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**Harmonization: Top Down, Bottom Up—and Now
Sideways? The Impact of the IP Provisions of
Megaregional Agreements on Third Party States**

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HARMONIZATION: TOP DOWN, BOTTOM UP—AND NOW SIDEWAYS? THE IMPACT OF THE IP PROVISIONS OF MEGAREGIONAL AGREEMENTS ON THIRD PARTY STATES

Rochelle Cooper Dreyfuss

[Forthcoming in *MEGAREGULATION CONTESTED: GLOBAL ECONOMIC ORDERING AFTER TPP* (Benedict Kingsbury, et al., eds., Oxford University Press, 2018)]

Abstract

This chapter examines the impulse to include intellectual property within the scope of a megaregional trade agreement that is largely devoted to the promotion of a particular vision of economic ordering and to the adoption of a regional framework supportive of competition, investment and regulatory coherence. Using the TPP as an example, it argues that megaregional intellectual property agreements not only lead to changes in the law within member states, but can also have strong effects outside those states. The innovation sector within the region's trading partners must adapt to the new regime of it wishes to continue to trade in the region. That can alter the intellectual property politics in these other countries. Furthermore, members of the epistemic community within the new regime influence those outside it. Finally, the law of the megaregion has an impact on the ability of the member states to negotiate future agreements with third countries and can also affect the way that existing agreements are interpreted. The last section of the chapter discusses the normative implications of megaregional spillover effects on third countries. While a megaregional exposes countries that had no role in the negotiation process to a changed legal landscape, it also creates a new way to harmonize intellectual property law, what I call "sideways" harmonization. Third countries can join at their own pace and in a manner that responsive to their own creative sectors. These agreements also offer an opportunity to experiment with transnational trade rules, such as rules on in transit seizure, parallel importation, and cross-border enforcement.

I. Introduction

Following the formation of the World Trade Organization (WTO), many nations turned to bilateral and megaregional arrangements. The United States initially joined Asian, Antipodean, and American countries in negotiating the Trans-Pacific Partnership Agreement (TPP) and with the EU, sought to develop the Transatlantic Trade and Investment Partnership (TTIP). At around the same time, the EU and Canada completed a Comprehensive Economic and Trade Agreement (CETA) and there are analogous efforts—such as China’s Belt and Road Initiative (BRI)—elsewhere. As in the WTO, intellectual property protection constitutes an important part of many of these instruments. In the main, the provisions are intended to increase the level of protection beyond that required by the WTO’s Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).¹

As the framing chapter describes, using the TPP as its example, US megaregional economic agreements are intended to promote a specific vision of economic ordering (“megaregulation”).² As drafted, the TPP ensured the protection of property rights, promoted the free flow of capital, and imposed obligations that promote market exchanges. In particular, it scaled to the regional level regulatory provisions to facilitate and expand the domain of private ordering. In addition, the TPP created rules responsive to technological changes and to modern business practices. Further, it adopted a legal framework to support competition, investment, and regulatory coherence. Significantly, the TPP was intended to reach beyond its immediate members: it had the geopolitical goal of simultaneously engaging China and counterbalancing its influence in Asia. Moreover, it was open to accession by nonparties, on the theory that the liberal ordering it promoted would spread as others found that vision (and accompanying trade preferences) congenial to their interests.

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 33 ILM 81 (TRIPS); Trans-Pacific Partnership (5 October 2015) <<https://perma.cc/FW48-BR5K>> (TPP); Transatlantic Trade and Investment Partnership <<https://ustr.gov/ttip>> (TTIP); Canada-EU Comprehensive Economic and Trade Agreement (5 August 2014) <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> (CETA).

² Benedict Kingsbury et al., this volume.

To a large extent, this view also captures the impulse to include intellectual property within the scope of the TPP (and other megaregionals). Belief in the welfare-enhancing effect of property regimes supports the creation of exclusive rights in information products, sales of which could otherwise fail to allow creators to capture adequate returns on their investments. A degree of agreement on basic intellectual property issues facilitates crossborder trade. Furthermore, in the knowledge production arena, changes in technology and business arrangements have been particularly pronounced. TRIPS was consummated before the Internet became a major factor in the distribution of protected works. Although the Internet Treaties concluded under the auspices of the World Intellectual Property Organization (WIPO) updated international law to a degree,³ the TPP had much more specificity regarding the rules of the road for the digital economy.⁴ Finally, the trade secrecy provisions of the TPP, which obligated members to criminalize computer hacking, were among the most explicit examples of the TPP's concerns about China.

In some ways, however, the intellectual property provisions in the TPP stood apart from other measures. It accomplished for the creative industries something they could never have done for themselves, even in a regulatory environment that enhanced cooperation among members: it expanded proprietary rights in all TPP countries at the expense of the public domain and thereby would convert more consumer surplus into producer value. And although the framing chapter differentiates between geopolitics, which it regards as an impetus for the TPP, and national security, which it claims is but a small part of the rationale for the Agreement, the trade secrecy provisions function as a counter example.⁵ They were aimed not only at protecting the knowledge products found on computers, but also at safeguarding the integrity of networked computer systems and the infrastructure of the Internet. Thus, they found strong support in the rhetoric of national security.⁶

³ WIPO Copyright Treaty (adopted 20 Dec 1996) 36 ILM 65; WIPO Performances and Phonogram Treaty (adopted 20 Dec 1996) 36 ILM 76.

⁴ Thomas Streinz, this volume.

⁵ TPP, art 18.78.

⁶ Cf Rochelle Dreyfuss and Orly Lobel, 'Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security' (2016) 20 Lewis & Clark L Rev 419.

Most important, however, the influence of the TPP's intellectual property chapter on third countries was not simply a matter of others joining because they agreed with its rules, or found themselves at a competitive disadvantage outside it. Since intellectual property is intangible and non-localized, legislation in any country has an inevitable impact on creators and consumers in other places. Adoption of new law in a megaregional like the TPP, which maps imperfectly onto trade patterns in information products, the structures of creative communities, and cultural relationships, can magnify that impact. Because nations that had no role in negotiating the instrument can thus nonetheless find themselves operating in a new legal landscape, megaregionals arguably represent an even more worrisome democratic deficit than the international regimes that have long been a focus of concern for legal scholars.⁷

At the same time, however, megaregionals have some attractive features. Because the bargaining occurs among a small group of likeminded but somewhat heterogeneous countries, the rules adopted may be more centrist than those developed multilaterally under the leadership of a few dominant nations or through lopsided bilateral bargaining between nations of profoundly unequal bargaining power. The inevitable spillovers may prevent fragmentation of international obligations. And the seepage of megaregional standards to nonmembers avoids the problem of one set of countries imposing its will on others directly. Instead, third states can adapt to megaregional standards at their own pace and in a manner that responds appropriately to internal regulatory needs; for intellectual property, to the requirements of their creative sectors and those who rely on creative output. Megaregionals also offer an opportunity for experimentation with the rules of transnational trade. In the intellectual property context, examples include rules on parallel importation (international exhaustion), in-transit seizure, and crossborder enforcement—issues that were not squarely addressed multilaterally by TRIPS because they were not fully appreciated, or were controversial or of indeterminate economic impact. Just as experiments with substantive laws have been ‘uploaded’ over the years to the international framework of TRIPS, successful regional experiments with transborder regimes may eventually be multilateralized.

⁷ Eg Gráinne De Búrca, ‘Developing Democracy Beyond the State’ (2008) 46 *Colum J Transnatl L* 221; Eyal Benvenisti, ‘Exit and Voice in the Age of Globalization’ (1999) 98 *Mich L Rev* 167.

This chapter explores these conflicting views of the effect of megaregional agreements on third countries. Part I explains why intellectual property is a good place to consider the impact of a megaregional on third parties. Using the TPP as an example, Part II demonstrates the many ways in which such spillovers can occur. Part III takes up the normative question of how megaregionals compare to other forms of global governance. Tracing the TPP from early drafts to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the changes made after the United States withdrew from the TPP,⁸ Part III discusses the advantages and costs of what can be called ‘sideways harmonization’—convergence that is neither top-down (through the imposition of multinational norms)⁹ or bottom-up (through the formation of informal supranational networks),¹⁰ but is rather based on the composition and small group dynamics of megaregional negotiations.

II. Why Intellectual Property?

Intellectual property laws offer an excellent place to observe the third-party impacts of megaregional agreements because the creative industries have strong reasons to intrude on the innovation and cultural policies of remote locations and, in a knowledge based economy, have significant leverage on international negotiators.¹¹ If this sector cannot directly force an alteration in the intellectual property laws of other countries, the adoption of rules that have the effect of regulating across national boundaries is a close second best. Most obviously, the rights at issue cover intangibles. Abstractions move easily across borders, especially in the modern era when the Internet brings digitized materials from abroad into every home and the storage of protected works is often in the ‘cloud’. Even physical embodiments can be difficult to control. Knowledge products readily appeal to the nationals of more than one country: the same medicines are used everywhere, copyrighted works are enjoyed around the globe, while trademarks are

⁸ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (8 March 2018) <<https://perma.cc/M87Q-P3CH>> (CPTPP).

⁹ Cf Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge MA 1995).

¹⁰ Cf Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton NJ 2004).

¹¹ See Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, Cambridge 2003).

encountered (and found desirable) through travel and engagement with foreign media and global marketing platforms.

