UNJUSTLY VILIFIED TRIPS-PLUS?: INTELLECTUAL PROPERTY LAW IN FREE TRADE AGREEMENTS

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ABSTRACT

Intellectual property (IP) law provisions of free trade agreements (FTAs) have attracted much criticism. Critics have argued that FTA negotiators, succumbing to the lobbying of various stakeholders, have eliminated or significantly limited many of the flexibilities that multilateral treaties had created, forced stronger IP protection onto developing countries, and fragmented international IP law. While agreeing with a great deal of the criticism expressed by others, this Article departs from the typical vilification of FTAs by identifying and analyzing the positive features of FTA IP provisions that are worth replicating and expanding in future FTAs. These positive features include provisions concerning the transparency of IP systems, cooperation among national IP offices, and clarifications of multilateral IP treaties. The processes of FTA negotiations, adoption, and implementation may produce positives as well; FTAs provide opportunities for experimentation at the bilateral and regional level, whose results may usefully inform future multilateral negotiations. Cross-border IP issues, which can benefit from international coordination, can also be a focus area in future FTA negotiations.

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INTRODUCTION

Free trade agreements (FTAs) have become an important locus of international intellectual property (IP) lawmaking at the bilateral and regional levels. As of January 22, 2021, there were 337 regional trade agreements in force notified to the World Trade Organization (WTO); of the 337 agreements, 211 included one or more provisions concerning IP law ("FTA IP provisions").[1] Of the 211 FTAs with IP

1. The statistic is based on a search conducted on January 21, 2021, in the WTO's Regional Trade Agreements Database. *Regional Trade Agreements Database*, WTO,

provisions, 45% have entered into force since January 1, 2010,[2] and the FTA numbers and their surge appear striking, particularly when compared to the outcomes of multilateral IP treaty negotiations; multilateral treaty-making in the area of IP law has produced only two international treaties since January 1, 2010.[3]

FTAs, most of which build on the 1994 Agreement on Trade-Related Aspects of International Property Rights (TRIPS)[4] and form the complicated TRIPS-plus regime, have attracted much criticism for their IP law provisions. The literature that is critical of FTA IP provisions is voluminous and its arguments compelling, and its readers might conclude that there is little, if anything, positive about the role of FTAs in IP law.[5] In response to the critical literature, this Article searches for "pluses" in the TRIPS-plus development, identifies positive features of FTA IP provisions, and suggests how these types of features may be beneficial now and in the future.

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https://rtais.wto.org/UI/PublicSearchByCr.aspx [https://perma.cc/LZ2D-27TJ] [hereinafter *RTAs Database*]. According to its User Guide, "[t]he Regional Trade Agreements Database is a comprehensive database of all RTAs notified to the GATT/WTO." *Regional Trade Agreements Database User Guide*, WTO 4, https://rtais.wto.org/UserGuide/User%20Guide_Eng.pdf [https://perma.cc/6Q9N-BSQL] [hereinafter *User Guide*].

The 211 FTAs are from 292 regional trade agreements (RTAs) that the WTO database classifies by the content of the agreement provisions. According to the glossary to the database, the database does not classify FTAs as having particular provisions, such as IP provisions, if they fall into one of the following two categories: "(i) all accessions to existing RTAs, which while notified separately to the WTO, are not treated as having different provisions from the original RTA; and (ii) certain agreements involving the Commonwealth of Independent States countries which are due to become inactive." *RTA Provisions Glossary*, WTO, https://rtais.wto.org/USERGUIDE/Glossary_MT_Eng.pdf [https://perma.cc/V8UT-KLJP].

2. *RTAs Database*, *supra* note 1.

3. Beijing Treaty on Audiovisual Performances, June 24, 2012, U.N.T.S. No. 56432 (entered into force Apr. 28, 2020); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, U.N.T.S. No. 54134 (entered into force Sept. 30, 2016).

4. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

5. For a rare critical view of the literature that is critical of FTA IP provisions see Joseph Straus, *TRIPS, TRIPS-Plus Oder TRIPS-Minus—Zur Zukunft des Internationalen Schutzes des Geistigen Eigentums* [TRIPS, TRIPS-Plus or TRIPS-Minus—On the Future of International Protection of Intellectual Property], *in* PERSPEKTIVEN DES GEISTIGEN EIGENTUMS UND WETTBEWERBSRECHTS [PERSPECTIVES ON INTELLECTUAL PROPERTY AND COMPETITION LAW] 197–212 (Ansgar Ohly et al. eds., 2005). Straus has even identified some TRIPS-minus developments. *Id.* at 208–09.

There are at least two reasons for which a review of the positive features of FTA IP provisions is warranted. First, given the overwhelming condemnation of the provisions, it seems appropriate to present a legitimate alternative view. The analysis and examples provided in this Article are unlikely to persuade the most adamant critics of FTAs and FTA IP provisions, but the review may contribute to a balanced consideration of the treatment of IP law in existing FTAs, which has attracted much criticism and relatively little praise.

The second reason to review the provisions while focusing on their positive features is to offer lessons that might be helpful in the future. As the United States emerges from its retreat to unilateralism and "engage[s] with the world once again,"[6] it is important to revisit the role of FTAs in international relations, suggest where and how existing FTAs might be beneficial to IP law, and identify tools that might be useful in future FTAs, which could be negotiated to enhance positive goals through IP law.[7]

Critics might accuse this Article of cherry picking. An evaluation of the effects of FTA IP provisions depends on audience; provisions that are beneficial to one country might be disadvantageous to another

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6. Joseph R. Biden Jr., U.S. President, Inaugural Address (Jan. 20, 2021), (transcript available in the White House Briefing Room at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr [https://perma.cc/3CKA-XWX4]). For an article suggesting that the U.S. administration is taking a cautious approach to future trade agreements see Thomas L. Friedman, *Biden Made Sure "Trump Is Not Going to Be President for Four More Years*," N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/opinion/biden-interview-mcconnell-china-iran.html [https://perma.cc/GAQ8-CDB4], which quotes President Biden.

7. *Cf.* 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 175 (2d ed. 2005) (predicting an eventual return to multilateralism). For examples of other prospective-looking analyses of FTAs see MAX PLANCK INST. FOR INTELL. PROP. & COMPETITION L., PRINCIPLES FOR INTELLECTUAL PROPERTY PROVISIONS IN BILATERAL AND REGIONAL AGREEMENTS (2013) [hereinafter MPI PRINCIPLES], https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/06_principles_for_intellectua/principles_for_ip_provisions_in_bilateral_and_regional_agreements_final1.pdf [https://perma.cc/7AHX-KCFQ]; Anke Moerland, *Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU*, 48 INT'L REV. INTELL. PROP. & COMPETITION L. 760, 761 (2017) (suggesting "how [developing countries] should best address negotiations"); Caroline Ncube et al., *A Principled Approach to Intellectual Property Rights and Innovation in the African Continental Free Trade Agreement*, *in* INCLUSIVE TRADE IN AFRICA: THE AFRICAN CONTINENTAL FREE TRADE AREA IN COMPARATIVE PERSPECTIVE 177–94 (David Luke & Jamie Macleod eds., 2019).

country. What makes any evaluation even more complex is that the effects and the perceptions of the effects also vary by stakeholders—what is positive to some stakeholders might be negative to others.[8] Additionally, the effects of FTAs extend beyond the parties to particular FTAs, which makes any definitive value judgment yet more difficult. In the end, there might be only a few provisions in any FTA that are objectively and unequivocally good for everyone.

This Article begins with an overview and typology of existing FTA IP provisions and an explanation of their significance for national and international IP law. The first Section on typology and significance is followed by a review of some of the most notable criticisms of the role of FTAs in the development of IP law and of the effects that FTA IP provisions have had in various countries. This Article then addresses the challenges of identifying the positive features of TRIPS-plus developments and reviews selected features of FTA IP provisions that

8. Some empirical studies have attempted to show the effects of FTA IP provisions on economic development; generally, the results have been inconclusive. *See, e.g.*, MAXIMILIANO SANTA CRUZ S., INTELLECTUAL PROPERTY PROVISIONS IN EUROPEAN UNION TRADE AGREEMENTS vii (2007), https://www.yumpu.com/en/document/read/23494699/intellectual-property-provisions-in-european-union-iprsonlineorg [https://perma.cc/8K6E-BC36] ("Empirical evidence on the role of intellectual property protection in promoting innovation and growth remains inconclusive. Diverging views also persist on the impacts of IPRs on development prospects."); Jean-Frederic Morin et al., *Having Faith in IP: Empirical Evidence of IP Conversions*, 3 WIPO J. 93, 99 (2011); Taleb Awad Warrad, *The Economic Impact of the TRIPS-Plus Provision on the Jordan–United States Free Trade Agreement*, *in* 4 WIPO–WTO COLLOQUIUM PAPERS 45, 45–56 (2013), https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2013/chapter_6_2013_e.pdf [https://perma.cc/2ZTJ-T4TX]; Raymundo Valdés & Maegan McCann, *Intellectual Property Provisions in Regional Trade Agreements: Revision and Update*, 6 fol., 40 (WTO, Working Paper No. ERSD-2014-14, 2014), https://www.wto-ilibrary.org/content/papers/25189808/169/read [https://perma.cc/4RH5-V2Z7] ("The assessment of the economic impact of deep integration RTAs, including those containing IP provisions, has proved to be difficult."); Sami Rezgui, *Preferential Trade Agreements, IPR Constraints and Fair Solutions: Case of the European Union–Tunisia Trade Agreements*, *in* 7 WIPO–WTO COLLOQUIUM PAPERS 75, 80 (2016), https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2016/chapter_9_2016_e.pdf [https://perma.cc/8829-3YSZ] ("Based on these empirical findings, it is reasonable to say that the impact of IPR regulation on local innovative efforts and capabilities does not seem to be evident, at least in the short run."); Piergiuseppe Pusceddu, *Assessing Access to Medicines in Preferential Trade Agreements: From the Trans-Pacific Partnership to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 49 INT'L REV. INTELL. PROP. & COMPETITION L. 1048, 1074–75 (2018) (citing several studies on the unclear effects of "enhanced IP protection in developing countries").

might be considered pluses in TRIPS-plus developments. Finally, this Article highlights the benefits that may stem not only from particular FTA IP provisions reviewed herein, but also from the processes of negotiation, adoption, implementation, and assessment of FTA IP provisions.

Although this Article takes an optimistic approach to FTA IP provisions while considering the positives in TRIPS-plus developments, this Article is not a wholesale endorsement of the developments. Many criticisms are warranted, and it is impossible not to share many serious concerns about TRIPS-plus developments. Nevertheless, just as a wholesale endorsement is not appropriate, neither is a wholesale vilification of the developments. This Article contributes to the extensive literature on TRIPS-plus by adding some pixels into the complex picture of TRIPS-plus.[9]

I. THE TYPOLOGY AND SIGNIFICANCE OF FTA IP PROVISIONS

FTA IP provisions exist in a variety of scopes, coverages, and depths, and consequently significantly vary in their lengths. The first Section of this Part gives a high-level overview of FTAs with IP provisions, including their timing (the year an FTA was signed) and their signatories (the countries and organizations that signed the FTAs), and offers a categorization of FTAs based on their IP law content. Some of the FTA IP provisions are discussed further and in much greater detail in Part III, below, but it is helpful to begin by surveying the relevant FTA landscape before introducing, in Part II, some of the major criticisms of FTA IP provisions. Criticisms of the provisions raise serious concerns the weight of which becomes apparent in Section B of this Part, which explains the significance of FTA IP provisions for national and international IP law.

A. The Typology of Existing FTA IP Provisions

FTA IP provisions exist in bilateral and regional trade agreements.[10] The WTO database that collects information about all trade agreements notified to the WTO refers to them as "regional trade

9. This Article does not endeavor to provide comprehensive guidelines for an FTA negotiations strategy. For negotiation recommendations see MPI PRINCIPLES, *supra* note 7, Part 2.

10. The terminology could include plurilateral agreements, but for simplification this Article uses the terms bilateral and regional agreements with the intention of including all FTAs with IP law provisions.

agreements" (RTAs). Technically, FTAs are only one type of RTAs; other types of RTAs that parties notify to the WTO are customs unions, economic integration agreements, and "partial scope" agreements.[11] For simplification, this Article refers to all these agreements as FTAs.[12]

The oldest FTA that the WTO database identifies as including IP law provisions is the Treaty Establishing the European Community (EC Treaty), but its label as the oldest FTA with IP provisions is somewhat misleading. Today it is clear that the EU powers cover IP matters; the Treaty on the Functioning of the European Union (TFEU)[13] expressly refers to IP in three of its articles,[14] and the volume of EU secondary legislation on IP law[15] leaves little doubt that IP rights are within the scope of the TFEU, which provides legal bases for the adoption of secondary legislation.[16] Whether a legal basis existed for IP legislation in the founding treaties was not always clear; from the beginning, Article 30 of the 1957 EC Treaty listed the protection of industrial property as a justification for possible prohibitions of or restrictions on imports, exports, or transit of goods, but the Treaty did not state specifically that the European Community had authority in IP matters. In its decisions from the 1970s and 1980s, the Court of Justice of the European Communities confirmed that EC rules on competition and

11. *User Guide*, *supra* note 1, at 2.

12. The FTA typology presented in this Article is similar to the typology offered by Azmi in Ida Madieha bt. Abdul Ghani Azmi, *The Intellectual Property Dimension of Bilateral and Regional Agreements in Asia: Implications for Trade and Development Policy*, 8 WIPO–WTO COLLOQUIUM PAPERS 42, 44 (Asian ed. 2017), https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2017_asian/chapter_5_2017_e.pdf [https://perma.cc/4UGB-579W]. For an example of a different FTA IP provision typology and a more granular FTA IP provision overview (from 2014) see Valdés & McCann, *supra* note 8, at 6 fol.

13. Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [https://perma.cc/AU62-N6W9].

14. *Id.* art. 118 (on uniform protection of IP rights); *id.* art. 207 (on the common commercial policy); *id.* art. 262 (on the conferral of jurisdiction in EU IP matters).

15. The primary types of secondary EU legislation on IP law are directives and regulations. *See id.* art. 288.

16. *Cf.* Case C-146/13, Spain v. Parliament, ECLI:EU:C:2015:298, ¶¶ 33–53 (May 5, 2015) (addressing an alleged lack of legal bases for EU legislation concerning the EU patent with unitary effect); Case C-147/13, Spain v. Council, ECLI:EU:C:2015:299, ¶¶ 65–75 (May 5, 2015) (same).

free movement of goods affected the exercise of IP rights,[17] but it was only in 1993 that the Court of Justice held that IP rights, specifically copyright and related rights, "fall within the scope of application of the Treaty."[18]

Leaving aside examples that are similar to the EC Treaty, such as the Convention Establishing the European Free Trade Association, which originally had no IP law provision but later added one,[19] the oldest FTA in the WTO database that includes an IP law provision is the Israel-U.S. FTA, which was signed in and entered into force in 1985.[20] Article 14 of this FTA is an example of one of the most compact FTA IP provisions; the article reaffirms the parties' IP law-related obligations under other agreements and their adherence to the principles of national treatment and most-favored-nation treatment.[21]

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17. Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG, 1971 E.C.R. 487, 498–500, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0078&qid=1611337573595 [https://perma.cc/4YCE-K4YS]; Joined Cases 55 & 57/80, Musik-Vertrieb membran GmbH & K-tel Int'l v. GEMA—Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, 1981 E.C.R. 147, 166–67, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61980CJ0055&qid=1611337573595 [https://perma.cc/C6PT-SAS9]; Case 7/82, Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Comm'n, 1983 E.C.R. 483, 504–09, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61982CJ0007&qid=1611337573595 [https://perma.cc/92XY-3RLM]; Case C-341/87, EMI Electrola GmbH v. Patricia Im- und Export, 1989 E.C.R. 79, 95–97, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0341&qid=1611337573595 [https://perma.cc/5YQY-UH88].

