly replicate language of the TRIPS Agreement. Many of them are, however, TRIPS-plus, but they are for the most part subject to the interpretation by Parties in amending or formulating their laws and policies. This is therefore an area where the general provisions of the IP Chapter will be crucial to ensure a balance between the protection of IP and the public interest. As such, it is important to reassert that RCEP should be legally interpreted with its numerous references to public health and the public interest in the balancing of IP rights: they are an integral and essential part of the architecture of the agreement.

Article 11.58 sets out general obligations, which include availability of enforcement procedures, including expeditious remedies to prevent infringements and to deter future infringements (Article 11.58.1), the need for them to be fair and equitable, and not “unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays” (Article 11.58.2), and to take into account the proportionality between infringement and applicability of remedies and penalties and interest of third parties (Article 11.58.3). Importantly, it clarifies that “this Section does not create any obligation to put in place a judicial system for the enforcement of IPRs distinct from that for the enforcement of law in general, nor does it affect the capacity of each Party to enforce its law in general” (Article

³⁹ Switzerland, for example, has enacted a national specific legislation on the protection of the country's name and the utilization of its Swiss cross by commercial products, with a very restricted scope. See “Swissness” legislation (revision of the Federal Act on the Protection of Trademarks and Indication of Source). Available from https://www.fedlex.admin.ch/eli/cc/1993/274_274_274/en.

11.58.4). In other words, no specialized IP enforcement procedures, institutions, and agencies are required. In copyrights, the name indicated in the work serves as presumption of authorship (Article 11.58.5).

Subsection 2 deals with Civil Remedies. It details what a fair and equitable procedure should be (Article 11.59), damages stipulation (Article 11.60) – which provides leeway for Parties to decide based on “any legitimate measure of value the right holder submits”, and not a pre-fixed amount –, court costs and fees (Article 11.61), destroying infringing goods and materials and implements (Article 11.62) – noting generally the requirement to have mechanisms to destroy infringing goods without compensation and to dispose infringing goods from channels of commerce to further avoid infringement, but also noting that removing a trademark from a counterfeit is not enough to release the good. These provisions do not preempt Parties from adopting specific enforcement policies. For example, excessively elevated damages, reverse of burden of proof and additional civil sanctions may deter competitors from entering markets due to excessive litigation risks, even if their conducts are legitimate. TRIPS-plus enforcement measures have impeded access to medicines in other contexts and have therefore been combatted.⁴⁰ Overall, it is positive that Parties retain policy space to delineate national policies on enforcement for civil remedies. The IP Chapter clarifies that such measures shall be implemented in accordance with Article 50 of the TRIPS Agreement, which deals with the same matter (Article 11.64.5).

Subsection 3 refers to Border Measures. Similar to the issue of provisional measures, a crucial concern is how these may be used to prevent access to medicines due to over-restrictive or unbalanced border control.⁴¹

⁴⁰ See, for example, TRIPS Flexibilities and Anti-Counterfeit Legislation in Kenya and the East African Community: Implications for Generic Producers, UNCTAD & UNIDO Discussion Paper, 2016, Available from https://unctad.org/system/files/official-document/diaepcb2015d6_en.pdf. In Kenya, the Anti-Counterfeit Law was later struck down by the Kenyan High Court due to the confusion generated and its impact to public health (see *Patricia Asero Ochieng v. Attorney General of Kenya*, 2012). There is also often confusion between counterfeits and substandard (which do not meet quality requirements) or falsified (which deliberately misrepresent identity, composition or source) medicines. See World Health Organization (WHO). *Definitions of Substandard and Falsified (SF) Medical Products*. 2017, Available from <https://www.who.int/medicines/regulation/ssfc/definitions/en/>.