As Sam Ricketson and Jane Ginsburg relate, unauthorized reproduction of foreign works was once an established feature of cultural and social life: books authored (and protected) in England were available in cheap (unauthorized) versions in Ireland and America; French authors were pirated in Switzerland and Belgium.¹² Tolerating these infringements not only decreased the foreign rewards that authors could expect from their output, unauthorized copies could also flow back to the country of origin, leading to lower domestic returns as well. Bilateral agreements solved this problem for copyrighted works among countries that shared a language, but by the late 19th century, it became evident that multilateral arrangements were necessary for copyright as well as other types of intellectual property. The Berne Convention, first adopted in 1886, imposed obligations to protect works of foreign authorship,¹³ whereas the Paris Convention of 1883 dealt with protection for foreign industrial property (trademarks, patents, and industrial designs).¹⁴ These were, however, minimum standard agreements and did not account for all types of works or for all usages. For example, the Paris Convention required national treatment of foreign inventors, but did not require member states to recognize exclusive rights in inventions. In 1994, TRIPS increased the level of protection (for example, it required member states to offer patent protection) and limited the ambit of exceptions and limitations. It also extended coverage to new subject matter, including geographical indications, topographies, and undisclosed information.¹⁵

Still, the creative industries retain a strong interest in the level of protection outside their home markets. In some cases, the problem is lack of coverage. For example, traditional knowledge is not provided for in Berne, Paris, or TRIPS. Nor did these agreements deal with digital works on the Internet—a problem

¹² Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (OUP, Oxford 2005) ss 1.20–1.24.

¹³ Berne Convention for the Protection of Literary and Artistic Works (24 July 1971) 1161 UNTS 31 (Berne Convention).

¹⁴ Paris Convention for the Protection of Industrial Property (14 July 1967) 828 UNTS 305 (Paris Convention); John Gladstone Mills III, 'A Transnational Patent Convention for the Acquisition and Enforcement of International Patent Rights' (2006) 88 J Pat & Trademark Off Socy 958; Gerald J. Mossinghoff, 'National Obligations Under Intellectual Property Treaties: The Beginning of a True International Regime' (2000) 9 Fed Circuit BJ 591.

¹⁵ TRIPS, arts 22–24; 27; 35–38; 39.

so important to the United States that it put digital economy issues on the WTO's agenda and included it in other international negotiations as well; it is an area in which China is apparently also strongly interested.¹⁶ Further, none of the earlier agreements impose restrictions on parallel importation.¹⁷ Yet because the response to parallel importation could be an increase in price in the country of exportation, these rules potentially generate significant externalities.

Other factors contribute to the strong interests that creative sectors have in the law of remote nations. Intellectual property rights are rarely exploited solely through manufacturing products that incorporate the protected information. Instead, licensing allows authors to expand to new markets (turning a book into an opera, play, movie, or video game, or translating it into other languages); it allows inventors to mine all the applications of their innovations (a new lens, for instance, for use in eyeglasses, telescopes, binoculars, cameras, and projectors); and it enables traders to fully extract the branding value of their trademarks (consider the mark "Trump").¹⁸ Licensing across industries and geographical regions is therefore widespread, and that leads licensors to have strong interests in the intellectual property laws of the nations where potential licensees are located.

Modern business practices magnify this interest. The operations required to bring products to market have been unbundled and disaggregated. Manufacturing now takes place in low-labor—principally developing—countries. But innovation, at least innovation at global levels, is largely the province of developed nations. As free trade has eroded the manufacturing and agricultural bases of developed countries, these countries have acquired a strong interest in appropriating returns from their creative inputs into the global economy. That requires intellectual property protection in all the nations where production and distribution occur.¹⁹ The emergence of global value chains exacerbates this concern. A single good or service can now involve activities in multiple countries; at each stage, intellectual value may be added

¹⁶ See Bryce Baschuk, 'US Floats Concepts for WTO E-Commerce Talks' *Bloomberg Law Electronic Commerce & Law Report* (Arlington VA, 5 July 2016).

¹⁷ Eg TRIPS, art 6; *Kirtsaeng v John Wiley & Sons, Inc.*, 133 S Ct 1351 (2013); *Impression Products v Lexmark Int'l*, 2017 WL 2322830 (2017).

¹⁸ Eg Davis Aaker and Erich Joachimsthaler, 'The Lure of Global Branding' (1999) 77 *Harvard Bus Rev* 137–44.

¹⁹ Daniel Jacob Hemel and Lisa Larriomore Ouellette, 'Knowledge Goods and Nation-States' (2016) 101 *Minn L Rev*.

(innovative methods for refining raw materials, novel manufacturing technologies, improved distribution and servicing techniques, new ad campaigns and trademarks). Intellectual property rights can act as markers of these contributions and thus serve a value-allocative function in these chains.²⁰ So long as each country in the chain offers protection for the relevant intellectual inputs, it is possible to ensure that each participant reaps an award commensurate with the knowledge it added. Value chain participants are therefore affected by, and have a strong interest in, the intellectual property policies of other countries. In particular, they will tend to favor strong coverage in every nation where the value chain does business.

Even before the commercialization stage, there can be significant crossborder concerns. The Internet and collaborative platforms such as Google Drive and Dropbox facilitate communication and joint venturing. The wide range of actors involved (commercial firms, universities, government, private-public partnerships) are affected by the intellectual property protection, ownership rules, and safeguards for open innovation available in the countries of each participant. Disparate legal regimes can create internal friction among researchers, slow their progress, and hamper dissemination of their work.²¹

Tax practice may also play a role in sparking interest in the contents of foreign intellectual property laws. Firms often transfer their intellectual property interests to jurisdictions where the royalty streams they receive are subject to low tax rates (or to jurisdictions with patent boxes and other tax preferences). These transfers are usually made without regard to substantive intellectual property issues other than ownership. However, as the OECD has recognized in its work on base erosion and profit shifting (BEPS), practices such as these have led to a worldwide losses of tax revenue. For intellectual property, the OECD advocates that tax authorities pay close attention to transfer pricing and to rules that ‘ensur[e] that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation’.²² While these proposals do not have a direct impact on intellectual property laws, an

²⁰ Cf Jonathan M Barnett, ‘Intellectual Property as a Law of Organization’ (2011) 84 S Cal L Rev 785.

²¹ Eg Rochelle Cooper Dreyfuss, ‘Collaborative Research: Conflicts on Authorship, Ownership, and Accountability’ (2000) 53 Vand L Rev 1161.

²² OECD, ‘Action Plan on Base Erosion and Profit Sharing’ (2013) actions 8, 20 <<https://perma.cc/AU6H-4KEW>>. See also OECD, ‘Conforming Amendments to Chapter IX of the Transfer Pricing Guidelines’ (4 July 2016) ss 9.55–9.77 <<https://perma.cc/P5US-6Z8H>>.

emphasis on the substance of transactions (rather than merely legal ownership of the rights) may lead those seeking to minimize tax to move their research or management teams to low-tax jurisdictions. If they do, they will inevitably become concerned with the intellectual property laws of those jurisdictions, for they will not wish to lose control over the information products created there. Moreover, they will want to make their claims of local management and domestic joint venturing appear plausible; that will be easier if the laws of the place of management or venturing adequately protect intellectual property.

Almost all these factors capture the interests of firms that hold intellectual property rights. Accordingly, they enhance the impetus for states to negotiate for higher levels of intellectual property protection. Indeed, that is exactly what the TPP did: it was a TRIPS-plus agreement. For example, it included provisions on traditional knowledge, it extended patent protection, and clarified rights on the Internet.²³ One might ask, however, whether there are not equivalent interests in lowering the level of protection and if so, why these interest groups are not equally successful in the negotiation process. As to the first question, there are such groups operating in the intellectual property space. They include nongovernmental organizations (NGOs) such as Doctors Without Borders, Knowledge Ecology International (KEI), and the Electronic Frontier Foundation (EFF);²⁴ open source communities, such as Linux; and firms whose main business is the distribution of creative works, such as Google and Facebook. Like right holders, their interests can extend beyond their own jurisdictions. It is, for example, not enough to enjoy, within a particular state, a defense that enables a user to build on a protected work; distributing the advance globally requires that parallel defenses be available where the intended distribution is to occur.

In some ways, these entities had an influence on negotiations. For example, during the extended negotiation process of the copyright rules in the TPP, rumors suggested it would include obligations to banish from the Internet (or otherwise punish) those who engage in repetitive unauthorized distributions

²³ Eg TPP, arts 18.16 (on traditional knowledge); 18.37(2) (as originally drafted, the TPP would have required protection for new uses of known products); 18.58 (clarifying the right to control the reproduction of copyrighted works in electronic form). Art. 18.37(2) is now suspended according to sec. 7(b)(i), CPTPP Annex.