18. Joined Cases C-92 & C-326/92, Collins v. Imtrat Handelsgesellschaft mbH, 1993 E.C.R. I-5145, I-5180, https://curia.europa.eu/juris/showPdf.jsf;jsessionid=ADC404CC8D9178F7E3E3695CDB9416C8?text=&docid=98462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1053934 [https://perma.cc/CQ9W-CXHY].

19. Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3, https://www.efta.int/sites/default/files/documents/legal-texts/efta-convention/Vaduz%20Convention%20Agreement.pdf [https://perma.cc/7QLS-YTKH]. The current Convention includes Article 19 on the Protection of Intellectual Property. See the consolidated version of the Convention available at https://www.efta.int/sites/default/files/documents/legal-texts/efta-convention/Vaduz%20Convention%20Agreement.pdf [https://perma.cc/6C4N-V8S7].

20. Agreement on the Establishment of a Free Trade Area, Isr.-U.S., Apr. 22, 1985, 24 I.L.M. 653 [hereinafter Israel-U.S. FTA].

21. *Id.* art. 14. The provision also specifies the IP rights to which the principles apply, but does so very broadly, including copyrights and "industrial property of all kinds." *Id.* The commitment to the most-favored-nation principle in this FTA predated the introduction of the principle into international IP law by TRIPS Article 4. TRIPS, *supra* note 4, art. 4.

The literature that is critical of FTA IP provisions understandably focuses on FTAs that include elaborate IP law chapters or longer IP law sections, but it is important to recognize, in the interest of providing a full picture of the FTA landscape, that about half of the 211 FTAs with IP provisions that have been notified to the WTO either include no IP-specific provisions (and only mention IP rights in provisions that cover multiple areas of law)[22] or have only one or a few articles devoted specifically to IP rights.[23] The articles range from minimalistic—such as a "rendez-vous clause" in which countries simply agree to negotiate various matters, including IP matters[24]—to highly elaborate—such as Article 31 of the EU-Turkey FTA, which refers further to an annex to the FTA that lists international IP treaties to which Turkey agrees to accede and EU legislation that Turkey agrees to approximate in its domestic legislation.[25]

Some of the FTAs with a single IP article were concluded before TRIPS was negotiated (TRIPS was signed in 1994). In addition to the Israel-U.S. FTA mentioned above, FTAs with a single IP article that predate TRIPS are FTAs that the European Free Trade Association

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22. *See, e.g.*, Agreement on Comprehensive Economic Partnership Among Japan and Member States of the Association of Southeast Asian Nations, art. 53(c), *opened for signature* Mar. 26, 2008, https://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf [https://perma.cc/L4B6-3WFY] (including mention of intellectual property within an article more broadly focused on economic cooperation).

23. It is important to recognize a clear limitation of this statistical approach to FTAs: the effects of FTAs that are concluded with countries with small economies cannot be compared to the effects of the more substantial FTAs that are concluded among countries with large economies.

24. Economic Partnership Agreement, Kenya-U.K., art. 3(b)(iv), Dec. 8, 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf [https://perma.cc/495X-JLA3].

25. Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Customs Unions, art. 31, Dec. 22, 1995, 1996 O.J. (L 35) 1 [hereinafter EU-Turkey FTA] (referring to Annex 8 on the protection of intellectual, industrial and commercial property); *see also, e.g.*, Stabilisation and Association Agreement Between the European Communities and Their Member States, of the One Part, and the Republic of Albania, of the Other Part, art. 73(1), June 12, 2006, 2009 O.J. (L 107) 166 (referring to Annex V on intellectual, industrial, and commercial property rights); Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the One Part, and the Arab Republic of Egypt, of the Other Part, art. 37(1), June 25, 2001, 2004 O.J. (L 304) 39 (referring to Annex VI on intellectual property rights).

(EFTA) concluded with Turkey and Israel[26] and the Faroe Islands-Norway FTA.[27] Many more FTAs with a single IP article postdate TRIPS, including numerous FTAs that the European Union and the EFTA signed with multiple countries between 1995 and 2016.[28]

Although about half of all FTAs with a single IP article were concluded by either the European Union or the EFTA, such provisions do not appear only in FTAs with at least one traditional promoter of IP protection. Turkey also entered into FTAs with a single IP article with multiple countries (these FTAs were signed between 1995 and 2014)[29]

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26. Agreement Between the European Free Trade Association Countries and Turkey Relating to Trade, art. 15, Dec. 10, 1991, 1740 U.N.T.S. 3; Agreement Between the European Free Trade Association Countries and Israel Relating to Trade, art. 15, Sept. 17, 1992, 1741 U.N.T.S. 3.

27. Agreement on Free Trade, Faroe Is.-Nor., art. 17, Sept. 1, 1992, WTO Doc. WT/REG25/1. The ASEAN Trade in Goods Agreement refers to IP rights in the general provision on non-discrimination. ASEAN Trade in Goods Agreement, art. 8(d), Feb. 26, 2009, https://investasean.asean.org/files/upload/Doc%2002%20-%20ATIGA.pdf [https://perma.cc/V8PY-MT5J].

28. For examples of EU FTAs see Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member States, of the One Part, and Arab Republic of Tunisia, of the Other Part, art. 39, July 17, 1995, 1998 O.J. (L 97) 2; Agreement on Trade, Development and Cooperation Between the European Community and Its Member States, of the One Part, and the Republic of South Africa, of the Other Part, art. 46, Oct. 11, 1999, 1999 O.J. (L 311) 3; Economic Partnership Agreement Between the European Union and Its Member States, of the One Part, and the SADC EPA States, of the Other Part, art. 16, June 10, 2016, 2016 O.J. (L 250) 3. For examples of EFTA FTAs see Agreement Between the EFTA States and the Kingdom of Morocco, art. 16, June 19, 1997, https://www.efta.int/media/documents/legal-texts/free-trade-relations/morocco/EFTA-Morocco%20Free%20Trade%20Agreement%20EN.pdf [https://perma.cc/24EK-FT7T]; Free Trade Agreement Between the EFTA States and the United Mexican States, art. 69, Nov. 27, 2000, https://www.efta.int/media/documents/legal-texts/free-trade-relations/mexico/EFTA-Mexico%20Free%20Trade%20Agreement.pdf [https://perma.cc/AZ2C-3YAD]; Free Trade Agreement Between the EFTA States and the Republic of Chile, art. 46, June 26, 2003, https://www.efta.int/media/documents/legal-texts/free-trade-relations/chile/EFTA-Chile%20Free%20Trade%20Agreement.pdf [https://perma.cc/2FBZ-BJ9P]; Free Trade Agreement Between the EFTA States and the Philippines, art. 8, Apr. 28, 2016, https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/philippines/EFTA-Philippines-Rectification-Main-Agreement.pdf [https://perma.cc/KT3U-K6YJ].

29. *See, e.g.*, EU-Turkey FTA, *supra* note 25, art. 31; Free Trade Agreement, Malay.-Turk., art. 9.12, Apr. 17, 2014, https://fta.miti.gov.my/miti-fta/resources/Malaysia%20-%20Turkey/MTFTA_Main_Agreement.pdf

and single IP articles also appear, for example, in the Treaty for the Establishment of the East African Community,[30] the Russia-Serbia FTA,[31] and the Agadir Agreement among the Arab Mediterranean countries.[32]

More elaborate FTA IP provisions have been arranged into brief sections or chapters on IP rights, and about 20% of the 211 FTAs include such brief chapters.[33] The chapters comprise from two to several articles that specifically address IP rights, but even though they are more extensive than the single IP articles in the previous category, the chapters do not approximate TRIPS in terms of scope and length. In addition to the 1992 Protocol 28 of the European Economic Area Agreement, which addresses IP matters in nine articles, the FTAs with such brief chapters span the period between 1996 and 2019, and include the Canada-Israel FTA,[34] the Australia-Thailand FTA,[35] the

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[https://perma.cc/2HE3-4XAU]; Free Trade Agreement, Mold.-Turk., art. 15, Sept. 11, 2014, https://www.trade.gov.tr/free-trade-agreements/moldova [https://perma.cc/WT2P-E5LU]; Agreement on Trade in Goods, S. Kor.-Turk., art. 3.14(4), Aug. 1, 2012, https://www.customs.go.kr/download/engportal/han_turkey_02_02.pdf [https://perma.cc/96CZ-C9W4] (including a provision concerning IP within an article on customs cooperation).

30. Treaty for the Establishment of the East African Community, art. 103(1)(i), Nov. 30, 1999, 2144 U.N.T.S. 255.

31. Agreement on Free Trade, Russ.-Serb., art. 12, Aug. 28, 2000, https://findrulesoforigin.org/documents/pdf/itc00525_full.pdf.

32. Agreement Setting Up a Free Trade Area Between the Arab Mediterranean Countries, art. 22, Feb. 25, 2004, http://rtais.wto.org/rtadocs/583/TOA/English/ToA.pdf?msclkid=ba79d49db47411ecbeb87b29fb372924www.agadiragreement.org/EchoBusV3.0/SystemAssets/PDFs/EN/aghadirtext/Agadir%20Agreement%20Text.pdf [https://perma.cc/9RMB-6YLK].

33. This Article does not adopt an exact criterion, such as a number of words, to determine which FTA IP provisions are in which of the three categories identified by the Article. Therefore, the numbers of FTAs in each of the three categories are approximate. The Author includes in the category of brief chapter FTAs the Japan-Mexico FTA, which does not have a brief IP chapter but has three IP provisions in different parts of the treaty. *See* Agreement for the Strengthening of the Economic Partnership, Japan-Mex., arts. 8, 73, 144, Sept. 17, 2004, 2768 U.N.T.S. 3 [hereinafter Japan-Mexico FTA].

34. Free Trade Agreement, Can.-Isr., ch. 10, July 31, 1996, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/10.aspx?lang=eng [https://perma.cc/EEG3-W2GJ] [hereinafter Canada-Israel FTA].

35. Free Trade Agreement, Austl.-Thai., ch. 13, July 5, 2004, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2689/download [https://perma.cc/3MZV-ZWVB] [hereinafter Australia-Thailand FTA].

India-Korea FTA,[36] and the China-Mauritius FTA.[37] Another example is a brief section on IP in the Treaty on the Eurasian Economic Union;[38] the IP chapter in the ASEAN-Australia-New Zealand FTA is more extensive but can perhaps still be classified as a brief chapter.[39]

The remaining 30% of the 211 FTAs feature detailed IP chapters that go far beyond a simple reaffirmation of the national treatment principle and countries' commitments under international treaties. A detailed IP chapter was in the North American Free Trade Agreement (NAFTA), which was signed in 1992 but replaced by the U.S.-Mexico-Canada FTA (USMCA), which was signed in 2018 and came into force in 2020.[40] Other early detailed FTA IP chapters are in Mexico's FTAs with Colombia and with Chile from 1994 and 1998, respectively.[41] About 39% of the FTAs with detailed IP chapters that are in force were signed in 2000–2009; the majority—about 58%—were signed since January 1, 2010.

Fifty-eight percent of FTAs with detailed IP chapters were concluded by the United States, Japan, or the European Union;[42] Mexico,

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36. Comprehensive Economic Partnership Agreement, India-S. Kor., ch. 12, Aug. 7, 2009, https://dot.gov.in/sites/default/files/India%20Korea%20CEPA%2007.08.2009.pdf [hereinafter India-Korea FTA].

37. Free Trade Agreement, China-Mauritius, ch. 10, Oct. 17, 2019, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6074/download [https://perma.cc/LR7G-V8U2] [hereinafter China-Mauritius FTA].

38. Treaty on the Eurasian Economic Union, sec. 23, May 29, 2014, https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf [hereinafter TEEU].

39. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 13, Feb. 27, 2009, 2672 U.N.T.S. 3 [hereinafter ASEAN-Australia-New Zealand FTA].

40. NAFTA is not included in the 211 FTAs currently in force; it was replaced by the USMCA.

41. Tratado de Libre Comercio Entre la Republica de Colombia, la Republica de Venezuela y los Estados Unidos Mexicanos [Free Trade Agreement Between the Republic of Colombia, the Republic of Venezuela, and the United Mexican States], ch. 18, June 13, 1994, https://www.tlc.gov.co/getattachment/acuerdos/vigente/tratado-de-libre-comercio-entre-los-estados-unidos/importante/normatividad/ley-172-del-20-de-diciembre-de-1994/ley-172-del-20-de-diciembre-de-1994.pdf [https://perma.cc/GM6U-Y572]; Tratado de Libre Comercio [Free Trade Agreement], Chile-Mex., ch. 15, Apr. 17, 1998, http://www.sice.oas.org/trade/chmefta/text_s.asp [https://perma.cc/895G-8GQW] [hereinafter Chile-Mexico FTA].

42. On the European Union's preference before 2007 for a "'simple' structure of [its FTA] IP chapters" and a possible "turning point in its approach" see SANTA CRUZ S., *supra* note 8, at ix, 1, 18 fol.

Colombia, Australia, Peru, and Korea all signed six or more such FTAs. The U.S. preference for extensive treatment of IP rights is apparent in U.S.-concluded FTAs; only one of the U.S. FTAs currently in force includes just a single IP article (the Israel-U.S. FTA), and no U.S. FTA in force fits into the "brief chapter" category.

The USMCA and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), both signed in 2018, are prominent in the detailed-chapter category. With more than 25,000 words, the CPTPP IP chapter is the longest FTA IP chapter to date, far exceeding TRIPS's comparatively modest 12,500 words. The IP chapter in the USMCA ranks second with over 22,500 words, which dwarfs not only TRIPS, but also the USMCA predecessor, the NAFTA IP chapter, which was less than half of the length of the USMCA IP chapter.[43]

B. The Significance of FTA IP Provisions

It might not initially be apparent why FTA IP provisions should be of any significant concern—or at least why they should be of concern outside the countries that have signed any particular FTA. It is true that some FTAs have been concluded by countries that are major economic players or by multiple countries, such as the CPTPP, USMCA, and the EU treaties,[44] and the effects of these FTAs may therefore extend far beyond the borders of the particular FTA signatory countries. But many other FTAs involve only two or three countries that have smaller economies, and these FTAs do not seem to merit interest outside of the two or three signatory countries.

Skeptics might also doubt that FTAs could have any particular significance for IP law, which has enjoyed an impressive history of harmonization at the international level, with the oldest international IP treaties dating back to the 1880s.[45] Many aspects of IP law have been internationally harmonized to some degree, and it would seem that little

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43. The NAFTA IP Chapter's word count was slightly less than 10,000 words. *See* North American Free Trade Agreement, ch. 17, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

44. The term "FTAs," as it is used in this Article, includes economic integration agreements. *See supra* note 11 and accompanying text.

45. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896, S. TREATY DOC. NO. 99-27 (1986) (as revised at Paris on July 24, 1971 and amended in 1979) [hereinafter Berne Convention].

has been left to treaty-making outside of existing international IP treaties. Additionally, international IP law benefits from a wide acceptance of international IP treaties; the three major IP treaties—the Paris Convention, the Berne Convention, and the TRIPS Agreement—have each been signed by more than 160 parties.[46]

Importantly, IP law treaties do not just set minimum standards for IP protection; they also constrain what countries may do outside of the treaties. Parties to the Paris Convention may enter into other agreements only if the agreements do not contravene the provisions of the Convention;[47] similarly, parties to the Berne Convention may only enter into agreements that do not contravene the Convention or agreements that provide rights to authors that are more extensive than the rights that the Convention grants.[48] TRIPS allows countries to adopt "more extensive protection than is required" by TRIPS, as long as the more extensive protection does not contravene TRIPS.[49]

Notwithstanding the significant scope that international IP treaties cover, the wide acceptance that they enjoy, and the constraints that they place on subsequent bilateral and regional treaties, such as FTAs, it would be a mistake to discount the importance of FTA IP provisions, whether inside or outside the countries that signed the FTAs. As suggested in the previous Section and illustrated in Part III, below, many FTAs do not merely reiterate existing international obligations, basic principles, and general statements on IP protection; they include detailed IP provisions that are more than mere TRIPS embellishments.