⁴¹ For example, border measures have been previously utilized to apprehend legitimate generics in transit from India to other developing countries in European ports See DS408 and DS409– European Union and a Member State – Seizure of Generic Drugs in Transit: “On 11 May 2010, India requested consultations with the European Union and the Netherlands regarding the repeated seizures on patent infringement grounds of generic drugs originating in India but transiting through ports and airports in the Netherlands to third country destinations. India alleges that the measures at issue are, in several respects, inconsistent as such and as applied, with the obligations of the European Union and the Netherlands under Articles V and X of GATT 1994 and under various provisions of the TRIPs Agreement, namely, Article 28 read together with Article 2, Articles 41 and 42, and Article 31 read together with the provisions of the August 2003 Decision on TRIPs and Public Health. On 28 May 2010, Brazil, Canada and Ecuador requested to join the consultations. On 31 May 2010, China, Japan and Turkey requested to join the consultations. Subsequently, the European Union informed the DSB that it had accepted the requests of Canada, China, Ecuador, India, Japan and Turkey to join the consultations.” WTO, Available from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds408_e.htm. an overview of the case, see UNCTAD, European Union and a Member State – Seizure of Generic Drugs in Transit: Request for Consultations by India (DS408/1) and Brazil (DS409/1), 19 May 2010 WTO, Dispute Settlement Body, 2021, Available from <https://unctad.org/ipccaselaw/sites/default/files/ipccaselaw/2020-12/WTO%20DS408%20DS409%20India%2C%20Brazil%20v%20EU%20on%20seizure%20of%20goods%20in%20transit.pdf>.

The subsection deals with the suspension of the release of suspected pirated copyright goods or counterfeit trademark goods upon a right holder's application (Article 11.65), applications for suspension or detention (Article 11.66), security or equivalent assurance (Article 11.67), information provided by competent authorities to right holders (Article 11.68), suspension of the release of suspected pirated copyright goods or counterfeit trademarks goods by *ex officio* action (Article 11.69), information provided by right holders to competent authorities in case of *ex officio* action (Article 11.70), infringement determination within reasonable period by competent authorities (Article 11.71), destruction order by competent authorities (Article 11.72) – whereby destroying is the general order, with very limited exceptions authorized as long as it does not harm the right holder's rights, and fees (Article 11.73).

Subsection 4 addresses Criminal Remedies. Criminal procedures and penalties are at the minimal applied to “cases of willful copyright or related rights piracy or trademark counterfeiting on a commercial scale” (Article 11.74.1); sanctions need to include imprisonment and fines (although not necessarily both) (Article 11.74.2), possibility to seize suspected goods, related material and evidence (Article 11.74.3), order destruction of goods (Article 11.74.4) and a provision to recognize “the need to address unauthorized copying of a cinematographic work on a commercial scale” (Article 11.74.5), although not creating any specific obligations.

Subsection 5, which contains only Article 11.75, stipulates that provisions of Subsections 2 (civil remedies) and 4 (criminal remedies) should be applicable to the same extent to infringements committed in the digital environment.

Section K – Cooperation and Consultation

This section details measures for cooperation and consultation between the Parties (Article 11.76). It reaffirms most of the general provisions, and notes the importance of the utilization, protection and enforcement of IP to promote trade and investment (Article 11.76.1). It acknowledges significant capacity differences (Article 11.76.2), determines that Parties “shall cooperate” and “engage in dialogue and information exchange” (Article 11.76.3), and endeavor to cooperate in education and awareness of IP (Article 11.76.4), cooperate on border measures (Article 11.76.5), endeavor to cooperate between patent offices to facilitate “sharing of search and examination work, and exchanges of information on quality assurance systems which may facilitate better understanding in the Parties' patent systems” (Article 11.76.6), endeavor to cooperate on information to prevent online copyright infringement (Article 11.76.7), that Parties **may** cooperate on administration of systems for protection of new varieties of plants, including exceptions to breeder's rights (Article 11.76.8), endeavor to cooperate in patent grace periods (Article 11.76.9), that Parties **may** exchange information on issues related to procedures and processes to reduce cost of obtaining the grant of a patent (Article 11.76.10) geographical indications (Article 11.76.11) and **may** cooperate in training of patent examiners for patent applications related to traditional knowledge associated to genetic resources (Article 11.76.12). It also notes that all activities should be done “on request of a Party, on mutually agreed terms, and subject to the relevant laws and regulations and availability of resources of the Parties involved” (Article 11.76.13).

It is important to note that these cooperation mechanisms, particularly those related to work sharing between patent offices,⁴² should not become **a means** to harmonize IP law and practices. The scope of the cooperation mechanisms being so broad, it is really up to the implementer of the agreement to determine what form they will concretely assume.

Section L – Transparency

Article 11.77.1 mandates that final judicial decisions and administrative rulings be published or made publicly available. Parties should endeavor to publish them online. The wording of this provision replicates a long-standing obligation to publish **final** decisions only. There is no obligation to publish **all** judicial or administrative acts or procedures. As Mark Cohen notes, this is particularly relevant for China, which has widely improved its publication system, but does not publish everything.⁴³ As such, RCEP does not create additional obligations for the Parties.