²⁴ The contributions to Rochelle C Dreyfuss and César Rodríguez Garavito (eds), *Balancing Wealth and Health: The Battle Over Intellectual Property and Access to Medicines in Latin America* (OUP, Oxford 2014), describe the nature of NGO involvement in the negotiation and implementation of free trade agreements in Latin America.

of copyrighted works and to impose greater policing duties on Internet service providers.²⁵ Yet the final provisions on rules for the digital economy did not include initiatives as draconian as these. Indeed, the TPP contained one of the few provisions in international law that directly fosters protection for access interests.²⁶

These ‘dogs that didn’t bark’ are possibly the result of the greater comfort the United States Trade Representative (USTR) feels when dealing with firms like Google, that have business interests in minimizing restrictions on the use of protected works on the Internet,²⁷ as opposed to advocates concerned with such issues as distributive justice, health, and human rights. The absence of stronger protection may also reflect learning on the part of the negotiating parties—the proposals made, and strategies used, in earlier free trade agreements may have enabled TPP negotiators to come to the table better prepared for parrying demands for strong protection. But these factors can only go so far. Because TRIPS permits WTO members to implement more extensive protection, but allows only narrow derogations from obligations, the TPP could not roll back WTO requirements.²⁸ Furthermore, the structure of international intellectual property law is not conducive to protecting access interests. All of the principal agreements were developed in response to the interests of right holders. Accordingly, none provides significant protection for user rights, only the capacity of states to create exceptions. These are often interpreted narrowly, and it is difficult to see how user safeguards could be enforced through dispute resolution (after all, their direct impact is on local users, and states do not bring complaints against themselves).²⁹ While there are advocates for moving to a system of user rights,³⁰ changing the basic contours of international law and dispute resolution is difficult. Furthermore, user groups are much more poorly organized and less well financed than are right holders, which often have industry groups to champion their interests. As Eyal Benvenisti and George Downs have

²⁵ Eg Josh Taylor, ‘Penalties for Piracy as Three Strikes Off the Table in TPP Negotiations’ (*ZDNet*, 13 November 2013) <<https://perma.cc/DG8H-3APB>>; Kurt Opsahl and Carolina Rossini, ‘TPP Creates Legal Incentives for ISPs to Policy The Internet. What is At Risk? Your Rights’ (*Electronic Frontier Foundation*, 24 August 2012) <<https://perma.cc/BFH4-BPRZ>>.

²⁶ TPP, art 18.66 (reflecting US law on fair use).

²⁷ Eg Carter Dougherty, ‘Trans-Pacific Partnership: TPP Rewards Apple, Facebook, Google, Others with Unrestricted Flow of Cross-Border Data’ *International Business Times* (New York, 6 October 2015).

²⁸ TRIPS, arts 1.1; 13; 17; 30.

²⁹ See Graeme B Dinwoodie & Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS: Building a Resilient International Intellectual Property System* (OUP, Oxford 2012) 189–201.

³⁰ Eg Graeme Dinwoodie, ‘The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?’ (2007) 57 Case W Res L Rev 751.

argued, international negotiations by executive agencies strongly favor actors who are better organized.³¹ Hence the phenomenon of ever-stronger protection, as well as the ability of right holders to gain through international agreement protection they could not acquire through the domestic lawmaking process.³²

III. Spillovers

Whether by design or happenstance, the intellectual property obligations in megaregionals can readily seep from one territory to others. Using examples drawn from the TPP, this section discusses the many ways spillovers can occur.

1. *Access.* Although trade lawyers now consider inadequate intellectual property protection to be a non-tariff barrier to trade, the immediate effect of raising obligations to recognize intellectual property rights is to inhibit the distribution of information across borders.³³ A good example is the way in which obligations regarding patent law and data exclusivity changed in the move from TRIPS to the TPP.

TRIPS required protection for ‘inventions’ that are ‘new, involve an inventive step and are capable of industrial application’.³⁴ TRIPS did not, however, define these terms, giving WTO members considerable policy space to tailor their law to domestic needs. For example, India—long considered the pharmacy to the world—protects its strong generic drug industry (built by initially denying patent protection to pharmaceutical products) with a high ‘inventive step’. Among other things, it excludes from patentability the ‘mere discovery of a new form of a known substance’ and the ‘new use for a known substance’ under most conditions.³⁵ Under this provision, many important pharmaceuticals—most prominently Gleevec, a treatment for leukemia—are not patentable in India.³⁶ India can thus continue to make these medicines and

³¹ Eyal Benvenisti and George W Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60 *Stan L Rev* 595.

³² Eg Jonathan Band, ‘The SOPA-TPP Nexus’ (2012) 28 *Am U Intl L Rev* 31.

³³ Rochelle Cooper Dreyfuss and Andreas F Lowenfeld, ‘Two Achievements of the Uruguay Round: Putting Trips and Dispute Settlement Together’ (1997) 37 *Va J Intl L* 275, 279. Admittedly, the long term effect may be otherwise: firms may be more willing to locate manufacturing facilities in a foreign country that protects its technical advances and know how (patents and trade secrets) from copyists. Lower manufacturing costs in these jurisdictions could lead to an increase in production, yield scale economies, and result (ultimately) in more trade.

³⁴ TRIPS, art 27.1.

³⁵ India Patent Act, s 3(d).

³⁶ *Novartis AG v Union of India*, AIR 2013 SC 1311 (India).

to sell them in any country with similar laws (or in places where the originator has not chosen to patent). Not surprisingly, other developing countries are emulating India's approach.³⁷

While the United States was a participant, the TPP directly targeted this flexibility. By requiring member states to provide patents for 'new uses of a known product, new methods of using a known product, or new processes of using a known product',³⁸ it ensured that within the region, advances like Gleevec would be protectable. To obtain the power to exclude, pharmaceutical firms would, of course, be required to procure patent protection, which can be expensive. But even if they did not wish to absorb that expense, the TPP offered another safeguard for their interests: data exclusivity.

To be sure, data exclusivity was also required under TRIPS. But there was considerable room to maneuver. Under TRIPS, members were obliged to protect pharmacological data necessary to market 'new chemical entities' against 'unfair commercial use', if the data was generated with 'considerable effort'.³⁹ Since these terms were undefined, members could accord short periods of protection, and protect only data generated locally and only data about entirely novel products. Moreover, WTO members could reasonably believe that if they did not look at the data but instead approved a drug based on an approval elsewhere, they would not violate TRIPS.⁴⁰ Under the TPP, however, a showing of 'considerable effort' would no longer be necessary; the Agreement also included an autonomous definition of unfairness (five years for small molecules and eight for biologics); it referred to a 'new pharmaceutical product', which is arguably different from 'a new chemical entity',⁴¹ and it made clear that approvals based on third-country approvals would be considered use, even if local authorities never viewed the data.⁴²

³⁷ WIPO Committee on Development and Intellectual Property, Study on Pharmaceutical Patents in Chile, CDIP/15/INF/2 (8 January 2015).

³⁸ TPP, art 18.37.2. The provision is now suspended according to sec. 7(b)(i), CPTPP Annex.

³⁹ TRIPS, art 39.3.

⁴⁰ Carlos M Correa, 'Test Data Protection: Rights conferred under the TRIPS agreement and some effects of TRIPS-plus standards' in Rochelle C Dreyfuss & Katherine J Strandburg (eds) *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar, Northampton MA 2011) 568–90.

⁴¹ TPP, art 18.52

⁴² TPP, arts 18.50; 18.51. These provisions are now suspended according to secs. 7(e) & (f), CPTPP Annex.

Together the patent and data exclusivity provisions would, if put into practice, have had a strong impact within TPP countries. Because they would constrain manufacturing for a significant time period, countries like Chile and Vietnam that have generic drug industries would have been particularly affected. Furthermore, for the medicines subject to the new rules, patients across the region would no longer have been able to purchase generic versions from either local manufacturers or distant ones. And the impact would have extended outside the TPP region. Patients in non-TPP countries would not have been able to purchase such medicines from generic producers in the TPP region; generic producers that relied on markets in TPP countries would no longer have been allowed to ship these products into TPP members. That would have detracted from the income of generic firms and, depending on the significance of TPP sales, could have affected scale economies to the point where it would have no longer been commercially feasible for these firms to manufacture and sell products enjoying TPP protection anywhere.

There was also a potentially significant knock-on effect on access to pharmaceuticals. Under TRIPS, countries can issue compulsory licenses in what they regard as emergency situations, including insufficiency of public access.⁴³ These licenses are, in fact, rarely issued because originator firms tend to respond to the threat of a license by lowering prices and increasing supply. But without a strong generic drug industry to lend credibility, the originators are less likely to continue to react that way. Arguably, countries could rely on an amendment to TRIPS, promulgated in the aftermath of the Doha Declaration on public health, that permits a country that lacks manufacturing capabilities to ask a third country to manufacture on its behalf.⁴⁴ But that system has proved to be so difficult to implement in practice, firms are not as likely to see the possibility as a real risk and thus would not be as motivated to act favorably.⁴⁵ Accordingly, the TPP's negative impact on generic production could have significantly affected both the price of pharmaceuticals and their availability in TPP countries and elsewhere.

⁴³ TRIPS, art 31.

⁴⁴ WTO, art 31*bis* (entered into force 23 January 2017). See Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1 paras 17, 19; General Council, Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/641 (8 December 2005).

⁴⁵ Holger P Hestermeyer, 'Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines' *ASIL Insights* (Washington DC, 10 December 2007) <<https://perma.cc/77E8-CR4Z>>.

Admittedly, these effects can also occur when a country unilaterally decides to raise the level of protection. For example, if India were to abandon its position on new uses of known compounds for its own internal reasons (for example, because its generic firms have become originators), nations that relied on Indian production would similarly suffer. But a country with a strong generic industry or a large base of generics consumers has little impetus to change its law except to meet the standards of a megaregional agreement. Furthermore, relative to bilateral trade agreements, which can also lead to changes in the level of protection, megaregionals increase the size of the affected trading area and thus exacerbate the problems arising from increased protection.