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46. As of April 10, 2022, the numbers of parties to the conventions were as follows: Berne Convention 181 countries, *see WIPO-Administered Treaties: Contracting Parties: Berne Convention*, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15 (last visited Apr. 15, 2022); Paris Convention 178 countries, *see WIPO-Administered Treaties: Contracting Parties: Paris Convention*, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=2 (last visited Apr. 15, 2022); and TRIPS Agreement 164 parties, *see Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/TFM5-Z7KC].

47. Paris Convention, *supra* note 45, art. 19.

48. "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable." Berne Convention, *supra* note 45, art. 20.

49. TRIPS, *supra* note 4, art. 1(1).

As any international obligations do, the IP law-related commitments in FTAs matter most if they are actually implemented and put into effect by the parties to the FTAs.[50] Skeptics might doubt the potential for enforcement of the FTA IP provisions, but even if there are few instances of actions by FTA parties formally enforcing the provisions, countries can employ other trade-related pressures to force compliance, and additional forces might be in place to compel compliance. Some recent disputes brought under bilateral investment treaties have shown that FTA IP provisions can be weaponized, even if the particular disputes did not result in a finding against the countries that were the alleged treaty violators.[51]

The most obvious reason for any country and for any stakeholder to be interested, even in FTAs to which their own country is not a party, is the extension of the effects that any FTA might have through the

50. In some cases, regional organizations might be parties to the treaties instead of individual countries.

51. For examples of FTAs that expressly include IP rights in their definition of "investment" see Agreement Between the EFTA States and Singapore, art. 37(b), June 26, 2002, https://www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf [https://perma.cc/E8RM-NBJW]; Agreement for a New-Age Economic Partnership, Japan-Sing., art. 72(a)(vi), Jan. 13, 2002, 2739 U.N.T.S. 3 [hereinafter Japan-Singapore FTA]; Free Trade Agreement, Chile-S. Kor, art. 10.1, Feb. 15, 2003, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2646/download [https://perma.cc/UX8A-PVZU] [hereinafter Chile-Korea FTA]; Australia-Thailand FTA, *supra* note 35, art. 901(f); Free Trade Agreement, China-Pak., art. 46(1)(d), Nov. 24, 2006, https://wits.worldbank.org/GPTAD/PDF/archive/China-Pakistan.pdf [https://perma.cc/X4A9-BKE7]; ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 11, art. 2(c)(iii); India-Korea FTA, *supra* note 36, art. 10.1; Free Trade Agreement Between the EFTA States and Ukraine, art. 4.2(c), June 24, 2010, https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/ukraine/EFTA-Ukraine%20Free%20Trade%20Agreement.pdf [https://perma.cc/ZS56-VVKK]; Agreement for a Closer Economic Partnership, Malay.-Pak., art. 88(1)(d)(iv), Nov. 8, 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2543/download [https://perma.cc/6K9P-QEEQ] [hereinafter Malaysia-Pakistan FTA]; Free Trade Agreement, China-Peru, art. 126(d), Apr. 28, 2009, http://www.sice.oas.org/Trade/PER_CHN/PER_CHN_e/FullText_20090422_e.pdf [https://perma.cc/CZ4H-GYJ3] [hereinafter China-Peru FTA]; Closer Economic Partnership Agreement, N.Z.-Thai., art. 92(a)(iv), Apr. 19, 2005, 2524 U.N.T.S. 279; Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, art. 8.1, Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter EU-Canada FTA].

principle of most-favored-nation treatment.[52] The most-favored-nation treatment principle was introduced in international IP law at the multilateral level by TRIPS Article 4, according to which a country that grants "any advantage, favour, privilege or immunity" to nationals of any other country with regard to IP must then accord the same "advantage, favour, privilege or immunity" to nationals of all WTO countries.[53] Therefore, in IP law, WTO member countries must extend their best treatment of foreign nationals—including treatment stemming from an FTA commitment—to the nationals of all WTO member countries, and persons and entities benefit from the FTA IP provisions in the countries that are parties to an FTA even if their own country has not acceded to the same provisions.[54]

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52. Thomas Cottier & Marina Foltea, *Global Governance in Intellectual Property Protection: Does the Decision-Making Forum Matter?*, 3 WIPO J. 139, 151–52 (2012) (noting the difference in the effects of FTAs concluded before and after TRIPS); *see also* Israel-U.S. FTA, *supra* note 20, art. 14 (including a most-favored-nation principle provision that pre-dates TRIPS).

53. There are four types of agreements that TRIPS exempts from the principle: pre-TRIPS agreements, agreements on judicial assistance and law enforcement, agreements on certain neighboring rights, and treatment under the Berne Convention and the Rome Convention when "the treatment accorded [is to] be a function not of national treatment but of the treatment accorded in another country." TRIPS, *supra* note 4, art. 4(b).

On the inclusion of the most-favored-nation treatment principle in the Israel-U.S. FTA see *supra* note 20, art. 14.

For the uses of the most-favored-nation treatment principle in international treaties in general see, for example, U.N. CONF. ON TRADE & DEV., MOST-FAVOURED-NATION TREATMENT, at 9 fol., U.N. Doc. UNCTAD/DIAE/IA/2010/1, U.N. Sales No. 10.II.D.19 (2010), https://unctad.org/system/files/official-document/diaeia20101_en.pdf.

54. *See* Anselm Kamperman Sanders & Dalindyebo Shabalala, *Intellectual Property Treaties and Development*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 41, 68 (Daniel J. Gervais, 2d ed. 2014) (noting that because of the most-favored-nation principle, FTAs "have the effect of multilateralizing bilateral obligations on IP"). Other treaties may include anti-discrimination provisions that will have the same effect as the most-favored-nation principle. *See, e.g.*, Joined Cases C-92 & C-326/92, Collins v. Imtrat Handelsgesellschaft mbH, 1993 E.C.R. I-5145, I-5180, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=ADC404CC8D9178F7E3E3695CDB9416C8?text=&docid=98462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1053934 [https://perma.cc/7U6G-86UM]; Silke von Lewinski, *Intellectual Property, Nationality, and Non-Discrimination*, *in* WORLD INTELLECTUAL PROP. ORG. [WIPO], INTELLECTUAL PROP. AND HUMAN RIGHTS 175–99 (1999) (prepared for panel discussion on intellectual property and human rights held in commemoration of fiftieth anniversary of the Universal Declaration of Human Rights).

The most-favored-nation treatment principle affects not only rights and interests inside a party to an FTA, but it may also affect rights and interests outside the country. The scope of the effects of FTA commitments coincides with the scope of the implementing national law, and to the extent that the national law has any extraterritorial effects, the FTA commitments implemented in the law do as well.[55] The national law and the FTA commitments that the law implements may also have indirect extraterritorial effects; for example, a stronger IP protection in a country–FTA party may improve an IP rights owner's market, negotiation, or litigation positions even outside the country.

In addition to creating effects for particular stakeholders, FTAs serve other important functions. An FTA may be a useful source of information about the countries that concluded the FTA; in IP law, an FTA may indicate the countries' interests and suggest their intentions for future bilateral, regional, or multilateral negotiations. An FTA may set a standard for future FTA negotiations and establish a template that countries use in their future FTAs with other countries.[56] In some cases,

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On a proposal by Switzerland to introduce into TRIPS an exception to the most-favored-nation principle see Thu-Lang Tran Wasescha, *Negotiating for Switzerland*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 171 (Jayashree Watal & Antony Taubman eds., 2015).

55. On the extraterritorial reach of IP laws see, for example, Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119 (2008) (articulating an approach that would require courts to explicitly consider foreign law in assessing whether to enforce a patent extraterritorially); Marketa Trimble, *The Extraterritorial Enforcement of Patent Rights*, *in* PATENT ENFORCEMENT WORLDWIDE 569 (Christopher Heath ed., 3d ed. 2015) (discussing the means that patent owners employ to enforce patent rights abroad).

56. See, for example, the similarities among U.S. FTAs following the United States' FTA with Chile, and Korea's FTAs following its FTA with the United States. Free Trade Agreement, Chile-U.S., ch. 17, June 6, 2003, https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text [https://perma.cc/6JTE-NDXM] [hereinafter Chile-U.S. FTA]; Free Trade Agreement, S. Kor.-U.S., ch. 18, June 30, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [https://perma.cc/7RZD-WB58] [hereinafter Korea-U.S. FTA]. On the use of FTAs as templates for future agreements see, for example, RICKETSON & GINSBURG, *supra* note 7, at 174; MATTHEW KENNEDY, WTO DISPUTE SETTLEMENT AND THE TRIPS AGREEMENT: APPLYING INTELLECTUAL PROPERTY STANDARDS IN A TRADE LAW FRAMEWORK 98 (2016); Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU SCI. & TECH. L. REV. 97, 106–07 (2017); see also SANTA CRUZ S., *supra* note 8, at 10, who notes, about the pre-2007 EU FTA IP provisions, that "[d]espite the differences in context, the complexity and sophistication of the respective IP provisions in the various types of agreements do not vary substantially

FTAs may reveal where countries are positioning themselves for further negotiations with the same or other countries.[57] Crucially, FTAs provide an important framework for future negotiations because FTAs limit or foreclose countries' flexibilities in future negotiations. FTAs can be difficult to renegotiate, and it may be undesirable to open them for renegotiation; therefore, parties may be locked into the FTAs and their FTA commitments for years to come.[58]

As the number of FTAs increase and bind more countries in a complicated web of overlapping IP law-related obligations, the risk is that the cumulation of FTAs becomes counterproductive. Regardless of the particular content of FTA IP provisions, their inflation has generated justified doubts about their utility and called attention to the FTA landscape.[59] It is important to be aware of negotiated and concluded FTA IP provisions and to monitor the coherency of the FTA web. If, as this Article suggests, FTAs can be useful tools for international IP lawmaking, particularly when international treaty-making has faltered, FTAs must serve a meaningful function.

II. THE EXISTING CRITICISMS OF FTA IP PROVISIONS

FTA IP provisions have attracted a great deal of criticism, and this Part summarizes the most important critical points raised by various commentators.[60] This Part does not list all critical points appearing in the literature but focuses instead on structural criticisms of the role of FTAs in IP law and policy. This Part does not cover the general

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from one agreement to the other. Indeed, the [EU] IP chapters in the agreements are quite homogeneous, with relatively few variations between them."

57. For example, future positioning was the strategy taken by countries in the CPTPP negotiations after the United States left the CPTPP negotiations. *See* Jeremy de Beer, *Intellectual Property Chapter of USMCA Proves Canada's Pragmatism*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 5, 2018), https://www.cigionline.org/articles/intellectual-property-chapter-usmca-proves-canadas-pragmatism [https://perma.cc/WW7Z-5TU2].

58. *See infra* Section III.A (discussing reasons why renegotiation may be difficult or undesirable).

59. *See infra* notes 96–99 and accompanying text.

60. For an overview of four TRIPS-plus "[r]eductionist [n]arratives" see Daniel J. Gervais, *IP Calibration*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 86, 90 (Daniel J. Gervais, 2d ed. 2014). For FTA criticisms in documents by international organizations see Carlos M. Correa, *Intellectual Property: A Regulatory Constraint to Redress Inequalities*, *in* INTERNATIONAL POLICY RULES AND INEQUALITY: IMPLICATIONS FOR GLOBAL ECONOMIC GOVERNANCE 179, 180 (José Antonio Ocampo ed., 2019).

criticism that concerns the inclusion of IP matters in trade negotiations;[61] this criticism applies to TRIPS and is not specific to TRIPS-plus developments. This Part presents no reactions to the criticisms that it reviews; reactions are reserved for a later presentation of the positive features of FTAs in Part III.

The criticism that appears perhaps most frequently is that FTAs have raised, and continue to raise, the standard of IP protection. The standard is typically measured in relation to TRIPS, which provides a benchmark for IP protection that most countries must implement under international law.[62] The standard increase often consists of some limitation or a complete elimination of TRIPS flexibilities that TRIPS, intentionally or accidentally, has reserved to member countries to utilize when they calibrate their national IP laws to comport with their national circumstances and goals. Whether by choice, ignorance, or necessity, countries have not always availed themselves of the flexibilities, at least not fully or efficiently.[63] However, the flexibilities remain an important element of TRIPS; flexibilities in international

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61. *See, e.g.*, MPI PRINCIPLES, *supra* note 7, at 1.

62. Kamperman Sanders & Shabalala, *supra* note 54, at 65 ("The significant shift in the framing of IP in international IP-related fora should not blind us to the fact that TRIPS standards have become the floor for international IP protection."); GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 148 (2012) ("FTAs deal with matters that are already covered in TRIPS: in these cases, they either reiterate TRIPS norms or raise the standards of protection above that level."); *id.* at 144 ("But many economists and traders . . . prefer to see TRIPS as a code; as setting . . . a globally harmonized level of intellectual property protection, one that imposes a globally optimal incentive to produce knowledge-intensive goods."); *see also* Antony Taubman, *Thematic Review: Negotiating "Trade-Related Aspects" of Intellectual Property Rights*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 15, 49 (Jayashree Watal & Antony Taubman eds., 2015) ("The TRIPS Agreement . . . has been used as a basis for further multilateral and bilateral negotiations on IP in other spheres."); *cf.* Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 130 (2004) (noting that "the TRIPS Agreement should never have been understood as a crowning point of international intellectual property regulation"); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 121 (2003) ("The TRIPS agreement is hardly the end of the story. In many ways, it is just the beginning.").

63. On some of the possible reasons that countries do not utilize flexibilities see, for example, Duncan Matthews, *TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements*, 27 EUR. INTELL. PROP. REV. 420 (2005).

treaties often reflect negotiators' acknowledgment and acceptance of existing or potential national differences in law and policy choices.

Cottier and Foltea have pointed out that "[t]he analysis of TRIPS-plus IP provisions suggests that certain obligations directly undermine these flexibilities,"[64] and there are indeed many examples of FTAs narrowing the TRIPS flexibilities.[65] The examples include a mandatory expansion of patentable subject matter under patent law to protect plants,[66] an expansion of protectable subject matter under trademark law to protect sounds,[67] an extension of the grace period for patents to twelve

64. Cottier & Foltea, *supra* note 52, at 152.

65. For some other examples see DINWOODIE & DREYFUSS, *supra* note 62, at 148; SAM F. HALABI, INTELLECTUAL PROPERTY AND THE NEW INTERNATIONAL ECONOMIC ORDER: OLIGOPOLY, REGULATION, AND WEALTH REDISTRIBUTION IN THE GLOBAL KNOWLEDGE ECONOMY 57–58 (2018).

66. *See, e.g.*, Free Trade Agreement, Morocco-U.S., art. 15.9(2), June 15, 2004, Hein's No. KAV 7206 [hereinafter Morocco-U.S. FTA]; Agreement on the Establishment of a Free Trade Area, Bahr.-U.S., art. 14.8(2), Sept. 14, 2004, Hein's No. KAV 6866 [hereinafter Bahrain-U.S. FTA]. Under TRIPS, countries need not protect plant varieties by patents; a sui generis form of protection is acceptable and indeed preferred in many countries. TRIPS, *supra* note 4, art. 27(3)(b); *see also* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 18.37(4), Mar. 8, 2018, https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf [hereinafter CPTPP]; Agreement Between the United States of America, the United Mexican States, and Canada, art. 20.36(3), Nov. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA] (allowing countries to exclude from patentability "plants other than microorganisms").