Article 11.77.2 notes that Parties shall take appropriate measures “to publish or make available to the public, information on applications and registrations of IPRs, and where applicable, legal status information thereof, such as registration and expiration dates.”

Section M – Transition Period and Technical Assistance

RCEP contains capacity-building, technical assistance policies and transition periods (delays in implementing certain provisions) for some ASEAN countries (Cambodia, Laos, Malaysia, Myanmar, Philippines, Thailand, and Vietnam). Article 11.78 notes that nothing in the Chapter derogates rights related to the transitional period of the TRIPS Agreement applicable to LDCs. Similarly, Article 11.79 allows certain Parties to delay implementation of certain provisions as per Annex 11A. This needs to be notified to the RCEP Committee on the Business Environment (Article 11.80). Finally, Article 11.81 notes the possibility of undertaking technical assistance between Parties, subject to mutual agreement.

Annex 11A on Party-Specific Transition Periods allows countries to delay the implementation of the obligations set forth by RCEP, including joining other treaties, such as WIPO “internet treaties” and the adoption of infringement-related provisions in the digital environment, protection of plant varieties protection, as well as non-traditional marks.

Annex 11B of RCEP deals with the List of Technical Assistance Requests and includes, *inter alia*, a capacity building for Cambodia and Laos to set up a process for “electronic application for processing, registering, and maintenance of trademarks”, for Myanmar in relation to a number of administrative processes and rights management and to “take effective action against infringement in the digital environment” and to “effectively check

⁴² See Syam, Nirmalya, “Robust patent examination or deep harmonization? Cooperation and work sharing between patent offices”, in *Access to Medicines: Implementing Flexibilities Under International Intellectual Property Law*, Correa, C. and Reto Hilty, eds. (Springer, forthcoming).

⁴³ Cohen, Mark. *Op cit*.

pirated copyright goods and counterfeit trademark goods for enforcement by ex officio action”, and for Vietnam to support law amendment to cover sound mark protection, its trademark examination and expertise to join the WCT, the WPPT and the Marrakesh Treaty.

Section N – Procedural Matters

Article 11.82 recognizes the importance of efficient administration of IP systems, and that each Party “shall continue to review and endeavour, where appropriate, to make improvements to its procedures for the administration of IPRs.” Finally, Article 11.83 contains endeavors to streamline procedural requirements regarding certification of translations in patent applications and authentication of signatures to applications for patents, industrial designs and trademarks. This section does not contain any substantive obligations to the Parties.

A Notable Absence: Control of Anti-Competitive Conducts

A notable absence in the IP Chapter to any mention to the control of anti-competitive conducts in contractual licensing (Article 40, TRIPS) and more broadly the need to “prevent the abuse of IPRs by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology” (Article 8, Principles, TRIPS Agreement). Such provisions are also not part of the RCEP Competition Chapter.

4 CONCLUSIONS

This paper provides a preliminary overview of the RCEP Agreement, and a description of the main aspects of its IP Chapter. Some commentators have noted that RCEP commitments have a limited depth as compared to previous trade agreements, despite having created the “world’s largest trading bloc”.⁴⁴ Indeed, many provisions were already integrated in previous bilateral agreements and the CTPPP. Furthermore, as other FTAs, RCEP is largely a mechanism for trade liberalization, advancing a developmental strategy based on integration of value chains and free trade.⁴⁵

However, the “all-encompassing but shallow” scope of RCEP means that it maintains more policy space for developing countries than other FTAs, which will be crucial in multiple areas, such as IP;⁴⁶ this is also the result of the negotiating power of developing countries.⁴⁷ Whether other non-commercial topics should be included or not in a trade agreement is yet another matter of contention.⁴⁸ Ultimately, the impact of RCEP will depend on the ways the agreement is implemented nationally, and how national policies and courts will apply the deal’s provisions.

The IP Chapter does not contain significant TRIPS-plus provisions with impact on public health. The reference to the Doha Declaration on IP and Public Health and provisions indicating that Parties cannot be prevented from adopting public health measures, can be seen as salutary. However, they can only do so much in light of the broader architecture of FTAs, which are designed to expand IP protection.⁴⁹ Still, the IP Chapter may be an important precedent for future FTAs, to the extent that it does not contain measures that impact the Parties’ capacity to enact their national policies on public health, particularly the full implementation of TRIPS flexibilities necessary to achieve developmental and health-oriented goals.⁵⁰ Others have noted the innovation in flexibilities related to copyright’s exceptions and limitations, with reference to fair use without restricting its application.⁵¹

⁴⁴ Mbengue, M.; Schachecher, S. 2021, *op cit*; Olson, S., 2021, *op cit*.