2. *Restructuring epistemic communities.* Patent law furnishes another example of how megaregionals can affect third countries. Before patents issue, applications are examined to determine whether the advances claimed are new, inventive, useful, and properly disclosed. To make the process of applying for patents globally more efficient, the Patent Cooperation Treaty (PCT) allows applicants to apply in multiple countries simultaneously.⁴⁶ Applicants select one of the PCT's designated International Searching Authorities (which are all in developed or emerging countries) to search for prior art and, if the applicant wishes, to issue a preliminary report on whether the advance is patentable in light of that art. Each country where the applicant seeks protection is eventually supposed to examine under its own law, but some countries have gone one step further: they have joined the Patent Prosecution Highway (PPH), a set of bilateral arrangements among examining authorities whereby each agrees to give deference to the first examination.⁴⁷ And to make examinations even more portable among agencies, the US Patent and Trademark Office, the European Patent Office, and the Japanese Patent Office have formed the Trilateral, which conducts regular studies and issues reports aimed at harmonizing procedures and outcomes.⁴⁸ These efforts have created a strong epistemic community—a network of officials in the intellectual property offices of high-protection jurisdictions.

⁴⁶ WIPO, Patent Cooperation Treaty (19 June 1970) 28 UST 7645, 1160 UNTS 231.

⁴⁷ See USPTO, Patent Prosecution Highway (PPH)—Fast Track Examination of Applications, <<http://www.uspto.gov/patents-getting-started/international-protection/patent-prosecution-highway-pph-fast-track>>.

⁴⁸ See 'About Us', Trilateral, <<http://www.trilateral.net/about.html>>. [*I prefer version w/ live links*]

In what can be considered an example of bottom up harmonization, the views of this community are regularly exported to other countries. First, the Trilateral engages in various efforts to persuade countries to alter rules and regulations that produce inconsistencies. Second, developing countries strapped for examining resources often defer entirely to PCT reports, even though the International Searching Authority will not have considered the specifics of their laws. A country with a patent law such as India's might therefore wind up issuing a patent on a new use of an old compound because the International Searching Authority would consider it patentable.⁴⁹ India solves this problem by giving interested parties the right to challenge a patent upon issuance; analogously, Brazil allows its health authority to review pharmaceutical patent applications before the patents issue.⁵⁰ But absent such a mechanism, patents in developing countries may issue based on the terms of foreign law. Third, developed countries 'help' developing countries build capacity by training their examiners, either at WIPO or by hosting trainees in their patent offices.⁵¹ As Peter Drahos has shown, either way, the training process socializes these new examiners into the practices of high-protection countries and tends to bias their decisionmaking.⁵²

The TPP would magnify these problems. It would create more countries where patent law is highly protective. Furthermore, by mandating patent cooperation and work sharing among examining offices in all TPP countries,⁵³ it would strengthen a community of shared, pro-patent values and coopt examiners in countries like Vietnam. Conversely, the TPP could weaken the possibility of forming an epistemic community more skeptical of patents. As Amy Kapczynski and Ana Santos Rutschman have independently noted, the adoption of rules like India's in other developing countries has created an opportunity for these countries to obtain the same efficiency gains that the PPH provides to developed countries. Convergence

⁴⁹ Bhaven N Sampat, Kenneth C Shadlen, and Tahir M Amin, 'Challenges to India's Pharmaceutical Patent Laws' (2012) 337 Science 414 (noting lack of § 3(d) rejections).

⁵⁰ See M Monirul Azam, 'The Experiences of TRIPS-Compliant Patent Law Reforms in Brazil, India, and South Africa and Lessons for Bangladesh' (2016) 7 Akron Intell Prop J 61, 76; Law No 9279/96, amended by Law No 10196 (14 February 2001) (Brazil).

⁵¹ See eg, WIPO, Patent Cooperation Treaty (PCT) Working Group, Training of Examiners (26 April 2016) PCT/WG/9/18; Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (CUP, Cambridge 2010).

⁵² Peter Drahos, 'Trust Me: Patent Offices in Developing Countries' (2008) 34 Am J L & Med. 151–74.

⁵³ TPP, art 18.14.

makes it possible for these countries to train their own examiners, develop procedures for compulsory licensing, and collaborate in international fora.⁵⁴ The TPP could disrupt this possibility by taking a group of emerging nations out of the mix—including several countries with the resources to conduct deference worthy examinations and the capacity to engage effectively in law and norm reform.

3. *Treaty making and interpretation.* Megaregionals can also influence the way that other international agreements are structured and interpreted. Just as bilaterals like the Korea-US FTA (KORUS) served as templates for the TPP,⁵⁵ if enacted, the TPP may well serve as a template for *future* agreements. For example, TPP concepts could play a role in any negotiations over the digital economy that take place in the WTO or in connection with other regional agreements.

If it goes into force, the TPP could also serve as a shield and constrain the ability of non-TPP parties to achieve their own objectives in future negotiations with TPP members. One example is the protection for geographical indications (GIs). The EU regards GIs—geographic terms that signify to consumers that there is a link between the characteristics of a product and the place from which it originated—as an important component of agricultural policy, which is aimed at protecting small farms and traditional production methods.⁵⁶ Its Foodstuffs Regulation awards GIs to regional producers when their production methods meet certain criteria, and it regulates other uses of geographic terms, including when they appear in trademarks. Trademark holders must generally tolerate GIs using the same terms, even if the use might confuse consumers.⁵⁷ This practice is controversial under TRIPS,⁵⁸ yet in its negotiations with

⁵⁴ Amy Kapczynski, 'Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector' (2009) 97 Cal L Rev 1571; Ana Santos Rutschman, 'Steps Towards an Alignment of Intellectual Property in South-South Exchanges: A Return to TRIPS' (2015) 43 Denv J Intl L & Poly 515.

⁵⁵ Sean M Flynn and others, 'The US Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement' (2012) 28 Am U Intl L Rev 105, 113.

⁵⁶ Council Regulation (EC) 510/2006 (20 March 2006) on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (Foodstuffs Regulation). In particular, point (2) stresses the encouragement of agricultural production and improving farmer incomes.

⁵⁷ Foodstuffs Regulation, art 3.4 (excepting only trademarks with a strong reputation and renown that were registered in good faith prior to the registration of the GI).

⁵⁸ Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (15 March 2005) WT/DS174/R.

the United States, the EU allegedly wants to strengthen GI protection, relative to trademark protection.⁵⁹ But were the United States to join the TPP, its provisions would stand in the way, for it protects trademark owners from the unauthorized use of similar signs, including ‘subsequent geographical indications’.⁶⁰

Most important, megaregionals may affect the interpretation of *existing* agreements. Consider, for example, trademarks, arguably the most easily disseminated intellectual property. Since the 19th century, international law has tried to protect traders from pirates, who register famous marks in remote regions, and hold the registrations up for ransom when the trader expands geographically. Both the Paris Convention and TRIPS require member states to prohibit registration or use of marks that are liable to create confusion with ‘a mark considered . . . to be well known’.⁶¹ However, neither instrument defines ‘well known’ and WTO members have developed disparate interpretations.⁶² In 1999, WIPO adopted the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks,⁶³ which both defines the term and describes the scope of protection to be accorded to well known marks. The definition of ‘well-known’ is very broad: under the Joint Recommendation, consumers do not need to be aware of the mark; it is enough that it is recognized in business circles dealing with the goods on which it is used.⁶⁴ Significantly, however, the Joint Recommendation never became law. Because parts of the Recommendation were opposed by several WIPO members,⁶⁵ it has, at best, the status of ‘soft law’.

Arguably, however, the TPP could change that result. Like several US free trade agreements, it would require every party to recognize the Joint Recommendation.⁶⁶ Admittedly, its definition of ‘well-known’ would apply directly only in member countries. However, the WTO confronts a difficult interpretive

⁵⁹ See Jessica Watts, ‘The Transatlantic Trade and Investment Partnership: An Overly “Ambitious” Attempt to Harmonize Divergent Philosophies on Acceptable Risks in Food Production Without Directly Addressing Areas of Disagreement’ (2015) 41 NCJ Intl L 83.

⁶⁰ TPP, art 18.20.

⁶¹ Paris Convention, art 6*bis*; TRIPS, arts 16.2 & 3.

⁶² See eg, *Grupo Gigante SA De CV v Dallo & Co* 391 F3d 1088, 1096 (9th Cir 2004); *McDonalds Corp v Joburgers Drive-Inn Restaurant (Pty) Ltd* 1996 (1) SA 1(A) (S Afr).

⁶³ WIPO and Assembly of the Paris Union for the Protection of Industrial Property (29 September 1999) 883(E) (Joint Recommendation).

⁶⁴ Joint Recommendation, art 2(2)(a)(iii).

⁶⁵ See Graeme B Dinwoodie and others, *International Intellectual Property Law* (2edn LexisNexis, Newark 2008) 205–06.