67. *See, e.g.*, Chile-U.S. FTA, *supra* note 56, art. 17.2(1); Free Trade Agreement, Austl.-U.S., art. 17.2(2), May 18, 2004, Hein's No. KAV 6422 [hereinafter Australia-U.S. FTA]; Morocco-U.S. FTA, *supra* note 66, art. 15.2(1); Trade Promotion Agreement, Colom.-U.S., art. 16.2(1), Nov. 22, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/final-text [https://perma.cc/Z56S-3DZJ] [hereinafter Colombia-U.S. FTA]; Trade Promotion Agreement, Peru-U.S., art. 16.2(1), Apr. 12, 2006, Hein's No. KAV 8674 [hereinafter Peru-U.S. FTA]; Free Trade Agreement, Oman-U.S., art. 15.2(1), Jan. 19, 2006, Hein's No. KAV 8673 [hereinafter Oman-U.S. FTA]; Free Trade Agreement, Nicar.-Taiwan, art. 17.07(1), June 16, 2006, https://www.trade.gov.tw/english/Pages/List.aspx?nodeID=677 [hereinafter Nicaragua-Taiwan FTA]; Korea-U.S. FTA, *supra* note 56, art. 18.2(1); Trade Promotion Agreement, Pan.-U.S., art. 15.2(1), June 28, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text [https://perma.cc/C5YN-EWY6] [hereinafter Panama-U.S. FTA]; Free Trade Agreement, Colom.-S. Kor., art. 15.6(1), Feb. 21, 2013, http://www.sice.oas.org/tpd/col_kor/draft_text_06.2012_e/june_2012_index_pdf_e.asp [https://perma.cc/DVP3-GN37]; Free Trade Agreement, Austl.-S. Kor., art. 13.2(1), Apr. 8, 2014,

https://www.dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta [hereinafter Australia-Korea FTA]; Free Trade Agreement, N.Z.-S. Kor., art. 11.4(1), Mar. 23, 2015, https://www.dfat.gov.au/sites/default/files/korea-australia-free-trade-agreement.pdf [hereinafter Korea-New Zealand FTA]; Free Trade Agreement, China-Geor., art. 11.11, May 13, 2017, http://fta.mofcom.gov.cn/georgia/annex/xdzw_en.pdf [https://perma.cc/G58T-NJRN] [hereinafter China-Georgia FTA]; Free Trade Agreement, Geor.-H.K., ch. 11, art. 11, June 28, 2018, https://www.tid.gov.hk/english/ita/fta/hkgefta/text_agreement.html [https://perma.cc/5E8Q-R8FV] [hereinafter Georgia-Hong Kong FTA]; Free Trade Agreement, Austl.-H.K., art. 14.10(1), Mar. 26, 2019, https://www.dfat.gov.au/trade/agreements/in-force/a-hkfta/a-hkfta-text/Pages/default [hereinafter Australia-Hong Kong FTA]; The Dominican Republic-Central America-United States Free Trade Agreement, art. 15.2(1), Aug. 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [https://perma.cc/8VY5-4TPL] [hereinafter CAFTA-DR]; Free Trade Agreement, Can.-S. Kor., art. 16.9(1), Sept. 22, 2014, https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/korea-coree/16_CKFTA_EN.pdf [https://perma.cc/9WQQ-GE3S] [hereinafter Canada-Korea FTA]; Free Trade Agreement, China-S. Kor., art. 15.11(2), June 1, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3461/download [https://perma.cc/C6BY-PQNS] [hereinafter China-Korea FTA]; Free Trade Agreement Between the Republic of Colombia and the EFTA States, art. 6.6.(1), Nov. 25, 2008, https://www.efta.int/media/documents/legal-texts/free-trade-relations/colombia/EFTA-Colombia%20Free%20Trade%20Agreement%20EN.pdf [https://perma.cc/3WU5-H23C] [hereinafter EFTA-Colombia FTA]; Free Trade Agreement Between the Republic of Peru and the EFTA States, art. 6.6(1), June 24-July 14, 2010, https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/peru/EFTA-Peru%20Free%20Trade%20Agreement%20EN.pdf [https://perma.cc/TEJ9-DXXX] [hereinafter EFTA-Peru FTA]; Trade Agreement Between the European Union and Its Member States, of the One Part, and Colombia and Peru, of the Other Part, art. 203, June 26, 2012, 2012 O.J. (L 354) 3 [hereinafter EU-Colombia and Peru FTA]; Free Trade Agreement , China-Switz., art. 11.7(1), July 6, 2013, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2751/download [https://perma.cc/DUK3-353R] [hereinafter China-Switzerland FTA]; Free Trade Agreement, Austl.-Peru, art. 17.19, Feb. 12, 2018, https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/fta-text-and-associated-documents [hereinafter Australia-Peru FTA]; CPTPP, *supra* note 66, art. 18.18; USMCA, *supra* note 66, art. 20.17. TRIPS does not mandate that countries make trademark protection available for sounds. TRIPS, *supra* note 4, art. 15(1).

months,[68] an elimination of the principle of international exhaustion (by mandating the principle of national or regional exhaustion),[69] and a requirement of border measures for patents and for both importation and exportation.[70] Frankel has observed that even when

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68. *See, e.g.*, Morocco-U.S. FTA, *supra* note 66, art. 15.9(8); Bahrain-U.S. FTA, *supra* note 66, art. 14.8(8); Free Trade Agreement, Austl.-Malay., art. 13.11(2), May 22, 2012, https://www.dfat.gov.au/sites/default/files/Malaysia-Australia-Free-Trade-Agreement.pdf [hereinafter Australia-Malaysia FTA]; Australia-Korea FTA, *supra* note 67, art. 13.8(5); CPTPP, *supra* note 66, art. 18.38; USMCA, *supra* note 66, art. 20.37. TRIPS does not address the grace period. In first-to-file patent systems, the grace period tends to be shorter than twelve months. *See, e.g.*, European Patent Convention, art. 55, Oct. 5, 1973 (as revised in 1991 and 2000).

69. *E.g.*, Association Agreement Between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, art. 152, June 27, 2014, 2014 O.J. (L 261) 4 [hereinafter EU-Georgia FTA]; Association Agreement Between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and the Republic of Moldova, of the Other Part, art. 279, June 27, 2014, 2014 O.J. (L 260) 4 [hereinafter EU-Moldova FTA]. TRIPS does not mandate a particular type of exhaustion principle. TRIPS, *supra* note 4, art. 6; *see also* Association Agreement Between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part, art. 160, June 27, 2014, 2014 O.J. (L 161) 1 [hereinafter EU-Ukraine FTA] (confirming that countries are free to select the principle of exhaustion); Strategic Partnership and Cooperation Agreement , Geor.-U.K., art. 144, Oct. 21, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844167/CS_Georgia_1.2019_UK_Georgia_Strategic_Partnership_and_Cooperation_Agreement.pdf [https://perma.cc/D29F-MXZU] [hereinafter Georgia-U.K. FTA] (confirming the same).

70. *See, e.g.*, Agreement for a Strategic Economic Partnership, Chile-Japan, art. 161(1), Mar. 27, 2007, 2751 U.N.T.S. 179 [hereinafter Chile-Japan FTA] (requiring border measures for both importation and exportation and for goods infringing patents, utility models, industrial designs, trademarks, and copyrights and related rights); Free Trade Agreement, Can.-Ukr., art. 11.8, July 11, 2016, http://www.sice.oas.org/TPD/CAN_UKR/EiF/CUFTA_EiF_e.pdf [https://perma.cc/NPP8-NXY3] [hereinafter Canada-Ukraine FTA] (requiring border measures for both importation and exportation); Australia-Hong Kong FTA, *supra* note 67, arts. 14.16(3)–(4) (requiring border measures for both importation and exportation); China-Korea FTA, *supra* note 67, art. 15.26(1) (requiring border measures for "the importation, exportation, transshipment, placement under a free zone and placement under a bonded warehouse"); EU-Colombia and Peru FTA, *supra* note 67, art. 249 (requiring border measures for "import, export, or transit of goods"); Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part, art. 163(1), Oct. 15, 2008, 2008 O.J. (L 289) 3 [hereinafter EU-CARIFORUM FTA] (requiring border measures for "importation, exportation, re-exportation, entry or exit of the

some FTA provisions have been "framed as minimum standards, [they] are more prescriptive and allow for less flexibility in implementation than the minimum standards required under TRIPS."[71]

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customs territory, placement under a suspensive procedure or placement under a customs free zone or a customs free warehouse"); Agreement Between the European Union and Japan for an Economic Partnership, art. 14.51 (1), July 17, 2018, 2018 O.J. (L 330) 3 [hereinafter EU-Japan FTA] (requiring border measures for both importation and exportation); EU-Ukraine FTA, *supra* note 69, art. 250 (requiring border measures for "importation, exportation, re-exportation, entry into or exit from the customs territory," including for goods infringing a patent, a supplementary protection certificate, a plant variety right, a design, or a geographical indication). TRIPS does not require countries to introduce customs measures for exportation or for goods other than goods bearing counterfeit trademarks and pirated copyrighted goods. TRIPS, *supra* note 4, art. 51.

Additional examples of raised standards are in the following FTAs: Agreement for an Economic Partnership, Indon.-Japan, art. 121, Aug. 20, 2007, 2780 U.N.T.S. 133 [hereinafter Indonesia-Japan FTA] (requiring criminal penalties in cases of infringement of patents, utility models, industrial designs, trademarks, or layout designs, copyrights or related rights, or plant breeder's rights if committed willfully and on a commercial scale); ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13 (expanding criminal procedures and penalties beyond the cases for which they are mandated under TRIPS); Australia-Korea FTA, *supra* note 67, art. 13.9(27) (requiring criminal procedures and penalties for bootlegging); EU-Ukraine FTA, *supra* note 69, arts. 165–66 (requiring that the countries provide a 25-year term of protection for previously unpublished works that are published after the expiry of copyright protection, and permitting the countries to protect "critical and scientific publications of works which have come into the public domain" for 30 years from their publication); Canada-Ukraine FTA, *supra*, arts. 11.6–11.7 (requiring imprisonment and monetary fines as penalties for bootlegging, and requiring criminal enforcement for infringements of copyright and related rights on the internet); CPTPP, *supra* note 66, art. 18.76(9) & n.125 (requiring that countries apply border measures to more than small quantities of "goods of a commercial nature sent in small consignments"); CPTPP, *supra* note 66, art. 18.77(4); USMCA, *supra* note 66, art. 20.84(4) (requiring criminal procedures and penalties for bootlegging); Agreement for a Comprehensive Economic Partnership, Japan-U.K., art. 14.58(4), Oct. 23, 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929181/CS_Japan_1.2020_UK_Japan_Agreement_Comprehensive_Economic_Partnership__v1.pdf [https://perma.cc/F4DX-7VCF] [hereinafter Japan-U.K. FTA] (requiring criminal procedures and penalties for bootlegging). For the rights in the EU-Ukraine FTA see also Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Arts. 4–5, 2006 O.J. (L 372) 12.

71. Susy Frankel, *The Fusion of Intellectual Property and Trade*, *in* FRAMING INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY: INTEGRATING INCENTIVES, TRADE, DEVELOPMENT, CULTURE, AND HUMAN RIGHTS 89, 103 (Rochelle Cooper Dreyfuss & Elizabeth Siew-Kuan Ng eds., 2018).

FTAs do not raise IP protection standards only by limiting or eliminating TRIPS flexibilities; some FTAs introduce forms of IP or IP-like protection that strengthen the position of IP rights owners, even when TRIPS does not cover such forms of protection at all—or does not cover them expressly.[72] Provisions on data exclusivity and supplementary protection certificates have been among the most criticized of these TRIPS-plus provisions.[73] FTAs have also raised standards by mandating that countries relinquish transitional periods that were created for their benefit; for instance, Nicaragua agreed to implement TRIPS

72. Dinwoodie and Dreyfuss refer to these new forms of protection as "instruments that are not incorporated into TRIPS and which impose obligations not otherwise required by the WTO." DINWOODIE & DREYFUSS, *supra* note 62, at 148.

73. HALABI, *supra* note 65, at 57 ("The costliest TRIPS-plus terms are those that impose 'data exclusivity' separate from patent protection."); Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 226–29 (Lorand Bartels & Federico Ortino eds., 2006); *see, e.g.*, Agreement on the Establishment of a Free Trade Area, Jordan-U.S., art. 4.22, Oct. 24, 2000, Hein's No. KAV 5970; Chile-U.S. FTA, *supra* note 56, art. 17.10; Free Trade Agreement, Sing.-U.S., art. 16.8, May 6, 2003, https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text [hereinafter Singapore-U.S. FTA]; Australia-U.S. FTA, *supra* note 67, art. 17.10; Morocco-U.S. FTA, *supra* note 68, art. 15.10; CAFTA-DR, *supra* note 67, art. 15.10; Bahrain-U.S. FTA, *supra* note 66, art. 14.8(8); Peru-U.S. FTA, *supra* note 67, art. 16.10; Colombia-U.S. FTA, *supra* note 67, art. 16.10; Oman-U.S. FTA, *supra* note 67, art. 15.9; EFTA-Colombia FTA, *supra* note 67, art. 6.11; EFTA-Peru FTA, *supra* note 67, art. 6.11; Agreement on Free Trade and Economic Partnership, Japan-Switz., art. 121, Feb. 19, 2009, 2642 U.N.T.S. 3 [hereinafter Japan-Switzerland FTA]; EU-Ukraine FTA, *supra* note 69, arts. 220, 222; EU-Georgia FTA, *supra* note 69, arts. 186–87; EU-Moldova FTA, *supra* note 69, arts. 314, 315; EU-Canada FTA, *supra* note 51, art. 20.27; Free Trade Agreement, Sing.-Turk., art. 15.21, Nov. 14, 2015, https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/trsfta/turkey-legal-text-trsfta.pdf?la=en [https://perma.cc/52L8-ZXT5] [hereinafter Singapore-Turkey FTA]; CPTPP, *supra* note 66, arts. 18.50–18.51; USMCA, *supra* note 66, arts. 20.48, 20.50; EU-Japan FTA, *supra* note 70, art. 14.37; Free Trade Agreement Between the European Union and the Republic of Singapore, art. 10.33, Oct. 19, 2018, 2019 O.J. (L 294) 3 [hereinafter EU-Singapore FTA]; Georgia-U.K. FTA, *supra* note 69, arts. 178–179; Political, Free Trade and Strategic Partnership Agreement, Ukr.-U.K., arts. 210, 212, Oct. 8, 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934935/CS_Ukraine_1.2020_UK_Ukraine_Political_Free_Trade_Strat_Partner_Agreement.pdf [hereinafter Ukraine-U.K. FTA].

before the expiration of the transitional period so that it could benefit from a trade arrangement with the United States.[74]

Commentators do not spare strong words to describe FTA increases in IP protection; Drahos labels them the "global IP ratchet,"[75] and Kur describes "the incessant demands for increased [IP] protection" that FTAs reflect.[76] Musungu and Dutfiled have indicated their judgment of FTAs in their definition of TRIPs-plus as "rules and practices which have the effect of reducing the ability of developing countries to protect the public interest."[77]

Dinwoodie and Dreyfuss explain that the context of trade negotiations is particularly suitable to manipulating weaker countries into agreeing to stronger IP protection because trade negotiations "involve so many economic sectors that countries with capacity and leverage deficits will have difficulty evaluating the instrument or adequately protecting their intellectual property interests."[78] Reichman states that trade negotiations and FTAs can therefore serve "a maximalist agenda that has been rejected in multilateral negotiations since the 1990s";[79] "capital exporters" may achieve what Anderson and Razavi describe as "a net ratcheting-up of IPR standards."[80]

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74. Alan M. Anderson & Bobak Razavi, *The Globalization of Intellectual Property Rights: TRIPS, BITS, and the Search for Uniform Protection*, 38 GA. J. INT'L & COMP. L. 265, 272 (2010). For an example of a confirmation of TRIPS transitional periods in an FTA see ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13, art. 11.

75. Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 798 (2001).

76. Annette Kur, *From Minimum Standards to Maximum Rules*, *in* TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES 133, 133 (Hanns Ullrich et al. eds., 2016).

77. SISULE F. MUSUNGU & GRAHAM DUTFIELD, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) 1, 3 (Quaker United Nations Office ed., 2003), https://quno.org/sites/default/files/resources/Multilateral-Agreements-in-TRIPS-plus-English_0.pdf [https://perma.cc/X4XM-NCMS].