⁴⁵ For a critique, see Alessandrini, Donatella, “Global Value Chains (GVCs), trade and inequalities”, *AfronomicsLaw*, 10 November 2021, Available from <https://www.afronomicslaw.org/2020/11/10/global-value-chains-gvcs-trade-and-inequalities/>.

⁴⁶ “FTAs have as a clear objective the expansion and strengthening of IPRs, thereby providing an inherently biased context for interpretation of substantive and enforcement obligations. Although this may favour commercial over public interests considerations, FTAs dispute settlement bodies would in any case be bound by the Preamble and articles 7 and 8 of the TRIPS Agreement, as well as by other specific provisions contained in the FTAs requiring a balance of rights and obligations. Although these provisions may help to attenuate the negative impact of those FTAs obligations likely to increase inequalities, they would not be sufficient to redress the imbalance created by the high standards of IP protection embedded in those agreements.”, Carlos Correa, *Mitigating the Regulatory Constraints Imposed by Intellectual Property Rules under Free Trade Agreements*, Research Paper No. 74 (Geneva, South Centre, February 2017).

⁴⁷ Kelsey, J. *op cit*.

⁴⁸ For a broader overview of the issue of trade agreements, see Rodrik, 2018, *op cit*.

⁴⁹ See again Correa, C. 2017, *op cit*.

⁵⁰ In this particular sense, it is similar to the EU–Mercosur agreement reached in 2018 (pending final approval by the respective Parties nationally), which also did not contain equivalent TRIPS-Plus measures. See Blasetti, Roxana and Correa, Juan. *Intellectual Property in the EU–MERCOSUR FTA: A Brief Review of the Negotiating Outcomes of a Long-Awaited Agreement*, Research Paper No. 128 (Geneva, South Centre, February 2021).

⁵¹ Callo-Müller, María Vásquez; Upreti, Pratyush Nath. *Op cit*, pp. 5–7.

In relation to patents, undisclosed information and industrial designs, the IP Chapter largely reflects the TRIPS Agreement's wording. On geographical indications, the focus is on ensuring coherence and transparency among the Parties' national legislations, which are drastically different in their approach (hence, for example, the possibility to protect them either via trademarks or *sui generis* rights) and remains non-harmonized.

However, the IP Chapter does contain numerous TRIPS-plus provisions in other areas, particularly copyrights and trademarks. They include protection against circumvention of technological measures for copyrights and related rights, protection of non-traditional trademarks such as sound marks, the obligation to join a number of intellectual property treaties, and the obligation to have a domain name dispute settlement mechanism similar to UDRP, among others.

The IP Chapter also includes extensive provisions on enforcement of IPRs and border measures. Many only replicate the language of the TRIPS Agreement, but others are TRIPS-plus, such as provisions that mandate destruction of counterfeit goods. Their exact impact depends on how they will be interpreted and implemented. It will be crucial to adopt a balanced view between the protection of IP and public health (based on the IP Chapter's objectives, principles, its reference to the Doha Declaration, and the interpretative tools of the TRIPS Agreement and the WTO case law).⁵² In the IP Chapter, other administrative commitments (transparency, cooperation, procedural matters) do not entail TRIPS-plus obligations, but the working sharing mechanism and technical assistance requests may in the future be utilized to harmonize IP law and policies between Parties.

Finally, the inclusion of provisions related to GRs, TK and folklore is positive, albeit limited. RCEP could have forged a more resourceful framework in this and other fields conducive to developmental goals.⁵³ For example, the agreement could have included more robust protection for GRs and TK. However, considering that the overall purpose of RCEP—as other FTAs—is to liberalize trade, expectations regarding other development goals are necessarily limited.

⁵² In particular, the recent Australia – Tobacco Plain Package (2020) is an important precedent. See again, Correa, C., *forthcoming*, *op. cit.*; also, Romero, T. *Public Health and Plain Packaging of Tobacco: An Intellectual Property Perspective*, Research Paper No. 108 (Geneva, South Centre, 2020).

⁵³ See also, Callo-Müller, María Vásquez; Upreti, Pratyush Nath. *Op. cit.*

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