⁶⁶ TPP, art 18.22(3). See eg US-Jordan FTA, art 4(1)(a), 41 ILM 63 (2002); US-Singapore FTA, art 16.1(2)(b)(i), 42 ILM 1026 (2003).

problem whenever it deals with intellectual property complaints, for the terms that are used have never been defined in an international forum. When a WTO member's interpretation of such a term is challenged, the Dispute Settlement Body (DSB) has tended to consider how other WTO members have construed it.⁶⁷ The TPP's obligation to recognize the Joint Recommendation's definition of 'well-known' could, in what William Cornish has dubbed 'Genevan bootstrapping',⁶⁸ lead the DSB to turn that soft law definition into the hard law of the WTO. As such, it could affect all WTO nations. The same is potentially true of other terms 'clarified' in the TPP, including its patent provision on inventiveness and its data exclusivity provision on unfair use.⁶⁹

4. *Political economy*. Megaregionals may also export their rules by familiarizing foreign innovators with them and instilling in them the desire to benefit from the same protections domestically. Trademark law once again furnishes an example. TRIPS requires protection against the likelihood of consumer confusion and also mandates that protection extend to 'goods or services which are not similar to those in respect of which the trademark is registered'.⁷⁰ It has not, however, been clear whether the extension was intended to protect marks only against more remote possibilities of confusion or to also protect them from 'dilution'—blurring of the mark (a reduction in its signifying function) or tarnishment (a diminution in its cachet).⁷¹ Many countries have chosen to confine protection to the likelihood of confusion, but, as noted above, the Joint Recommendation articulates not only a definition of 'well-known', it also delineates the protection such marks are to receive—including protection against use that is likely to 'dilute in an unfair manner the distinctive character of the well-known mark'.⁷²

⁶⁷ See eg, Panel Report, *Canada-Patent Protection of Pharmaceutical Products* (17 March 2000) WT/DS114/R, para 7.69 (construing the term 'legitimate interests') (Canada-Pharmaceuticals).

⁶⁸ WR Cornish, 'Genevan Bootstraps' (1997) 19 Eur Intell Prop Rev 336.

⁶⁹ Another example is 'commercial scale', which was defined in Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (26 Jan 2009) WT/DS362/R (China-Enforcement) and redefined in TPP, art 18.77(1).

⁷⁰ TRIPS, arts 16.1 & 3.

⁷¹ See eg, Paul J Heald, 'Trademarks and Geographical Indications: Exploring the Contours of the TRIPS Agreement' (1996) 29 Vand J Transnatl L 635, 654–55.

⁷² Joint Recommendation, art 4(1)(b)(ii).

The inclusion of the Joint Recommendation in the TPP thus means that anyone doing business in with the TPP region would have to ensure that its marks do not dilute the marks of TPP traders. Avoiding such marks would likely be costly, as adopting a new mark would require an examination of all marks registered in the TPP and an inquiry into how the mark would be perceived by people who speak many different languages and pronounce words in diverse ways.⁷³ To be sure, these rules would not affect non-TPP traders in their business arrangements outside the TPP region. But traders often pursue global marketing strategies.⁷⁴ Accordingly, those operating within the TPP region would be likely to adopt marks compatible with TPP requirements for all their business dealings.

Significantly, the TPP would not just impose *costs* on foreign traders operating within the TPP region; it could also furnish them with the *benefits* of the instrument when they trade in the region. Under the WTO's most-favoured nation (MFN) obligation, all WTO members can claim the benefits a WTO member extends to others.⁷⁵ There is an exception in the GATT for free trade areas,⁷⁶ but as Rob Howse has argued, it applies only to tariff preferences, not to regulatory obligations.⁷⁷ Even if it did, GATT exceptions do not automatically apply to TRIPS. And TRIPS—unlike the GATS⁷⁸—does not include its own exception for free trade areas. Accordingly, while MFN may be withheld for other parts of the TPP, it arguably cannot be withheld for intellectual property. Besides, even if MFN treatment is not required, countries often extend intellectual property obligations broadly. One goal of trademark law is to provide consumers with signals that efficiently convey information about origin and quality; that function is impaired if consumers must keep in mind the nationality of the right holder. (Lower protection for works of foreign

⁷³ TPP also requires members to protect sounds and to make best efforts to protect scents, TPP, art 18.18. In contrast, TRIPS requires protection only for visually perceptible marks, art 15.1.

⁷⁴ Sonia K Katyal, 'Trademark Cosmopolitanism' (2014) 47 UC Davis L Rev 875; Susan P Douglas, Samuel Craig, and Edwin J Nijssen, 'Integrating Branding Strategy Across Markets: Building International Brand Structure' (2001) 9(2) J Intl Mktg 97.

⁷⁵ WTO, General Agreement on Tariffs and Trade (30 October 1947) art I <<http://docsonline.wto.org>> (GATT); TRIPS, art 4.

⁷⁶ GATT, art XXIV.

⁷⁷ Robert Howse, 'Regulatory Cooperation, Regional Trade Agreements, and World Trade Law-Conflict or Complementarity?' (2015) 78 L & Contemp Probs 137–51.

⁷⁸ WTO, General Agreement on Trade in Services (1 January 1995) art V <<http://docsonline.wto.org>> (GATS).

authorship or invention is also disadvantageous because it lowers prices relative to domestic works and thus requires locals to compete at a disadvantage.)

Once non-TPP traders become acquainted with the benefits of TPP trademark law within the region and begin to pay the costs of compliance on a global basis, they would likely lobby their own governments to enact laws according them the domestic benefits of adopting marks compliant with the TPP regime. They could also work to persuade their governments to enter into their own trade agreements that adopt TPP rules. These fifth columns could have significant influence. In keeping with the observations of Benvenisti and Downs, these right holders may well be better organized than users, who have diffuse interests in a competitive marketplace, free use of expressive signs, access to comparative information, and such. Should the right holders win, the TPP would affect not only TPP members, but also traders in countries that do business with TPP members and in countries that do business with those who do business in the TPP region.

5. *Norm generation.* A megaregional can do more than alter consumer expectations; it can also change attitudes towards information exchange. Intellectual property norms tend to be fluid. Where protection is new, strong normative positions have yet to develop. Even where such protection is well-established, technological changes can require a reappraisal of values. For example, before photocopying, there was no view on whether scientists could copy articles for use in their laboratories;⁷⁹ before videotaping, no position on time shifting;⁸⁰ before the Internet, no ethics of file sharing.⁸¹ In periods of uncertainty, users and producers are essentially in a race to promulgate and instantiate new norms. A megaregional offers a powerful way for producers to codify their preferences and gain, in effect, a first-mover advantage.

The TPP provision on trade secrecy is a good illustration. The impact of trade secrecy protection is ambiguous. The availability of protection creates incentives to develop subpatentable advances, offers a

⁷⁹ *Am Geophysical Union v Texaco Inc* 60 F3d 913 (2d Cir 1994).

⁸⁰ *Sony Corp of Am v Universal City Studios, Inc* 464 US 417 (1984).

⁸¹ *Napster Inc Copyright Litig* 479 F3d 1078 (9th Cir 2007); *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005).

cheap alternative to patent protection, and can facilitate licensing, financing, and the expansion of facilities.⁸² At the same time, over-zealous protection can impoverish the domain of accessible knowledge, inhibit employee mobility, interfere with government regulation, and damage academic norms of communalism.⁸³ Empirical research demonstrating that the states that do not enforce laws highly protective of trade secrets are more innovative than the states that do,⁸⁴ suggests that free information exchange is crucial to technological progress.

Because of this uncertainty, even developed countries have taken radically different approaches to trade secrecy. The Paris Convention, which required protection against ‘unfair competition’, did little to harmonize these regimes.⁸⁵ TRIPS was the first instrument that explicitly required protection against the misappropriation of industrial information that is valuable because it is secret,⁸⁶ but (as usual) it did not define key terms. The USTR has been using the threat of withdrawing trade preferences to pressure other countries to do more to protect trade secrets,⁸⁷ and observers had expected the TPP to include greater detail on what trade secrecy protection should entail. But instead, the TPP incorporated the Paris and TRIPS provisions by reference.⁸⁸ It then propounded a wholly new obligation to enact *criminal* trade secrecy law.⁸⁹

Given the indeterminacy of civil trade secrecy protection, the growing scholarly literature questioning the use of criminal law in *all* intellectual property contexts,⁹⁰ and the absence of an obligation to criminalize the infringement of patents (which protect more advanced innovations than trade secrets law), this provision was astonishing. Even more so were the details. While states must criminalize tampering with computer systems, the TPP allowed each individual state to choose which aspects of tampering to

⁸² Michael Risch, ‘Why Do We Have Trade Secrets?’ (2007) 11 Marq Intell Prop L Rev 1.

⁸³ Orly Lobel, *Talent Wants to be Free* (Yale University Press, New Haven 2013) 141–52.

⁸⁴ Matt Marx, Deborah Strumsky, and Lee Fleming, ‘Mobility, Skills, and the Michigan Non-compete Experiment’ (2011) 55 Mgmt Sci 875–89.

⁸⁵ Paris Convention, art 10*bis*.

⁸⁶ TRIPS, art 39.2.

⁸⁷ See eg, Office of the United States Trade Representative, *Special 301 Report 2014* <<https://perma.cc/DL7H-335V>>.

⁸⁸ TPP, art 18.78(1).

⁸⁹ TPP, art 18.78(2) & (3).

⁹⁰ Eg Jonathan Masur and Christopher Buccafusco, ‘Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law’ (2014) 87 S Calif L Rev 275; Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, Cambridge MA 2012).

criminalize. It also offered many alternatives on what other sorts of appropriations of information could constitute an offense; whether the defendant needs to have acted willfully or fraudulently; and the relevance of the defendant's motive for taking the information. If the provision were to come into force, the result would likely be a hodgepodge of criminal laws within the region—a situation sure to invite conflicts and produce a level of inconsistency that may well undermine exactly the kind of technology transfer that trade secrecy protection is meant to encourage. The measure was, in short, the antithesis of what one would expect from an international agreement related to trade.