78. DINWOODIE & DREYFUSS, *supra* note 62, at 148. On the criticism of the lack of transparency in FTA negotiations see Susy Frankel, *Trade-Offs and Transparency*, 44 INT'L REV. INTELL. PROP. & COMPETITION L. 913, 917–18 (2013); Moerland, *supra* note 7, at 766–67.

79. Jerome H. Reichman, *Reframing Intellectual Property Rights with Fewer Distortions of the Trade Paradigm*, *in* FRAMING INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY: INTEGRATING INCENTIVES, TRADE, DEVELOPMENT, CULTURE, AND HUMAN RIGHTS 62, 83 (Rochelle Cooper Dreyfuss & Elizabeth Siew-Kuan Ng eds., 2018).

80. Anderson & Razavi, *supra* note 74, at 274.

Critics have presented developing countries in particular as victims of the "maximalist agenda."[81] Kur, Okediji, Yu, and others criticize FTAs for ignoring or not sufficiently respecting the problems that developing countries have faced, and charge that developed countries have used FTAs to induce or even force developing countries to forego flexibilities in exchange for the possibility of entering into FTAs.[82] In Kur's words, "the industrialized part of the world employed [the promise of improved trade conditions] as a lever to impose enhanced protection standards on threshold and developing countries."[83] Yu warns that, in the process, the developing countries had little or no opportunity to reflect on or advocate for their interests, and the resulting higher IP protection standard can often completely ignore the countries' needs.[84]

Critics have also pointed out that the prominent role that the United States has held in trade negotiations enables it to influence the design of FTAs to revise the national IP laws of other countries to conform to the U.S. standard current at the time the FTAs were negotiated.[85] Even

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81. *Cf.* Ng-Loy Wee Loon, *The Story of Singapore's Intellectual Property Journey: 1965–2013*, 5 WIPO J. 127, 134 (2013) (noting that in the case of the U.S.-Singapore FTA, "Singapore was hardly a 'victim'" because "the higher level of IP protection under the US-Singapore FTA appears to be within the Government's agenda").

82. Ruth L. Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 U. PA. J. INT'L L. 191, 232 (2014) ("[B]ilateral trade and investment agreements were offered to developing countries in exchange for agreements to forego flexibilities or implement TRIPS-plus standards.").

83. Kur, *supra* note 76, at 136.

84. Yu, *supra* note 56, at 113.

85. *See, e.g.*, RICKETSON & GINSBURG, *supra* note 7, at 173 (discussing the significant effects that the Australia-U.S. FTA had on Australian copyright law and noting that while Australian implementing legislation "ran to nearly 100 pages," "[n]o corresponding change to US domestic laws occurred"); Straus, *supra* note 5, at 207 (discussing how Australia's FTA with the United States resulted in Australia de facto adopting the examination guidelines of the USPTO); Anupam Chander, *Exporting DMCA Lockouts*, 54 CLEV. STATE L. REV. 205, 205–217 (2006) (discussing the exportation through FTAs of the U.S. Digital Millennium Copyright Act's anti-circumvention provisions). *Cf.* Morin et al., *supra* note 8, at 99 (showing empirically that "socialisation," underpinned by various factors other than FTAs, might have a substantial effect on a developing country's adoption of "US-style IP rules"); *see also* Miranda Forsyth, *The Need for a Pluralist Approach to the Link Between Intellectual Property and Development: A Pacific Island Case Study*, 8 WIPO J. 123, 125 (2016) (mentioning that FTA "pressure alone does not explain the success of the expansion of intellectual property laws, policies and implementation programmes throughout the developing world").

worse, after countries subscribe to the increased U.S. level of protection of IP rights, those countries might begin promoting the same level of protection in their own FTAs with other countries. Yu has detected this "disturbing" phenomenon when "South Korea injected the terms of its free trade agreement with the United States into the [Regional Comprehensive Economic Partnership trade agreement] negotiations, despite the fact that the United States [was] not even a party to those negotiations."[86] The imposition of U.S. standards on other countries appears even more disturbing in light of the serious ongoing debates in the United States about whether some aspects of existing U.S. IP law truly serve innovation, creativity, and other IP policy goals.[87]

Even assuming that some single country's law could provide the ideal IP regime in that particular country, it does not follow that transplanting that law to another country would be the best choice for the other country. Without sufficient consideration of its own circumstances, a country that blindly implements a legal transplant may disadvantage itself, and a lack of truly negotiated rules may defeat any chance for the provisions in an FTA to become a useful experiment in international IP law.[88] Additionally, locking national law provisions through the medium of FTAs may inhibit countries' ability to adjust their laws to the latest developments, and to future developments. Correa has warned that the resulting inflexibility in national regulation may "contribute to an increase in inequality both between and within countries" and "have adverse economic and social effects."[89]

FTAs have been criticized not only for amplifying the influence of developed countries on developing countries, but also for reflecting pressures from lobbies favoring stronger IP protection. These pressures are not present only in developing countries; developed countries, including the United States, also experience these pressures.[90] Echoing the democratic deficit concerns that are present in other contexts, Reichman and Kaminski have been critical of the

86. Yu, *supra* note 56, at 107.

87. See, e.g., the ongoing debates on the patent protection for computer-implemented inventions and the potential revision of section 512 of the U.S. Copyright Act.

88. Yu, *supra* note 56, at 113–14.

89. Correa, *supra* note 60, at 179.

90. Kaminski has reported on the "institutional capture of USTR" by special interests. Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 978 (2014).

executive branches for hijacking FTA negotiations to accomplish their own domestic IP law objectives that the executives were unable to implement in their own countries through the legislative process.[91] According to Reichman, "these negotiators try to reconfigure unfavorable domestic laws or precedents into more pliable international standards; codify favorable domestic judicial interpretations as international rules; and omit aspects of existing domestic laws that balance intellectual property protection against other values."[92]

Commentators have criticized FTA negotiations as depriving developing countries of the benefit of collective bargaining—the opportunity to exert their "collective weight," which helps promote their interests in international negotiations. As Adrian Otten, the former WTO Secretary of the Uruguay Round TRIPS Negotiation Group, has described in his recollection of the TRIPS negotiations, the possibility of benefitting from its "collective weight" was what attracted developing countries to the TRIPS negotiations.[93] He has suggested that bilateral and regional FTA negotiations do not offer the possibility (that was available in the TRIPS negotiations) to "exploit the differences between the major *demandeurs*," and therefore, bilateral and regional negotiations are unlikely to "yield as much flexibility" as multilateral negotiations do and are not going to provide "the same degree of legitimacy."[94] Similarly, Cottier and Foltea have argued that "multilateral fora would be more appropriate to secure the flexibilities and policy space provided in the agreements drawn up multilaterally."[95]

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91. *See* Susan K. Sell, *The Dynamics of International IP Policymaking*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 73, 81–82 (Daniel J. Gervais, 2d ed. 2014); *see also infra* note 121 and accompanying text.

92. Reichman, *supra* note 79, at 84; *see also* Okediji, *supra* note 82, at 199 (commenting on "the resilience of local interest, sometimes working in concert with transnational actors, in identifying those domestic considerations that could successfully blunt the toughest edges of multilateral IP obligations").

93. Adrian Otten, *The TRIPS Negotiations: An Overview*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 55, 75 (Jayashree Watal & Antony Taubman eds., 2015); *see also* Chidi Oguamanam, *IP in Global Governance: A Venture in Critical Reflection*, 2 WIPO J. 196, 201 (2011) (referring to the United States' "'divide-and-conquer' politics" in FTA negotiations).

94. Otten, *supra* note 93, at 75.

95. Cottier & Foltea, *supra* note 52, at 153.

Vigorous FTA activity has produced an intricate web of overlapping obligations that have fragmented international IP law. Hilty calls it an "alarming movement" that countries continue to enter into "a dramatically increasing number of bilateral or regional free-trade agreements covering a range of topics of varying degrees of interest for the countries involved."[96] Consequently, countries may willingly or inadvertently enter into various FTAs that subject them to mutually conflicting obligations,[97] and El Said and Ruse-Khan warn about the negative effects on global trade of the "fragmentation of policy making"[98] and "the uncoordinated expansion of TRIPS-plus rules."[99]

Recent disputes have shown that investment treaties (or investment chapters of FTAs) and associated dispute resolution processes may be used to weaponize FTAs, including FTA IP provisions[100]—a prospect that has frightened the commentators who have been critical of a lack of sufficient IP expertise in trade negotiations and perceive an even greater lack of IP expertise in investment law and the associated dispute resolution processes. Frankel, Ho, Yu, and others have been

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96. Reto M. Hilty, *Ways Out of the Trap of Article 1(1) TRIPS*, *in* TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES 185, 191 (Hanns Ullrich et al. eds., 2016).

97. Tim Engelhardt, *Geographical Indications under Recent EU Trade Agreements*, 46 INT'L REV. INTELL. PROP. & COMPETITION L. 781, 817 (2015) ("Considering that Canada will commit to protect numerous EU GIs, including some that may currently be used by US producers, Canada may end up with conflicting obligations towards the USA under the NAFTA regime on the one hand and the EU under CETA on the other.").

For an example of one means to address an FTA overlap see CPTPP, *supra* note 66, Annex 18-F (Annex to Section J) (providing an alternative to the obligation to implement the CPTPP section on the liability of internet service providers by allowing countries to implement, in the alternative, the corresponding article of the U.S.-Chile FTA).

98. Mohammed El Said, *The Compatibility of Modern Intellectual Property Protection Norms with Islamic Principles: Lessons from History*, 4 WIPO J. 121, 128 (2012).

99. Henning Grosse Ruse-Khan, *IP and Trade in Post-TRIPS Environment*, *in* TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES 163, 164 (Hanns Ullrich et al. eds., 2018). For general information about FTAs see Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995) (referring to the "spaghetti-bowl proliferation of preferential trade arrangements [that] clutter[] up trade"); MPI PRINCIPLES, *supra* note 7, at 2 (commenting on the "ero[sion of] the policy space inherent in the TRIPS Agreement").

100. *See generally* Henning Grosse Ruse-Khan, *Challenging Compliance with International Intellectual Property Norms in Investor–State Dispute Settlement*, 19 J. INT'L ECON. L. 241 (2016); Peter K. Yu, *Crossfertilizing ISDS with TRIPS*, 49 LOY. U. CHI. L. J. 321 (2017); Rochelle Dreyfuss & Susy Frankel, *Reconceptualizing ISDS: When Is IP an Investment and How Much Can States Regulate It?*, 21 VAND. J. ENT. & TECH. L. 377 (2018).

alarmed by the potential impact of investment treaty dispute resolution processes on international and national IP laws;[101] Ho predicts that "investment claims may create havoc concerning TRIPS flexibilities."[102]

Some commentators have not stopped at criticizing FTA developments and have called for remedial measures to be taken to halt or mitigate increases in IP protection in FTAs. Maskus and Reichman have proposed a moratorium on TRIPS-plus FTA IP provisions;[103] the moratorium would help stabilize international IP law and perhaps facilitate the adoption of a new international treaty that would consolidate international IP law.[104] In fact, Reichman has suggested that such a moratorium might be beneficial for countries' domestic IP lawmaking as well; he has argued that the "secret intellectual property negotiations" of FTAs not only "generat[e] mistrust of the international trade system built around the WTO" but also unnecessarily "prematurely freeze domestic laws."[105] In 2004, in support of a proposal for the World Intellectual Property Organization (WIPO) development agenda that was submitted by Argentina and Brazil, representatives of non-governmental organizations, academics, scientists, and others signed the Geneva Declaration on the Future of the World Intellectual Property Organization, which called on WIPO to impose "a moratorium on new treaties and harmonization of standards that expand and strengthen monopolies and further restrict access to knowledge."[106]

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101. Yu, *supra* note 100, at 321–41; Pusceddu, *supra* note 8, at 1069.

102. Cynthia M. Ho, *A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings*, 6 U.C. IRVINE L. REV. 395, 397 (2016).

103. K.E. Maskus & J.H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 36 (Keith E. Maskus & Jerome H. Reichman eds., 2005); *see also* Reichman, *supra* note 79, at 88.

104. Ruse-Khan has noted that when "[c]omparing this post-TRIPS [fragmented] environment with pre-TRIPS era in the 1970-1980s . . . interesting parallels emerge . . . [W]ith these multilateral standards increasingly superseded by unilateral, bilateral and regional expansions of IP protection beyond TRIPS, a situation similar to the pre-TRIPS era emerges." Ruse-Khan, *supra* note 99, at 171.

105. Reichman, *supra* note 79, at 88. The secrecy in international IP negotiations has been a point of intense criticism since the negotiations of the Anti-Counterfeiting Trade Agreement.

106. *Geneva Declaration on the Future of the World Intellectual Property Organization*, OPEN SOC'Y FOUND., https://www.opensocietyfoundations.org/uploads/32d73d81-1463-498b-9b75-cfddc6126db3/wipo_declaration_0.pdf [https://perma.cc/98KX-3DPD].

As an alternative to a complete halt in FTA negotiations, Frankel has proposed formulating and implementing guiding principles for FTA negotiations so that negotiations "might less-destructively progress."[107] Similarly, Dinwoodie and Dreyfuss have suggested that "organizations with expertise in areas touching on intellectual property can help states with weak capacity to fully utilize the flexibilities found in TRIPS, to analyze proposed bilaterals, and to withstand unilateral pressure."[108]

Some commentators have posited that increases in IP protection could be stopped if international IP law set upper limits on IP protection; Dreyfuss and Kur have advocated for setting "substantive maxima,"[109] possibly in "ceiling treaties" that would set mandatory IP rules with ceilings on IP protection.[110] Ruse-Khan has agreed with the need to introduce such "ceilings" as "an *additional element of the international IP system*"[111] but has also argued that some "ceiling provisions" are already included in various TRIPS provisions—they need only to be properly interpreted as such.[112] Another measure that commentators have proposed to mitigate increases in IP protection is the inclusion in FTAs of rights that would establish meaningful counterweights to the rights of IP rights owners; in this context, user rights have been mentioned as a possible candidate.[113]

III. POSITIVE FEATURES OF FTA IP PROVISIONS

Existing criticisms of FTA IP provisions leave doubts as to whether there is any redeeming value whatsoever in FTA IP content. The criticisms have been more than adequately set forth by others, which leaves to this Article the analysis of the "bright side"; it focuses on features of the provisions that can be perceived as positive features of

107. Frankel, *supra* note 71, at 108.

108. DINWOODIE & DREYFUSS, *supra* note 62, at 147.

109. Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 27 (2004).

110. Kur, *supra* note 76, at 146. On "substantive maxima" see generally Annette Kur, *International Norm-Making in the Field of Intellectual Property: A Shift Towards Maximum Rules?*, 1 WIPO J. 27 (2009).

111. Ruse-Khan, *supra* note 99, at 181.

112. *Id.* at 170 ("Article 41:1, as well as several other specific provisions in the enforcement part of TRIPS and especially its section on border measures, can be understood as binding maximum standards or ceilings which constrain the ability of WTO members to introduce TRIPS-plus IP enforcement rules.").

113. DINWOODIE & DREYFUSS, *supra* note 62, at 199; Dreyfuss, *supra* note 109, at 22.

TRIPS-plus developments.[114] Before Section B presents and analyzes particular FTA features, Section A acknowledges the complexity of defining what "positive" means in the context of FTAs.