What the Agreement did do was to promote criminalization. With so many alternatives, every member state would surely find some set of activities that it is comfortable criminalizing. In this way, the drafters appear to have proposed criminal sanctions not to improve the rules of trade, encourage innovation, or facilitate technology transfer, but rather to use the moral force of the criminal law to express social condemnation of the practice of computer hacking—and also to such practices as exchanging information, changing jobs, and building on the work of others. The TPP was, in other words, aimed at generating new social norms.⁹¹

These norms could easily spread outside the TPP region. To some extent, they fill a void: countries that had not considered protection for trade secrets would be confronted by a fully realized code of conduct. Tellingly, other novel obligations have succeeded in changing attitudes on the ground. The UK case, *Page v. Chobani*,⁹² provides an interesting example, in which expectations grounded in the EU Foodstuffs Regulation were extended to an entirely different sphere—trademark law. In that case, the phrase 'Greek yogurt' was found likely to confuse consumers as to geographic source, even though the term was not recognized as a GI by the EU (or, for that matter, in Greece), and in fact, referred to a particular kind of yogurt, described by Codex Alimentarius Commission as 'concentrated yogurt with an increased protein content'. Restricting the use of geographic terms in this way is consistent with the EU's efforts to convince consumers to pay

⁹¹ RA Duff, 'Theorizing Criminal Law' (2005) 25 Oxford J Legal Studies 353; Lon L Fuller, *The Morality of Law* (Yale University Press, New Haven CT 1964); Richard Fuller, 'Morals and the Criminal Law' (1941–42) 32 J Crim L & Criminology 624.

⁹² [2014] EWCA Civ 5 (Court of Appeal 18 January 2014).

more for geographically-labelled products. However, expanding geographic limitations will also have considerable impact on competition in the UK, the United States (the home of defendant Chobani), and— if firms adopt global marketing schemes—beyond. There are many geographic terms like ‘Greek yogurt’ that do not, in fact, impart information about a special relationship to place (French fries, Dutch chocolate, Swiss cheese, Chicago pizza). If these terms become unavailable to all competitors, it will be difficult for those who are excluded to find suitable substitutes. The Codex Standard’s description of Greek yogurt is not exactly euphonious. Even if producers were allowed call their products ‘Greek-style,’ the value of their products might be reduced relative to yogurts that happen to come from Greece.

For trade secrecy, the likelihood of spillover is compounded by the fact that these laws will certainly be applied extraterritorially. Computer systems are delocalized, so working with them will often involve acts outside the TPP region. Moreover, the provision specifically contemplates the use of information within other states: it mentions penalties for ‘acts related to a product or service in ... international commerce’; to ‘acts directed by or for the benefit of ... a foreign economic entity’; and to ‘acts detrimental to a Party’s ... international relations or national defence or national security’.⁹³ Significantly, the United States, which has criminalized trade secrecy violations since 1996, has routinely applied its law to reach foreign actors and activities occurring outside its borders.⁹⁴ Once innovators become concerned with getting caught up in these criminal laws, the creative environment both inside and outside the region of the TPP would likely grow increasingly wary of open innovation and other unrestricted information exchanges.

6. *Procedure.* A final factor in generating spillovers is procedural. Transnational enforcement provisions in a regional agreement can affect all goods that move across the borders of the region, however briefly. For example, the TPP would permit its members to detain in transit goods ‘suspected of being counterfeit ... or pirated’.⁹⁵ However, it is not clear whether the WTO would allow such goods to be seized. India and Brazil lodged complaints against the EU on a closely related question involving the detention of

⁹³ TPP, arts 18.78(3)(b), (d), & (e).

⁹⁴ Dreyfuss and Lobel, ‘Economic Espionage as Reality or Rhetoric’.

⁹⁵ TPP, art 18.76(5).

patented goods, but the DSB has yet to resolve the dispute.⁹⁶ Thus, a shipment from China to South Africa, shipped through Vietnam, could be detained by Vietnam at the behest of a right holder in a TPP country. If Vietnam interprets the TPP as permitting it to apply its own, TPP-inflected law on the question whether the detained goods are counterfeit or pirated, then buyers and sellers in China and South Africa will be required to adopt an approach to copyright and trademark law dictated by the TPP even though neither country is a member of the agreement.

IV. Normative implications

There is much about the intellectual property chapters of the TPP for good global governance advocates to criticize. Foremost is the secrecy that surrounded negotiations. For intellectual property, this was secrecy in only the most attenuated sense, at least in the United States. As part of the process, the USTR shared proposals with an advisory committee composed exclusively of industry representatives. For the creative sector, this meant only participants interested in raising the level of intellectual property protection.⁹⁷ Furthermore, it asked for, and received comments on, early drafts from the Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15), which likewise is oriented toward industry and includes many representatives from the branded pharmaceuticals industry (and one generic drug association).⁹⁸ At the tail end of the process, after considerable pressure from interest groups and Congress,⁹⁹ the USTR decided ‘to add voices that were initially left out of the process’.¹⁰⁰ But even then, only summaries, priorities, fact sheets, and recaps—not full texts—were provided. Without seeing actual

⁹⁶ European Union and a Member State — Seizure of Generic Drugs in Transit, Dispute DS408 (India), request for consultations filed 11 May 2010; European Union and a Member State — Seizure of Generic Drugs in Transit, Dispute DS409 (Brazil), request for consultation filed 12 May 2010.

⁹⁷ Office of the United States Trade Representative, Advisory Committee for Trade Policy and Negotiations <<https://perma.cc/7KfZ-BUNN>> (listing advisors from the Software Alliance, the Information Technology Industry Council, 3M Corporation, VisionIT, and McGraw Hill).

⁹⁸ See also Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15), Report to the USTR on the TPP (3 December 2015) (noting that one representative of the generic drug industry was included) <<https://perma.cc/VJW7-96T2>>.

⁹⁹ See eg, DeLauro, Miller Push for More Transparency, Congressional Consultation in Trade Negotiations (2011), <<https://perma.cc/466X-F4J9>>; Electronic Frontier Foundation, Transpacific Partnership Agreement <<https://perma.cc/Q2N8-SRFZ>>.

¹⁰⁰ Office of the USTR, Fact Sheet: Transparency and the Obama Trade Agenda (2015) <<https://perma.cc/Z6FA-VUNM>>.

drafts, these groups had a difficult time reacting intelligently or persuasively to the draft.¹⁰¹ With considerable pressure from those interested in strong protection and only ill-formed responses from user-based organizations, it is no wonder that the text of the final Agreement was so one-sided.

One might have thought that experience with the Anti-Counterfeiting Trade Act (ACTA),¹⁰² a plurilateral agreement involving Australia, the EU, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and the United States, would have been instructive. Like the TPP, ACTA was intended to regulate the digital economy and improve enforcement of intellectual property rights. Although it was finalized and signed by the negotiating parties in 2011, it has yet to come into force (and may well be a dead letter). The European Parliament rejected it, in part, on the ground that it was negotiated in secret.¹⁰³ Moreover, the final product was considered by many commentators and lawmakers to be a fundamentally misguided effort to protect right holders at the expense of the public interest.¹⁰⁴

The damaging effect of secrecy on substance are clearly visible in the intellectual property chapters of the TPP. For example, the pharmaceutical industry's fingerprints are evident throughout. As the previous discussion noted, the TPP extended the scope of protection to include second uses of known pharmaceuticals, broadened the scope of data exclusivity to more compounds, and lengthened the period during which reuse is considered 'unfair'. In addition, the industry won the right to an extension of the term of patent protection to compensate for delays in obtaining marketing approval. This benefit was obtained in exchange for a requirement, optional in TRIPS,¹⁰⁵ that states adopt a regulatory review exception to infringement—a provision that favors generic producers.¹⁰⁶ The TPP also included a provision on (ironically) 'Procedural Fairness' which would have required member states to give pharmaceutical firms a voice in setting the price of pharmaceuticals and determining which medicines will be included in public

¹⁰¹ See eg, Margot Kaminski, 'Don't Keep the Trans-Pacific Partnership Talks Secret' *NY Times* (New York, 14 April 2015).

¹⁰² Anti-Counterfeiting Trade Agreement (3 December 2010) 50 ILM 243 (2011).

¹⁰³ Matt Warman, 'European Parliament Rejects ACTA Piracy Treaty' *The Telegraph* (London, 4 July 2012).

¹⁰⁴ Eg Kenneth L Port, 'A Case Against the ACTA' (2012) 33 *Cardozo L Rev* 1131; Peter K Yu, 'Six Secret (and Now Open) Fears of ACTA' (2011) 64 *SMU L Rev* 975.

¹⁰⁵ TRIPS, art 30; Canada-Pharmaceuticals.

¹⁰⁶ TPP, arts 18.48(2) & 18.49. Art. 18.48(2) was suspended according to sec. 7(d), CPTPP Annex.

formularies.¹⁰⁷ In response to the Philip Morris litigation on tobacco packaging,¹⁰⁸ advocates suggested that the investment chapter of the TPP carve out from the ambit of investor-state dispute settlement challenges to regulations intended to protect health.¹⁰⁹ In fact, however, only tobacco control measures were excluded,¹¹⁰ thereby leaving pharmaceutical firms free to contest laws that affect the validity and enforceability of their patent rights.¹¹¹ The influence of other right holders was similarly evident. Trademark holders were greatly favored over other users of the same or similar signals, including the holders of geographical indications. The digital economy provisions likewise imposed several strong safeguards for the interests of copyright owners.¹¹² Had the USTR shown draft texts to groups primarily interested in access, greater balance might have been achieved. For example, the decision to require ‘transparency’ in the negotiations of the price of pharmaceuticals would, perhaps, have included a requirement to hear from physician groups, patient advocacy organizations, and NGOs interested in healthcare.¹¹³

The strong spillover effects on nations outside the TPP region suggest that in the future, it would also be wise to create a formal mechanism for nations in the broader geographic region and countries that trade with the member states to make their views known to negotiators. As we have seen, the effects on these countries can be considerable. In some situations, the impact may be severe enough to give rise to a complaint in the WTO. As noted, there is already a case pending on whether the seizure of goods violates the GATT’s protection for freedom of transit.¹¹⁴ Arguably, some obligations take so much from the public, they run afoul of the proviso in TRIPS that prohibits members from increasing protection in a manner that ‘contravene[s] the provisions of this Agreement’.¹¹⁵ After the current moratorium on nonviolation complaints concerning TRIPS is lifted,¹¹⁶ countries might claim that the higher obligations imposed by the

¹⁰⁷ TPP, Annex 26-A, art 3. The provision is now suspended according to sec. 9, CPTPP Annex. See also Richard B. Stewart & Paul Mertenskoetter, in this volume.

¹⁰⁸ *Philip Morris Brands v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

¹⁰⁹ See Robert Stumberg, ‘Safeguards for Tobacco Control: Options for the TPPA’ (2013) 39 *Am J L & Med* 382, 399–403.

¹¹⁰ TPP, art 29.5.

¹¹¹ Eg *Eli Lilly & Co v Gov’t of Can*, ICSID Case No UNCT/14/2, Final Award (16 March 2017).

¹¹² Thomas Streinz, this volume.

¹¹³ TPP, Annex 26-A (entitled ‘Transparency and Procedural Fairness’).

¹¹⁴ GATT, art V.

¹¹⁵ TRIPS, art 1.1.

¹¹⁶ TRIPS, art 64.2; WTO, Ministerial Decision of 19 December 2015, TRIPS Non-Violation and Situation Complaints (21 December 2015) WT/Min(15)/41 (extending the moratorium until 2017); Ministerial Decision on

TPP impede the objectives of the WTO Agreement and undermine the benefits they expected to receive.¹¹⁷ But ex post challenges can only go so far. A greater opportunity to bring to the negotiators' attention the problems an agreement might cause would reduce potential conflicts from the start.

Similarly, it would be sensible to introduce into regional agreements opportunities for third countries to intervene in ongoing decisionmaking and relay complications to the agreement's governance authority. The institutional provisions of the TPP, for example, included a Commission and a committee structure.¹¹⁸ While the Agreement envisioned involvement by non-governmental persons or groups, that opportunity was limited to participation when the parties deemed it 'appropriate' and the persons or groups must be 'of the Parties'.¹¹⁹ Expanding inputs to include other sources, could have improved the Commission's understanding of the effects of the Agreement. It could also have enhanced the prospect for expanding membership and helped TPP members avoid inflicting severe problems, such as a collapse of generic supply of medicine to non-TPP countries or the improper seizures of critical goods. Significantly, the CPTPP requires the Commission to review the instrument prior to its entry into force. Thus, there is still time for the parties to create an opportunity for such intervention.¹²⁰

Nonetheless, as problematic as megaregionals appear, there are attractive features to this approach to global governance. Berne, Paris, and TRIPS were all 'top down' instruments, in which developed countries with strong knowledge-based economies imposed, often through divide and conquer strategies, their pro-intellectual property views on other nations.¹²¹ As is widely recognized, the result was a set of rules optimal nowhere: developed countries do not see TRIPS as requiring enough protection for intellectual property to properly compensate them for their intellectual inputs, and developing countries discovered that the returns from their exports do not offset the high prices that the holders of intellectual property rights

TRIPS Non-Violation and Situation Complaints of 13 December 2017 (instructing the Council for TRIPS to continue to examine use of these complaints and suspending them until 2019).

¹¹⁷ GATT, art XXIII(1)(b); Susy Frankel, 'Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes' (2009) 12 J Intl Econ L 1023–65.

¹¹⁸ TPP, ch 27.

¹¹⁹ TPP, art 27.2(4)(c).

¹²⁰ CPTPP, art 6.

¹²¹ Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*.

can charge.¹²² In some areas, both sides have moved to ‘bottom up’ strategies driven by networked intellectual property offices and, for developing countries, aided by UN agencies such as the World Health Organization (WHO) or the United Nations Conference on Trade and Development (UNCTAD); by NGOs, such as the International Centre for Trade and Sustainable Development (ICTSD); or by the Third World Network (TWN).¹²³ But the organizations on each side are polarizing and rarely communicate with one another. Nor do they all enjoy equivalent power to change the intellectual property landscape.

Megaregionals offer an appealing alternative. The TPP was negotiated by a small mix of countries with shared, yet somewhat heterogeneous interests. The region included roughly as many developing as developed countries; there were member states that could see both sides of the intellectual property issues because they are poor, yet in the midst of becoming innovative at world levels; there were also two highly developed small market economies (New Zealand and Singapore) with interests quite distinct from those of more populous developed countries.¹²⁴ While the instrument still wound up with many preferences for right holders, the TPP was more balanced than many observers expected. Leaked texts of the intellectual property chapters, which reveal the countries that proposed (or opposed) particular provisions, demonstrate the extent to which developing countries and small market economies played prominent roles in the deliberations, offering many proposals of their own¹²⁵ and countering proposals made by the United States and Japan, the two countries most interested in raising standards above TRIPS levels.¹²⁶ The positions of developing and small market countries did not always win. For example, while the proposal for a regulatory review exception was included in the patent provisions, a broader experimental use proposal was not accepted.¹²⁷ Nonetheless, it is clear these countries had an influence on the final text. The regulatory review exception became mandatory. The carve-out for health was perhaps weaker than expected, but it was

¹²² Annette Kur and Vytautas Mizaras (eds), *The Structure of Intellectual Property Law: Can One Size Fit All?* (Edward Elgar, Northampton MA 2011).

¹²³ Dinwoodie & Dreyfuss, *A Neofederalist Vision of TRIPS*, 152–56.

¹²⁴ Susy Frankel, *Test Tubes for Global Intellectual Property Issues: Small Market Economies* (CUP, Cambridge 2015).

¹²⁵ Eg Wikileaks, Release of Secret Trans-Pacific Partnership Agreement (TPP) Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions (30 August 2013) <<https://perma.cc/PP8A-AUPJ>> arts QQ.A.2 & 2bis; QQ.A.5; QQ.A.9.

¹²⁶ Eg, arts QQ.A.11; QQ.A.12; QQ.C.1; QQ.C.11; QQ.G.3; QQ.G.10, QQ.E.1; QQ.E.16, QQ.E.XX.4

¹²⁷ Wikileaks, QQ.E.5ter.

present for tobacco. The United States wanted data exclusivity for biologics to last for twelve years; in fact, it would have lasted at most eight.¹²⁸ The role of exceptions and limitations in copyright and related systems was elaborated.¹²⁹ The enforcement provisions regarding the Internet were toned down.¹³⁰

The CPTPP shines an even brighter light on the effect of composition and small group dynamics and further demonstrates the value of megaregional lawmaking relative to the chaos of multilateral negotiations among widely dissimilar participants or the asymmetries inherent in bilateral bargaining between a developed country and a powerless trading partner. Although the CPTPP remains very much a TRIPS-plus instrument, once the United States dropped out, so did many of the most controversial elements of the agreement. On the patent side, that included the provisions discussed above that were championed by the pharmaceutical sector: the requirements that member states protect new uses of known substances; grant five years' exclusivity to data generated to obtain marketing approval (eight for biologics), even if local authorities never viewed the data; extend patents for various delays; and provide 'Procedural Fairness'.¹³¹ The US withdrawal shifted the center of gravity and allowed the remaining parties to find a new compromise position. Significantly, it is one that is likely to be more appealing to nations in the general region that are entertaining the idea of joining (India is an obvious example).¹³² In the end, the CPTPP may more effectively achieve the TPP's original goals of promoting its vision of economic ordering and creating a broad framework supporting competition, investment, and regulatory coherence.

Megaregionals' spillover potential helps in that endeavor. As the region implements such an agreement, nonparties become acquainted with the new IP regimes through the experiences of the locals who do business there. If these third-parties find the rules inimical to their interests, they can take steps to protect themselves (they are not, after all, bound by the instrument). For example, if the TPP had gone into

¹²⁸ TPP, art 18.52. For other compromises in the patent section, see Burcu Kilic, 'Defending the Spirit of the Doha Declaration in Free Trade Agreements: Trans-Pacific Partnership and Access to Affordable Medicines' (2014) 12 *Loy U Chi Intl L Rev* 23, 38–55.

¹²⁹ TPP, art 18.66.

¹³⁰ See eg, TPP, art 18.82.

¹³¹ TPP, arts. 18.37; 18.50; 18.51; 18.46, 18.48; Annex 26-A, art 3; CPTPP Annex, secs. 7(b); 7(c); 7(d); 7(e), 7(f).

¹³² César Rodríguez-Garavito, 'A Golden Straightjacket? The Struggle over Patents and Access to Medicines in Colombia' in Dreyfuss and Rodríguez-Garavito, *Balancing Wealth and Health*, 169–92.

force and threatened developing countries with the loss of generic production, they could have banded together to encourage the development of their own generic drug industry. Significantly, the Doha Declaration on Public Health has been read to permit developing countries to harness economies of scale in this way.¹³³ But as third countries develop ambitions to become more innovative and move toward the knowledge frontier, their creative sectors will inevitably lobby for stronger protection. The rules of a megaregional are likely to be particularly congenial. Not only will those working in the region be familiar with them, the instrument's (somewhat) centrist positions may be more suitable than the rules imposed from the top down or promoted by intellectual property offices from the bottom up. In other words, 'sideways' harmonization avoids the problem of one set of countries directly exerting its will on others. Because the rules are at least somewhat moderate and their impact is softer—and come without the threat of the state-to-state or investor-state dispute resolution to which megaregional members are subject—third states can adapt slowly and in a manner that is responsive to their own regulatory needs and growing creative sectors.