A. Defining the "Positives" of Existing IP Provisions in FTAs

Identifying the features in FTAs, or in any other agreements, that are objectively, unequivocally, and universally positive is difficult.[115] Countries pursue their own goals in FTA negotiations, and their expectations of and perspectives on what constitute positive outcomes will vary widely. Nor does an entire country have a single perception because different stakeholders—government actors, political actors, private actors—have different stakes in negotiations and different views of outcomes. Impressions may also evolve as the effects of an FTA emerge.[116]

Defining what "positive" means is also difficult because no single IP law is ideal for all countries and at all times. Opinions on IP policies differ and evolve, and even in countries with highly developed IP laws, such as the United States, experts and stakeholders disagree on many significant questions in IP law.[117] At the international level, assessment of IP law is even more complicated because each country's IP law is embedded in its national legal system, where the law must be calibrated to reflect socio-economic and other factors while operating effectively and in harmony with other elements of the legal system.[118] An ill-considered introduction of a legal transplant can destabilize a legal

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114. This Article does not adopt Carlos Correa's taxonomy that distinguishes "TRIPS-minimum," "TRIPS-plus," "TRIPS-extra," "TRIPS ceilings," and "TRIPS-minus." *See* Correa, *supra* note 60, at 181–82.

115. On the nuances of international negotiations and the resulting outcomes see Taubman, *supra* note 62, at 22 (referring to TRIPS negotiations).

116. Taubman, *supra* note 62, at 42 (commenting on TRIPS negotiations that "it is misleading to assume that the negotiations were essentially between North and South [because of] the diversity of interests and shifting alliances that cut across the full economic and political spectrum of negotiators"); *see also* John Gero, *Why We Managed to Succeed in TRIPS*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 95, 97, 98 (Jayashree Watal & Antony Taubman eds., 2015).

117. For example, the patentability of computer-implemented inventions and the transformative character of use in the fair use doctrine.

118. On the topic of IP law calibration with the rest of a national legal system see, e.g., Marketa Trimble, *Patent Working Requirements: Historical and Comparative Perspectives*, 6 U.C. IRVINE L. REV. 483 (2016).

system and defeat the effectiveness of both the transplanted law and the other elements in the system.

Value judgments about FTAs vary by industry and stakeholder; for instance, the pharmaceutical industry, the motion picture industry, and the luxury brand industry might not agree on specific provisions in a particular FTA, regardless of the country from which their members originate.[119] Though some FTA IP provisions might be positive to a particular industry in all countries, other provisions might favor only industry players in one or some FTA countries.

National executive branches, which are in charge of FTA negotiations, might have an even more nuanced view of pluses in FTA negotiations. No negotiator wants to lose in a negotiation; all want to please their constituents and emerge victorious from international negotiations. But internally, the interests are more complicated. For some negotiators, the primary goal of FTA negotiations—of some or all of them—is to negotiate FTA IP provisions that follow their own national law; success might be measured by how minimal the changes to their national law must be when their country implements the negotiated provisions.[120]

There are many reasons to seek FTA IP provisions that are identical or extremely similar to the national law of the negotiators' country. Negotiators have a self-serving interest to avoid amendments to their national law necessitated by an FTA if the task of implementation will devolve to them or their national agency. Apart from a concern about increased workload, negotiators may be concerned that any reopening of national laws to the legislative process could cause the introduction of additional, undesirable non-FTA-related amendments. Negotiators may seek to cement existing national law by replicating the provisions of national law into an FTA, making the national law provisions unchangeable or much more difficult to change.[121] And negotiators

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119. *See* Susy Frankel, *The Continuing Excesses of Trade Agreements and the Object and Purpose of International Intellectual Property*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 523, 526 (2019) (observing, in the evaluation of FTA IP provision effects, that "the effects of too much protection are not just a 'developed' versus 'developing' matter, but the restrictions that excessive rights place on development also negatively impact industries in developed countries").

120. *See* SANTA CRUZ S., *supra* note 8, at 32 (advising "countries engaging in negotiations with the EU" to "consider putting on the table provisions that are already part of [EU] legislation"); *see also* Valdés & McCann, *supra* note 8, at 39 (noting "'exports' [of countries'] domestic regulatory regimes to trading partners").

121. *See supra* note 92 and accompanying text.

may simply defend their current national IP law because the law is the result of a democratic process; when laws result from a democratic process, it is a legitimate position to contend that those laws should remain intact after an FTA is signed.

For some negotiators, FTA negotiations may be an opportunity to effectuate changes in their own national law and achieve IP law objectives that the executive branch could not achieve domestically because of opposition from or reluctance by the national legislature and courts. Regardless of the intensity of the reporting to and the feedback from the national legislature during FTA negotiations, there are opportunities for negotiators to steer negotiations toward the outcomes that they desire.[122] And regardless of how the executive branch presents the results of the negotiations to the public, the results might be a silent victory for the negotiators and any stakeholders who lobbied for that result.

In the end, a country's negotiating position in IP law is likely to be a patchwork of various interests in and pressures for different outcomes. Not every move of the negotiators is necessarily choreographed to please lobbyists, just as not every move of the negotiators is necessarily designed to please everyone—or even most interests—in their country. Inevitably, positions and outcomes will please some and displease others, and there will never be only winners in international treaty negotiations.

B. Examples of Positive FTA IP Provisions and Features

Keeping in mind the caveats mentioned in the previous Section about the meaning of "positive" in the context of international treaties, this Section presents FTA IP provisions and features that can be interpreted as overall pluses in TRIPS-plus developments and can inspire future negotiations.

Critics are likely to identify at least some negative aspects in the provisions and features below; indeed, even the most benign-sounding FTA provision might have been designed with calculated intent, and

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122. On the problem of democratic deficit in FTA negotiations see Carlo Tovo, *The Role of National Parliaments in the Negotiation and Conclusion of EU Free Trade Agreements*, *in* THE CONCLUSION AND IMPLEMENTATION OF EU FREE TRADE AGREEMENTS 125, 125–42 (Isabelle Bosse-Platière & Cécile Rapoport eds., 2019). On the problem of democratic deficit at the EU level see Josiane Auvret-Finck, *The European Parliament and the Transatlantic Trade and Investment Partnership*, *in* THE CONCLUSION AND IMPLEMENTATION OF EU FREE TRADE AGREEMENTS 143, 143–58 (Isabelle Bosse-Platière & Cécile Rapoport eds., 2019).

every beneficial feature may, even if only in uncommon circumstances, produce disadvantages and result in unintended consequences.[123] Beneficial effects depend on the circumstances and implementation; without suitable circumstances and appropriate implementation, a provision with a beneficial potential might not produce positive effects. And even when positive developments follow the implementation of an FTA, it is difficult to isolate the effects of the FTA IP provisions on such developments, as several studies have demonstrated.[124]

A few notes are in order about the use of FTAs in this Section: This Section does not present an exhaustive list of all FTAs that include each provision that the Section mentions; rather, the Section refers to selected examples of the various provisions. Because it does not cover all provisions in any of the FTAs it mentions, the Section should not be taken to present the full scope of any of the FTAs. Also, no particular significance should be attached to any omission of an FTA from the lists of examples; this Article is based on a review of all 211 FTAs with IP provisions in force,[125] and listing all FTAs with a particular provision would create an unwieldly list. In many cases multiple, FTAs could be listed as examples for many provisions because countries replicate FTA texts; the repeated use of various FTA texts as templates for future FTAs results in identical or similar provisions appearing in multiple FTAs.[126]

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123. For example, an extension of the scope of a grace period for patent applications may be interpreted as beneficial (to the patent applicant) or as detrimental (to the public domain). *E.g.*, Morocco-U.S. FTA, *supra* note 66, art. 15.9(8); Bahrain-U.S. FTA, *supra* note 66, art. 14.8(8); Australia-Malaysia FTA, *supra* note 68, art. 13.11(2); Australia-Korea FTA, *supra* note 67, art. 13.8(5); CPTPP, *supra* note 66, art. 18.38; USMCA, *supra* note 66, art. 20.37.

124. *See supra* note 8; *cf.* Carlos M. Correa, *TRIPS and TRIPS-Plus Protection and Impacts in Latin America*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 141, 178 (Daniel J. Gervais, 2d ed. 2014) (noting that "[t]here is very little evidence so far about the impact of IPRs on variables such as investment and technology transfer, but several studies point to considerable costs derived from the implementation of higher standards of protection").

125. These are FTAs that have been notified to the WTO, are in force, and include IP provisions. *See supra* notes 1–2 and accompanying text. This Section does not provide a historical overview and therefore does not mention provisions in FTAs that are no longer in force, such as NAFTA.

126. On the use of FTAs as templates see *supra* note 56 and accompanying text. Because of the use of templates, it is possible to order FTAs into clusters. The most recent cluster comprises the U.K. FTAs that the United Kingdom concluded in

This Section focuses on TRIPS-plus provisions—provisions that enhance or complement the standards included in TRIPS. This Section assumes that countries that enter into future FTAs would already be bound by TRIPS and its standards, which would therefore not need to be repeated in the FTAs. In some places, this Section mentions additional multilateral IP treaties that concern some of the matters discussed here.

1. Transparency

Many FTAs include provisions that seek to enhance the transparency of countries' IP systems, which is a beneficial goal that is important from international, national, and transnational perspectives.[127] Internationally, transparency is important to countries' relations because it enables countries to monitor the implementation of treaty obligations and the continued compliance with treaty requirements. Greater information is also useful for analyzing the functioning of the national systems and assessing future proposals for reform.[128]

Within each country, transparency contributes to the safeguarding of due process; it ensures that applicants, rights holders, and third parties have access to information that is essential for the acquisition, maintenance, and enforcement of IP rights. Transparency plays an important role in establishing and preserving the appropriate balance between IP rights and other rights; for example, publications of IP rights applications for purposes of opposition—to enable third parties to oppose a grant or registration of the rights—are important for enforcing pre-existing rights and maintaining the public domain.[129]

For transnational IP dealings, international treaties, including FTAs, can provide "transparency about transparency." By setting minimum transparency standards, the treaties ensure that parties who engage in transnational IP dealings have access to information about countries' IP law systems. This information can be very helpful to foreign parties who might lack local knowledge and expertise and be disadvantaged by their limited ability to navigate countries' IP law systems. A local

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connection with Brexit; they include, e.g., the 2020 FTAs that the United Kingdom concluded with Japan and Ukraine.

127. This Section does not discuss the issue of the perceived lack of transparency of FTA negotiations. *See supra* note 78.

128. *See* Taubman, *supra* note 62, at 41 (pointing out that "seasoned practical understanding of domestic regulatory systems [including] IP enforcement . . . is vital for the creation of realistic and balanced international standards").

129. *See, e.g.*, CPTPP, *supra* note 66, art. 18.15(2).

knows the ins and outs of obtaining a particular piece of information; a foreigner might be left in the dark. FTAs can assist in mitigating this indirect discrimination that might otherwise arise from a lack of transparency about transparency.

Transparency-enhancing provisions should be welcome elements of FTAs, but even generally beneficial transparency provisions might create challenges. Transparency requirements can result in increased costs for countries if the requirements obligate countries to create new workflows, platforms, and controls. Attendant costs fall on the individual parties to an FTA and can be significantly burdensome for developing countries.[130] In some countries, publication of certain information might cause data protection/privacy concerns, and the consequent need to redact documents before their publication, and take additional privacy-protecting measures increases transparency costs for the countries. Translation costs may be an issue if an FTA requirement calls for publication in a particular language.

TRIPS's main transparency provision, Article 63, requires that countries ensure the publication of, or where publication is not practicable, the making available of, "in a national language," the "[l]aws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of [TRIPS]."[131] The publication requirement also extends to agreements. Countries have an obligation to notify their laws and regulations to the TRIPS Council[132] and, upon request from another country, supply specifically requested judicial decisions, administrative rulings, and bilateral agreements.[133] In the trademark section, TRIPS requires countries to publish trademarks for opposition.[134] For enforcement decisions on the merits, TRIPS Article 41(3) requires that such decisions "be made available at least to the parties to the proceeding without undue delay."[135]

Many existing FTAs include transparency-enhancing provisions that fill the space that TRIPS left unfilled. The degree of detail of the existing provisions varies; the most basic transparency provisions in FTAs simply declare the countries' general commitment to

130. Technical assistance from other countries or international or regional organizations may offset some of the costs.

131. TRIPS, *supra* note 4, art. 63(1).

132. *Id.* art. 63(2).

133. *Id.* art. 63(3).

134. *Id.* art. 15(5).

135. *Id.* art. 41(3).

transparency. For example, Australia and Chile in their FTA "recognise that it is important to . . . promote efficient and transparent intellectual property systems."[136] The Malaysia-New Zealand FTA states that "[e]ach Party is committed to the maintenance of transparent intellectual property rights regimes and systems,"[137] and several FTAs, including the China-Peru FTA and the Korea-New Zealand FTA, require countries to "establish and maintain transparent intellectual property rights regimes and systems."[138] On the other end of the spectrum in terms of comprehensiveness might be the pre-TRIPS Canada-Israel FTA, which includes a separate annex with Guidelines on Transparency in Intellectual Property.[139]

Some FTAs include a requirement concerning the availability of at least some information in a particular language. The ASEAN-Australia-New Zealand FTA requires that all laws and regulations be made available "in at least the national language of that Party or in the English language,"[140] and that the countries "endeavour to make the information . . . available in the English language."[141] Under the Australia-Hong Kong FTA, the countries must ensure that the laws and regulations are published or made publicly available in English;[142] the provision in this FTA from 2019 was perhaps prompted by concerns about the continued use of the English language in Hong Kong.

Some FTAs specifically address the possibility of making available on the internet the information that TRIPS requires.[143] The Chile-U.S FTA and the CAFTA-DR in 2003 and 2004, respectively, clarified in a footnote that the countries "may satisfy the requirement for publication [of all laws, regulations, and procedures concerning the protection or enforcement of IP rights] by making the [documents] available to the public on the Internet."[144] In 2009, the ASEAN countries and Australia and New Zealand committed in their FTA to

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136. Free Trade Agreement, Austl.-Chile, art. 17.2, July 30, 2008, 2695 U.N.T.S. 3 [hereinafter Australia-Chile FTA]; *see* EU-Japan FTA, *supra* note 70, art. 14.6(1).

137. Free Trade Agreement, Malay.-N.Z., art. 11.2(3), Oct. 26, 2009, 2724 U.N.T.S. 3 [hereinafter Malaysia-New Zealand FTA].

138. China-Peru FTA, *supra* note 51, art. 144(5); Korea-New Zealand FTA, *supra* note 67, art. 11.3(6)(b).

139. Canada-Israel FTA, *supra* note 34, Annex 10.7.

140. ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13.

141. *Id.* ch. 13, art. 10(2).