Spillovers may also reduce the incidence of fragmentation. While there are advantages to regulatory pluralism, a multiplicity of obligations regarding the same works can lead to disputes that cycle among tribunals and that are resolved, or are in danger of being resolved inconsistently.¹³⁴ While scholars such as Martti Koskenniemi have done a masterful job proposing interpretive methods to avoid incompatible results,¹³⁵ the creative community must still live with substantial indeterminacy. Spillovers regarding

¹³³ WTO General Council, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (1 September 2003) WT/L/540 para 6 and corr 1.

¹³⁴ For a small sample of the disputes between Anheuser-Busch and Budvar on rights to use their respective trademarks and GIs, see *Anheuser-Busch v. Budejovický Budvar NP*, [1984] FSR 413 (CA) (UK); *Anheuser-Busch Inc v Portugal*, App No 73049/01, 45 Eur HR Rep 36 [830] (Grand Chamber ECHR 2007); *Anheuser-Busch Inc v Budejovický Budvar*, 2004 ECR I-10989 (ECJ 2004); Case T-225/06, *Budějovický Budvar v OHIM—Anheuser-Busch*, [2009] ETMR 29 (CFI 2008); Case C-482/09, *Budejovický Budvar v Anheuser-Busch, Inc*, Case C-482/09, [2012] ETMR 2 (CJEU 2011). Similarly, there is a multiplicity of investor-state disputes over tobacco regulations, see Stumberg, 'Safeguards for Tobacco Control'; the High Court of Australia has also weighed in, *JT Intl SA v Commonwealth* [2012] HCA 43 (Austl).

¹³⁵ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group on the Fragmentation of International Law' (13 April 2006) UN Doc A/CN.4/L.682, para 242.

interpretations, expectations, and norms can reduce uncertainty and produce a more stable legal environment in which to trade.

Finally, megaregionals offer an opportunity to engage in what might be called meta-experimentation. Aside from the cornerstone obligations of national treatment and MFN, TRIPS dealt mainly with substantive intellectual property rights and local enforcement. It largely left crossborder issues unresolved. Thus, it took no position on international exhaustion.¹³⁶ It obliged countries to police imports, but required very little of nations that are known sources of counterfeit and pirated works regarding exports. Accordingly, it left right holders without an efficient way to prevent global distribution of unauthorized copies of their intellectual output.¹³⁷ And while TRIPS set out procedural requirements for adjudicating cases involving local infringements, it said nothing about entertaining crossborder disputes.¹³⁸

These issues have all proved contentious. Developing countries and small market economies favor a regime of international exhaustion because it increases the choice available to domestic consumers and decreases their costs.¹³⁹ However, when wealthy countries allow parallel importation, right holders tend to respond by raising global prices, thus requiring those least able to afford the works to pay more.¹⁴⁰ Because the net social welfare effect of parallel imports is therefore murky, it would be helpful to experiment in a megaregional to see which way the benefits run over time. New Zealand (among others) attempted to include a rule of international exhaustion in the TPP,¹⁴¹ but the final text maintained the TRIPS position.¹⁴² Negotiators did not even try to deal with such issues as the power of one country to enjoin infringements in another, authority to adjudicate the validity of foreign intellectual property rights, or choice of law

¹³⁶ TRIPS, art 6.

¹³⁷ TRIPS, arts 51–60; China-Enforcement.

¹³⁸ TRIPS, arts 41–50. In contrast, there is arguably a choice of law rule in the Berne Convention, art 5.2.

¹³⁹ Frankel, 159–84.

¹⁴⁰ For example, after *Kirtsaeng v John Wiley & Sons, Inc.*, 133 S Ct 1351 (2013) announced a rule permitting parallel importation of textbooks from Thailand, the publisher raised the price of international editions, see Wiley-VCH (10 July 2013) <<https://perma.cc/D8PX-V6RK>>. Significantly, the post-Doha amendment on compulsory licenses includes a strong rule barring exportation of the pharmaceuticals made under such licenses, see note 44.

¹⁴¹ Wikileaks, arts QQ.A.12; QQ.C.11; QQ.E.X; QQ.G.17

¹⁴² TPP, art 18.11.

questions—even though increased trade means these issues now arise repeatedly in national courts.¹⁴³ The American Law Institute and the Max Planck Institute Group on Conflict of Laws have promulgated proposals on jurisdiction, choice of law, and enforcement of foreign judgments, but these projects are not good vehicles for experimentation because they do not have the force of international law.¹⁴⁴

The TPP did, however, adopt mechanisms to promote efficient enforcement. The digital agenda included ways to create some centralized control over Internet distributions.¹⁴⁵ Although that provision was suspended, the CPTPP continues to include procedures for resolving domain name disputes.¹⁴⁶ For nondigitized works, the TPP allowed (but did not require) parties to give competent authorities the power to stop goods destined for export or in-transit if they are ‘suspected of being counterfeit trademark goods or pirated copyright goods’.¹⁴⁷ As noted earlier, when EU right holders used in-transit hubs as central places from which to curtail global distribution, India and Brazil lodged complaints with the WTO. These disputes were suspended when the Court of Justice of the European Union questioned whether the law applied led to seizures that violated EU customs regulations.¹⁴⁸ The TPP provision (continued in the CPTPP) would create an opportunity to experiment with solutions to the difficult problems these seizures raise: determining the authority to adjudicate claims involving foreign consigners and consignees, the process that is due these litigants, the safeguards necessary to deal with mistakes; as well as the question that vexed the EU on the law applicable to the question whether the seized goods are counterfeit or pirated. Decisions on these questions would help determine whether such seizures violate the GATT or TRIPS. More important, the

¹⁴³ Marketa Trimble, ‘GAT, Solvay, and the Centralization of Patent Litigation in Europe’ (2012) 26 *Emory Intl L Rev* 515.

¹⁴⁴ *Intellectual Property: Principles Governing Jurisdiction, Choice Of Law, and Judgments in Transnational Disputes* (American Law Institute Publishers, St Paul 2008); European Max-Planck Group for Conflict of Laws in Intellectual Property, *Principles for Conflict of Laws in Intellectual Property* (OUP, Oxford 2013).

¹⁴⁵ TPP, 18.82 (suspended by CPTPP Annex, section 7(k)).

¹⁴⁶ TPP, art 18.28.

¹⁴⁷ TPP, art 18.76.5.

¹⁴⁸ *Koninklijke Philips Electronics NV v Lucheng Meijing Industrial Company Ltd and Nokia Corporation v Her Majesty’s Commissioners of Revenue and Customs*, 1 December 2011, Joined Cases C-446/09 and C-495/09, [2011] WLR(D) 349. The EU may, however, change the rule for trademarks in its recast Community Trademark Regulation and Directive, Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, art 9(4); Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, art 10(4). See Martin Senftleben, ‘Wolf in Sheep’s Clothing? Trademark Rights Against Goods in Transit and the End of Traditional Territorial Limits’ 47 *IIC* 941 (2016).

experience would enabled the international community to evaluate the benefits centralization provides to right holders and to decide whether they outweigh the costs imposed on foreign traders and consumers. If the new regulations were found to improve enforcement, save litigation costs, and deter unlawful activity without affecting the legitimate interests of producers, shippers, and customers, the next round of multilateral negotiations could incorporate them.

V. Conclusion

The intellectual property provisions of the TPP demonstrate the interest of the creative sector in raising global standards for intellectual property protection and their lobbying power in doing so. They also show how easily laws involving intangible information products can affect third countries. There are many reasons to be wary of an agreement like the TPP. Because its provisions were mainly TRIPS-plus, complying with its obligations could raise prices, diminish access, and alter the competitive environment. Further, the TPP could impose these costs even in places that had no role in the negotiation process and that do not fully enjoy the offsetting trade preferences the TPP would afford member states. Were the negotiation process more transparent to both user interests and third countries, instruments such as the TPP would likely create a better balance between proprietary and access interests. Thus, going forward, parties to an agreement with the sort of ambitions inherent in the TPP should consider developing mechanisms for third party intervention, either through diplomatic ties, or through the offices of international organizations, such as the UN, or their specialized agencies, such as WIPO or the WHO. Further, they should include in the institutions that govern the agreement a protocol for consultations by third countries, particularly in emergency situations.

But even in the absence of transparency, megaregionals offer an interesting new approach to global governance. As the TPP and CPTPP demonstrate, a plurilateral agreement can encompass countries with different capacities to innovate and to purchase the fruits of global creativity. To some extent, negotiations among them may compensate for the absence of other voices. Especially interesting is the possibility that spillovers to third countries will, in effect, lead to ‘sideways’ harmonization. As third countries experience the effects of these agreements, they are free to defend themselves against the impact of these rules (as the

generic drug example demonstrates). However, over time, as their internal regulatory agendas change in response to the growth of their own creative sectors, they may choose to migrate voluntarily to the new regime. As important, these agreements offer opportunities to experiment with the rules of transnational trade and to better understand the benefits and costs of parallel importation, centralized control, and crossborder dispute resolution. Meta-experimentation of this sort will hopefully lead to better multilateral rules in the future.