142. Australia-Hong Kong FTA, *supr*a note 67, art. 14.7(1).

143. TRIPS, *supra* note 4, art. 63(1).

144. Chile-U.S. FTA, *supra* note 56, art. 17.1(12) n.2; CAFTA-DR, *supra* note 67, art. 15.1(14) n.4.

"endeavour to make the information [about laws and regulations of general application that pertain to the availability, scope, acquisition, enforcement and prevention of the abuse of IP rights] . . . available . . .on the internet."[145] Even recent treaties, such as the 2018 Australia-Peru FTA, the 2018 CPTPP, and the 2018 USMCA, do not mandate, but at least expect, countries to "endeavor" to publish the information on the internet.[146] As for final judicial and administrative decisions,[147] the 2004 CAFTA-DR explains in a separate footnote that countries may satisfy their obligation to make such decisions public by publishing the decisions on the internet,[148] while the 2008 Australia-Chile FTA expresses the parties' preference for electronic publication of decisions.[149]

FTAs may clarify or broaden the scope of information that countries must publish. The Canada-Israel FTA requires the publication of "the examination guidelines and assessment criteria, if any, used to review an application" and "the contact points for inquiries regarding the registration of industrial property rights."[150] The FTA intends that the information be specific and user-friendly when it states that the countries must publish "clear and simple instructions and explanations of the steps involved regarding the application, issuance and registration processes" and also "the provisions, if any, directed to small and medium sized enterprises."[151] The CAFTA-DR includes specific and detailed provisions on transparency concerning geographical indications; the countries must inter alia provide "available contact information sufficient to allow . . . the general public to obtain guidance concerning the procedures for filing applications or petitions and the processing of those applications or petitions in general."[152]

With respect to particular IP rights, FTAs may strive to improve the accessibility of information about granted and registered IP rights. The EU-Japan FTA contains the countries' commitment to "make all reasonable efforts to take appropriate available measures to publish

145. ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13, art. 10(2).
146. USMCA, *supra* note 66, art. 20.9, para. 1; *see also* Australia-Peru FTA, *supra* note 67, art. 19, paras. 1–2; CPTPP, *supra* note 66, art. 18.9, para. 1.
147. *See* TRIPS, *supra* note 4, art. 63, para. 1.
148. CAFTA-DR, *supra* note 67, art. 15.11, para. 3 n.16.
149. Australia-Chile FTA, *supra* note 136, art. 17.34, para. 2.
150. Canada-Israel FTA, *supra* note 34, Annex 10.7, paras. 1(b)–(c).
151. *Id.* Annex 10.7, paras. 1(a)–(d).
152. CAFTA-DR, *supra* note 67, art. 15.3, para. 6.

information" on grants and registrations of IP rights.[153] The ASEAN countries and Australia and New Zealand promise to "endeavour to co-operate . . . by developing publicly accessible databases of registered rights."[154] The Australia-Chile FTA requires the countries to provide, "to the maximum extent practical," "a publicly available electronic information system of registered trade marks,"[155] and the EU-Georgia FTA and the EU-Singapore FTA include the requirement without any qualification.[156]

Gradually, FTAs have shown countries' readiness to move publication of the information about granted and registered IP rights to the internet. The 2004 Australia-U.S. FTA was ahead of other FTAs when it made publication on the internet mandatory, but only in cases of trademark databases (of both applications and registrations).[157] The 2018 CPTPP and the 2018 USMCA have replicated this provision[158] and added an obligation for the countries to publish online information about other types of registered or granted IP rights, but only subject to the countries' laws.[159] The 2012 Australia-Malaysia FTA states that "[p]atent and trade mark databases will be made available on the Internet,"[160] and the 2015 Australia-China FTA and the 2017 China-Georgia FTA require the countries to make their "granted or registered patent for invention, utility model, industrial design, plant variety protection, geographical indication and trade mark databases available on the internet."[161]

Some FTAs address the accessibility of information regarding not only registered and granted IP rights, but also IP rights applications. The degree and scope of countries' commitments vary; many FTAs include provisions concerning trademarks and require countries to "provide a publicly available electronic database of trademark

153. EU-Japan FTA, *supra* note 70, art. 14.6, para. 3(a).

154. ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13, art. 9, para. 4.

155. Australia-Chile FTA, *supra* note 136, art. 17.14(b).

156. EU-Georgia FTA, *supra* note 69, art. 166, para. 3; EU-Singapore FTA, *supra* note 73, art. 10.13.

157. Australia-U.S. FTA, *supra* note 67, art. 17.2(8)(b).

158. CPTPP, *supra* note 66, art. 18.24(b); USMCA, *supra* note 66, art. 20.23(b).

159. CPTPP, *supra* note 66, art. 18.9, para. 3; USMCA, *supra* note 66, art. 20.9, para. 3.

160. Australia-Malaysia FTA, *supra* note 68, art. 13.6.

161. Free Trade Agreement, Austl.-China, art. 11.6, para. 1, June 17, 2015, https://www.dfat.gov.au/sites/default/files/chafta-agreement-text.pdf [hereinafter Australia-China FTA]; *see also* China-Georgia FTA, *supra* note 67, art. 11.10; *see also* Georgia-Hong Kong FTA *supra* note 67, ch. 11, art. 10.

applications and trademark registrations."[162] Some FTAs ask countries to "endeavour" to make the databases available on the internet;[163] the Australia-China FTA, the CPTPP, and the USMCA expand the obligation to databases of applications for other types of IP rights.[164]

FTAs may specify the kind of information that must be made available regarding applied-for and registered or granted IP rights. The CPTPP and the USMCA list specific types of information about patent applications and granted patents that the countries must make available to the public, namely search and examination results, including prior art searches, non-confidential communications from applicants, and citations to literature submitted by applicants and third parties.[165]

Finally, in some FTAs, parties commit to improving the public's awareness of IP law, which may be subsumed under the transparency heading. Some FTAs mention awareness of "intellectual property rights and systems,"[166] awareness of the "protection of intellectual property,"[167] or awareness of "the benefits of effective protection and enforcement of intellectual property rights."[168] These phrases might suggest a rather one-sided approach to IP awareness, with an emphasis on only the pro-IP protection perspective. However, it is certainly desirable for awareness-raising activities to encompass the entire IP rights ecosystem, including the use of public licenses and the minimization of potential abuses and the elimination of actual abuses

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162. EU-Colombia and Peru FTA, *supra* note 67, art. 204, para. 2; Korea-New Zealand FTA, *supra* note 67, art. 11.8, para. 8; Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, art. 12.19, para. 3, June 30, 2019, 2020 O.J. (L 186) 3 [hereinafter EU-Vietnam FTA]; *see also* EU-CARIFORUM FTA, *supra* note 70, art. 144(A); Georgia-Hong Kong FTA, *supra* note 67, art. 15.14, para. 2(b); *cf.* Canada-Korea FTA, *supra* note 67, art. 16.9, para. 10 (requiring that the countries "provide, *to the extent possible*, a publicly available electronic information system of trademark applications and registered trademarks" (emphasis added)).

163. ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13, art. 10, para. 3; *see also* CAFTA-DR, *supra* note 67, art. 15.2, para. 7 (stating that a party shall "work to provide, to the maximum degree practical, a publicly available electronic database").

164. *See* Australia-China FTA, *supra* note 161, art. 11.6, para. 2; CPTPP, *supra* note 66, art. 18.9, para. 2; USMCA, *supra* note 66, art. 20.9, para. 2.

165. CPTPP, *supra* note 66, art. 18.45; USMCA, *supra* note 66, art. 20.43.

166. Free Trade Agreement, China-N.Z., art. 164, para. 2(c)(i), Apr. 7, 2008, 2590 U.N.T.S. 101, 325–26 [hereinafter China-New Zealand FTA].

167. Agreement for an Economic Partnership, Brunei-Japan, art. 97(f), June 18, 2007, 2781 U.N.T.S. 3 [hereinafter Brunei-Japan FTA]; EU-Japan FTA, *supra* note 70, art. 14.7.

168. ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13, art. 9, para. 5.

of IP rights. Even when the phrasing in an FTA is more neutral, such as "awareness-building activities for the private sector and civil society"[169] or "promotion of public awareness of consumers and right holders,"[170] the content of the actual activities is ultimately what matters.

2. Cooperation among IP offices

FTAs may usefully promote cooperation among national IP offices; depending on their implementation, provisions to encourage and enhance collaboration among IP offices may be among the most beneficial FTA provisions. Some aspects of collaboration among IP offices are set out in TRIPS Article 69, but Article 69 is narrow and addresses collaboration only as concerns cross-border trade in IP-infringing goods. Much space remains in this area for beneficial TRIPS-plus initiatives.

FTAs may include general language requiring countries to "encourage and facilitate the development of contacts and cooperation" among national IP offices, and possibly among other agencies and institutions.[171] Some FTAs express goals for the cooperation; for example, the Australia-Thailand FTA mentions "improving and strengthening the intellectual property administrative systems";[172] Chile and China agreed in their FTA to "promote the efficient registration of intellectual property rights."[173]

Collaboration among IP offices, including in prior art searches, may be facilitated by the adoption of uniform classifications, and in some FTAs, countries pledge to use a specific classification system, such as the classifications based on the Strasbourg Agreement Concerning the

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169. Agreement Establishing an Association Between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part, art. 32, para. 2(e), Nov. 18, 2002, 2002 O.J. (L 352) 3 [hereinafter EU-Chile FTA].

170. Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, art. 10.69, para. 1(e), Oct. 6, 2010, 2010 O.J. (L 127) 6 [hereinafter EU-Korea FTA]; *see also* EU-Ukraine FTA, *supra* note 69, art. 252, para. 2(e) ("public awareness of consumers and right holders").

171. Australia-Thailand FTA, *supra* note 35, art. 1305(b); Malaysia-New Zealand FTA, *supra* note 137, art. 11.4, para. 2(c).

172. Australia-Thailand FTA, *supra* note 35, art. 1305(b)(i).

173. Free Trade Agreement, Chile-China, art. 111, para. 1(f), Nov. 18, 2005, http://investmentpolicy.unctagd.org/international-investment-agreements/treaty-files/2712/download [https://perma.cc/5FKP-3LWJ] [hereinafter Chile-China FTA].

International Patent Classification and the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.[174]

Important collaboration efforts concern patent examination by national patent offices, including the process of examination of "international" patent applications under the Patent Cooperation Treaty (PCT). In recent years, patent offices have successfully enhanced collaboration through mechanisms such as the Patent Prosecution Highway (PPH), and provisions in FTAs, though not a precondition of such collaboration, may be a useful starting point for further negotiations leading to a PPH project or another type of closer collaboration.

FTAs may address collaboration in prior art searches and in patent examination in general. For example, in its FTAs with Singapore and India, Korea agreed to possible cooperation in "international search and international preliminary examination under PCT, and facilitation of international patenting process."[175] India and Korea agreed to possible cooperation in "joint prior art search, including exchanging prior art search result[s], comparing search result[s], and reviewing differences of search result[s]."[176] The CPTPP and the USMCA countries agreed to the goal of "making search and examination results available to the patent offices of [the] other [countries]."[177] China and Korea have agreed to "enhance cooperation" concerning accelerated examinations of patent applications.[178]

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174. *See* Chile-Japan FTA, *supra* note 70, art. 159, para. 2 (requiring the use of classifications for patents and utility models pursuant to the Strasbourg Agreement); EU-Colombia and Peru FTA, *supra* note 67, art. 204, para. 1 (relying on the classification established in the Nice Agreement to classify goods and services for trademarks); CPTPP, *supra* note 66, art. 18.25 (implementing the classifications from the Nice Agreement); USMCA, *supra* note 66, art. 20.24 (using the classifications consistent with the Nice Agreement); EU-Vietnam FTA, *supra* note 162, art. 12.17, para. 2 (applying the classifications of the Nice Agreement).

175. India-Korea FTA, *supra* note 36, art. 12.5, para. 2(b); *see also* Free Trade Agreement, S. Kor.-Sing., art. 17.5, para. 2(a), Aug. 4, 2005, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2709/download [hereinafter Korea-Singapore FTA].

176. India-Korea FTA, *supra* note 36, art. 12.5, para. 2(c).

177. CPTPP, *supra* note 66, art. 18.14, para. 2(a); *see also* USMCA, *supra* note 66, art. 20.15, para. 2(a).

178. China-Korea FTA, *supra* note 67, art. 15.15, para. 5.

FTAs may even detail forms of delegation and recognition of patent examination. According to the Japan-Singapore FTA, "Singapore shall, in accordance with its laws and regulations, take appropriate measures to facilitate the patenting process of an application filed in Singapore that corresponds to an application filed in Japan."[179] The Indonesia-Japan FTA requires that the countries provide preferential examination to patent applications that were filed in the other country or some other country.[180] In its FTA with Korea, Singapore agreed to designate the Korean IP office as the patent office for examining any "patent application filed in Singapore that corresponds to a patent application filed in Korea,"[181] and also as a PCT International Search Authority and International Preliminary Examination Authority for any English-language patent application filed in Singapore's IP office.[182]

Several FTAs evidence countries' concerns about the quality of patent examination. Australia and China pledged to "consider opportunities for continuing cooperation" regarding not only "work sharing in patent examination," but also "improvement of patent examination quality and efficiency."[183] The CPTPP and the USMCA include the countries' commitment to "exchang[e] [. . .] information on quality assurance systems and quality standards relating to patent examination."[184]

Other potentially useful forms of collaboration that are mentioned in FTAs are "training and specialization courses for public servants on intellectual property rights and other mechanisms"[185] and technical assistance.

3. Procedural minima for administrative and judicial proceedings

Provisions setting procedural minima may also be positive features of FTAs, particularly when the provisions are designed to align procedures with the principles of due process. With these provisions,

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179. Japan-Singapore FTA, *supra* note 51, art. 98, para. 1. The details of the process are in the Implementing Agreement. *Id.* art. 7.

180. Indonesia-Japan FTA, *supra* note 70, art. 112, paras. 3–4.

181. Korea-Singapore FTA, *supra* note 175, art. 17.7.

182. *Id.* art. 17.6, para. 1.

183. Australia-China FTA, *supra* note 161, art. 11.23, paras. 3(a)–(d).

184. CPTPP, *supra* note 66, art. 18.14, para. 2(b); USMCA, *supra* note 66, art. 20.15, para. 2(b); *see also infra* note 373 and accompanying text (discussing the quality of patent examination).

185. Chile-China FTA, *supra* note 173, art. 111, para. 2(b); *see also* China-New Zealand FTA, *supra* note 166, art. 164, para. 2.

as with the transparency provisions discussed in Section III.B.1, above, negative effects may accrue; primarily, countries may experience increased costs as they reform their institutions and adjust their processes to comport to the FTA-required procedural minima. Nevertheless, the provisions should lead to improvements that are beneficial overall.

TRIPS provides a solid basis for procedural minima for administrative procedures associated with the acquisition and maintenance of IP rights; according to TRIPS Article 62, which concerns the "acquisition and maintenance of intellectual property rights and related *inter-partes* procedures," procedures and formalities must be reasonable and consistent with TRIPS.[186] Grants and registrations of IP rights must occur "within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection."[187] All procedures for acquisition and maintenance of IP rights and for any administrative revocation and inter partes procedures (opposition, revocation, or cancellation) that might be available under national laws must conform to the general principles and be fair, equitable, and "not . . . unnecessarily complicated or costly," and not "entail unreasonable time-limits or unwarranted delays."[188] Decisions on the merits rendered in such procedures "shall preferably be . . . in writing and reasoned," "based only on evidence in respect of which parties were offered the opportunity to be heard," made available to the parties "without undue delay," and be "subject to review by a judicial or quasi-judicial authority."[189]

For IP rights enforcement procedures, TRIPS Articles 41 and 42 list several due process requirements that apply to judicial proceedings and other types of IP rights enforcement procedures, such as border measures undertaken by customs. Enforcement procedures must be effective and provide for "expeditious remedies" while safeguarding against the abuse of procedures and not creating "barriers to legitimate trade."[190] The procedures must be "fair and equitable," and they must not be "unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."[191] Defendants must

186. TRIPS, *supra* note 4, art. 62, para. 1.
187. *Id.* art. 62, para. 2.
188. *Id.* art. 41, para. 2; *id.* art. 62, para. 2.
189. *Id.* art. 41, para. 3; *id.* art. 62, paras. 4–5; *see also id.* art. 32 (concerning "judicial review of any decision to revoke or forfeit a patent").
190. *Id.* art. 41, para. 1.
191. *Id.* art. 41, para. 2.

receive timely notice with sufficient details, and parties must be given the opportunity to be represented by "independent legal counsel."[192] The procedures should not be "overly burdensome" in terms of requiring personal appearances, and parties must be allowed to "substantiate their claims and to present all relevant evidence."[193] The procedures must allow for the protection of confidential information "unless this would be contrary to existing constitutional requirements."[194] The rules that apply to decisions on IP rights enforcement also apply to decisions on acquisition and maintenance of IP rights with respect to the writing requirement, the reasoning requirement, and the availability of review.

TRIPS does not require countries to create a separate judicial system for IP rights enforcement or prioritization of IP rights enforcement over other types of enforcement.[195] Each country may create specialized IP courts, adopt separate procedural rules for IP rights proceedings, and channel greater resources to enforcement of IP rights than to enforcement of other rights.[196]

Although TRIPS's treatment of procedural minima is quite extensive, additional space is left for FTAs to fill. For example, the various transparency provisions discussed in Section III.B.1, above, whether they concern laws, regulations, and decisions, or individual applications for and registration and grants of particular IP rights, all contribute to the safeguarding of due process.

Some FTAs focus on the details of the patent application, revocation, and invalidation processes, and the details of the trademark application, opposition, and invalidation processes.[197] The Patent Law Treaty (PLT) addresses some of the procedural aspects of patent acquisition; the PLT was signed in 2000, entered into force in 2005, and currently has forty-three contracting parties for which the PLT has entered into force.[198] For trademarks, the Trademark Law Treaty

192. *Id.* art. 42.
193. *Id.*
194. *Id.*
195. *Id.* art. 41, para. 5.
196. *See* Patent Law Treaty, art. 10, para. 3, Jan. 6, 2000, 2340 U.N.T.S. 3.
197. *See* Australia-Chile FTA, *supra* note 136, art. 17.13.
198. *See WIPO-Administered Treaties: Contracting Parties: Patent Law Treaty*, WORLD INTELL. PROP. ORG. , https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=4 [https://perma.cc/F9RQ-ANA6] (last visited April 15, 2022) (listing all contracting parties to the Patent Law Treaty).

(TLT) and the subsequent Singapore Treaty on the Law of Trademarks (Singapore Treaty) provide for many details of the trademark application process. The TLT was signed in 1994 and has fifty-four parties,[199] and the Singapore Treaty was signed in 2006 and has fifty-one parties. These three treaties refer to procedures in national patent and trademark offices that concern national IP rights; additional treaties cover procedures concerning international applications and regional rights, and they address aspects of due process in those procedures.[200]

FTAs often aim at the efficiency of IP grant and registration procedures. For instance, in the Chile-Japan FTA and the Brunei-Japan FTA, the countries declare their readiness to ensure transparent and streamlined administrative procedures concerning IP;[201] references to the streamlining of IP administrative procedures are also in Japan's FTAs with India and Australia.[202] FTAs may include countries' commitments to enhance IP registration systems and improve examination procedures, including quality systems;[203] for example, Hong Kong's FTAs with Georgia and Australia specify that such

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The PLT obligates countries to give a patent owner "the opportunity to make observations on the intended revocation or invalidation, and to make amendments and corrections where permitted under the applicable law, within a reasonable time limit." Patent Law Treaty, *supra* note 196, art. 10, para. 2. Concerning patent applications, the PLT requires that countries permit, upon request, a patent applicant to correct or add a priority claim and that countries provide an applicant the opportunity to make observations before such a request is denied. *Id.* art. 13, para. 1.

199. *WIPO-Administered Treaties: Contracting Parties: Trademark Law Treaty*, WORLD INTELL. PROP. ORG., https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/tlt.pdf [https://perma.cc/7LZR-4EZL] (listing all the contracting parties to the Trademark Law Treaty).

200. *See, e.g.*, Patent Cooperation Treaty (PCT), June 19, 1970, 28 U.S.T. 7645, http:// www.wipo.int/pct/en/texts/pdf/pct.pdf; Madrid Agreement Concerning the International Registration of Marks of April 14, 1891, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957 and at Stockholm on July 14, 1967, July 14, 1967, 828 U.N.T.S. 389; European Patent Convention, *supra* note 68, at 199.

201. Chile-Japan FTA, *supra* note 70, art. 159, para. 1; Brunei-Japan FTA, *supra* note 167, art. 97(d).

202. *See* Comprehensive Economic Partnership Agreement, India-Japan, art. 103, Feb. 16, 2011, 2862 U.N.T.S. 3; Agreement for an Economic Partnership, Austl.-Japan, art. 16.4, July 8, 2014, https://www.mofa.go.jp/files/000044322.pdf [https://perma.cc/X3RM-HXUC].

203. Australia-Hong Kong FTA, *supra* note 67, art. 11.9(a); China-Georgia FTA, *supra* note 67, art. 11.7(a).

improvements should occur "with a view to achieving efficient and timely grant or registration of intellectual property rights."[204] The CPTPP includes the countries' commitment to "cooperate to reduce differences in the procedures and processes of their respective patent offices" and thus to "reduce the complexity and cost of obtaining the grant of a patent."[205]

Sometimes FTAs go beyond general language and seek to cement specific procedural requirements. The CAFTA-DR requires the countries to provide patent applicants "with at least one opportunity to submit amendments, corrections, and observations in connection with their applications."[206] Later FTAs, for example the provisions in China's FTAs with Australia and Georgia (later replicated in Hong Kong's FTAs with the same countries), mandate "opportunities to make amendments, corrections and observations in connection with their applications in accordance with each [country's] laws, regulations and rules."[207] The Canada-Israel FTA encompasses additional IP rights in these requirements and mandates for any refusals to register a trademark or design or grant a patent "the opportunity to respond to communications from the relevant government authorities, challenge an initial refusal and have a higher authority review any refusal to register a trademark or design, or grant a patent."[208] The EU-Georgia FTA specifies that an opposition procedure must be available for trademarks and must be adversarial.[209]

FTAs may contribute to an increased digitization of processes; as noted in Section III.B.1, above, some FTAs require or encourage countries to maintain electronic databases of registered and granted rights and IP rights applications, and some FTAs address the electronic nature of processes other than publication. For example, in the CAFTA-DR and the Australia-Chile FTA, the countries commit to "provide, to the maximum extent practical: a system for the electronic

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204. Australia-Hong Kong FTA, *supra* note 67, art. 14.9, para. 1(a); *see also* Georgia-Hong Kong FTA, *supra* note 67, ch. 11, art. 7, para. 1(a) (requiring that each party shall work to improve its examination and registration systems).

205. CPTPP, *supra* note 66, art. 18.14, para. 3.

206. CAFTA-DR, *supra* note 67, art. 15.9, para. 8.

207. Australia-China FTA, *supra* note 161, art. 11.10; China-Georgia FTA, *supra* note 67, art. 11.9; Georgia-Hong Kong FTA, *supra* note 67, ch. 11, art. 9; *see also* Australia-Hong Kong FTA, *supra* note 67, art. 14.9, para. 2 ("in accordance with the laws and regulations of that [country]").

208. Canada-Israel FTA, *supra* note 34, Annex 10.7, paras. 2(a)–(b).

209. EU-Georgia FTA, *supra* note 69, art. 166.

application, processing, registration, and maintenance of trade marks";[210] the China-Korea FTA does not include such a qualification and requires that the countries provide such a system in an electronic format.[211] The CPTPP and USMCA require "a system for the electronic application for, and maintenance" of not only trademarks, but also industrial design rights.[212] The format of decisions is also the subject of some FTA provisions; a number of FTAs permit electronic delivery of trademark registration refusals,[213] and the 2015 Australia-China FTA simply includes in the definition of "writing" any "writing and communications in an electronic form."[214]

FTAs may assist in easing the administrative burden on IP applicants. For example, the Indonesia-Japan FTA prohibits the countries from requiring the authentication of signatures under certain circumstances, requiring the certification of translation of an earlier application, requiring separate powers of attorney for each application or registration, and requiring the submission of a power of attorney as a condition of the filing of an application.[215] The Japan-Thailand FTA includes a commitment to assist small and medium enterprises with the acquisition of IP rights, including, possibly, by reducing fees.[216]

Some FTAs include a provision concerning standing to oppose the grant or registration of an IP right or to seek the revocation, cancellation, or invalidation of an IP right. FTAs typically require that

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210. Australia-Chile FTA, *supra* note 136, art. 17.14(a); *see also* CAFTA-DR, *supra* note 67, art. 15.2, para. 7.

211. *See* China-Korea FTA, *supra* note 67, art. 15.14, para. 2(a).

212. CPTPP, *supra* note 66, art. 18.24(a); USMCA, *supra* note 66, arts. 20.23(a), 20.54(a).

213. *See* CAFTA-DR, *supra* note 67, art. 15.2, para. 6; Australia-Chile FTA, *supra* note 136, art. 17.13(a); Tratado de Libre Comercio [Free Trade Agreement], Costa Rica-Peru, art. 9.3, para. 4(a), May 26, 2011, https://www.sice.oas.org/Trade/CRI_PER_FTA_s/TEXT_CRI_PER_PDF_s/index_s.asp [https://perma.cc/5BB3-2BN2] [hereinafter Costa Rica-Peru FTA]; Tratado de Libre Comercio [Free Trade Agreement], Colom.-Costa Rica, art. 9.3, para. 4(a), May 22, 2013, https://www.tlc.gov.co/acuerdos/vigente/costa-rica/texto-del-acuerdo-espanol [https://perma.cc/FS4F-J857] [hereinafter Colombia-Costa Rica FTA]; Canada-Korea FTA, *supra* note 67, art. 16.9, para. 8; Korea-New Zealand FTA, *supra* note 67, art. 11.4, para. 8; China-Korea FTA, *supra* note 67, art. 15.14, para. 1(a).

214. Australia-China FTA, *supra* note 161, art. 11.9(e).

215. Indonesia-Japan FTA, *supra* note 70, art. 109.

216. Agreement for an Economic Partnership, Japan-Thai., art. 142, Apr. 3, 2007, 2752 U.N.T.S. 105 [hereinafter Japan-Thailand FTA].

countries afford standing to "any interested person,"[217] but they differ in the types of IP rights their standing provisions cover. For example, the 2007 Chile-Japan FTA includes a standing provision only for trademarks;[218] the 2015 Australia-Chile FTA and the 2017 China-Georgia FTA provisions on standing concern IP rights in general.[219]

Some FTAs build on TRIPS enforcement provisions by specifying the party having standing to enforce IP rights. In addition to IP rights holders, the EU-CARIFORUM FTA, the EU-Georgia FTA, the EU-Moldova FTA, and the EU-Canada FTA all list a number of other persons who have standing, but only when the persons are entitled to seek relief according to the country's law; such persons are "other persons authorised to use those rights," "intellectual property collective rights management bodies," and "professional defence bodies that are regularly recognised as having a right to represent holders of intellectual property rights."[220] The EU-Singapore FTA says that the term "right holders" includes "exclusive licensees as well as federations and associations having the legal standing to assert such rights."[221]

Some FTAs include provisions concerning the costs of experts that may be appointed in judicial or administrative proceedings. According to the CAFTA-DR and the Australia-Korea FTA, if experts are appointed by the authorities in civil proceedings and it is "require[d] that the parties [to the proceedings] bear the costs of such experts, the [countries] should seek to ensure that such costs are closely related,

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217. Canada-Israel FTA, *supra* note 34, Annex 10.7, paras. 2(c)–(d) 67; *see also* CAFTA-DR, *supra* note 67, art. 15.2, para. 6(c) ("interested parties"); Chile-Japan FTA, *supra* note 70, art. 161 ("interested parties"); Australia-Chile FTA, *supra* note 136, arts. 17.13(c), 17.21, para. 1 ("interested parties"); Australia-China FTA, *supra* note 161, art. 11.9(c) ("interested parties"); Korea-New Zealand FTA, *supra* note 67, art. 11.4, para. 11 ("interested parties"); China-Georgia FTA, *supra* note 67, art. 11.7(c) ("interested parties"); Australia-Hong Kong FTA, *supra* note 67, art. 14.9, para. 1(c) ("interested parties"); Georgia-Hong Kong FTA, *supra* note 67, ch. 11, art. 7, para. 1(c) ("interested parties").

218. *See* Chile-Japan FTA, *supra* note 70, art. 161.

219. Australia-China FTA, *supra* note 161, art. 11.9(c); China-Georgia FTA, *supra* note 67, art. 11.7(c); Australia-Hong Kong FTA, *supra* note 67, art. 14.9, para. 1(c); Georgia-Hong Kong FTA, *supra* note 67, art. 7, para. 1(c).

220. EU-CARIFORUM FTA, *supra* note 70, art. 152; EU-Georgia FTA, *supra* note 69, art. 191; EU-Moldova FTA, *supra* note 69, art. 319; EU-Canada FTA, *supra* note 51, art. 20.33.

221. EU-Singapore FTA, *supra* note 73, art. 10.38, para. 2(a).

inter alia, to the quantity and nature of work to be performed and [. . .] not unreasonably deter recourse to such proceedings."[222] The CPTPP and USMCA require that expert fees be "reasonable and related appropriately, among other things, to the quantity and nature of work to be performed and [. . .] not unreasonably deter recourse to such proceedings."[223] The Australia-Chile FTA lists "standardised fees" as an acceptable alternative for the calculation of expert remuneration.[224]

Some FTAs expand the TRIPS requirements concerning decisions to be in writing and to include reasoning. Under the CAFTA-DR, the Australia-Hong Kong FTA, and the CPTPP, final decisions should not only include reasoning but also "state any relevant findings of fact . . . on which the decisions . . . are based."[225] The inclusion of factual findings may be helpful, for example, if parties seek collateral estoppel effects in other proceedings.[226] Some FTAs specify that as an alternative to the reasons for a decision, the decision-maker may state the legal basis on which the decision is based.[227]

Some countries have used FTAs to boost their protection of geographical indications, and their FTAs include procedural provisions designed specifically for geographical indications. For example, the CAFTA-DR includes several procedural requirements concerning geographical indications, including a requirement for minimal formalities, a publication for opposition, and the availability of procedures for opposition and cancellation of geographical

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222. CAFTA-DR, *supra* note 67, art. 15.11, para. 16; *see also* Australia-Korea FTA, *supra* note 67, art. 13.9, para. 14.

223. CPTPP, *supra* note 66, art. 18.74, para. 11; *see also* USMCA, *supra* note 66, art. 20.82, para. 11.

224. Australia-Chile FTA, *supra* note 136, art. 17.36, para. 6.

225. CAFTA-DR, *supra* note 67, art. 15.11, para. 3; CPTPP, *supra* note 66, art. 18.73, para. 1(a); Australia-Hong Kong FTA, *supra* note 67, art. 14.7, para. 2 ("Each [country] shall provide that final judicial decisions or administrative rulings for the enforcement of intellectual property rights, that in accordance with the laws of the [country] are of general applicability, shall preferably be in writing and state any relevant findings of fact and the reasoning, or the legal basis on which the decisions or rulings are based.").

226. *See, e.g.*, Otokoyama Co. v. Wine of Japan Imp., Inc., 175 F.3d 266, 272–73 (2d Cir. 1999).

227. CAFTA-DR, *supra* note 67, art. 15.11, para. 3; Australia-Chile FTA, *supra* note 136, art. 17.34, para. 2; Australia-Hong Kong FTA, *supra* note 67, art. 14.7, para. 2 ("Each [country] shall provide that final judicial decisions or administrative rulings for the enforcement of intellectual property rights, that in accordance with the laws of the [country] are of general applicability, shall preferably be in writing and state any relevant findings of fact and the reasoning, or the legal basis on which the decisions or rulings are based.").

indications.[228] The Australia-Hong Kong FTA requires the publication for opposition in cases of applied-for geographical indications.[229]

4. Limitations on increases in IP protection

FTAs may be, and have been, used to raise minimum standards of IP protection; as Frankel observed, even a clarification of a TRIPS requirement may have resulted in an increase in IP protection.[230] However, TRIPS-plus also has been used to place limits on future increases in IP protection; Straus terms such provisions as "TRIPs-minus."[231] TRIPS itself is a treaty that has lowered a pre-existing IP protection standard; the WTO panel, in one of its decisions, interpreted the TRIPS provision on exceptions and limitations to copyright as permitting exceptions and limitations to rights under the pre-existing Berne Convention.[232]

FTAs may emphasize countries' commitments to seek an appropriate balance between IP rights and other rights and may specify the rights and interests that should be balanced. FTAs now frequently mention "the legitimate interests of users,"[233] and some FTAs add "the

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228. CAFTA-DR, *supra* note 67, art. 15.3.

229. Australia-Hong Kong FTA, *supra* note 67, art. 14.11(2)(a).

230. *See* Frankel *supra* note 71, at 103.

231. Straus, *supra* note 5, at 197; *see also* Correa, *supra* note 60, at 182–83.

232. Panel Report, *United States—Section 110(5) of U.S. Copyright Act*, WTO Doc. WT/DS160/R (adopted June 15, 2000) [hereinafter *U.S. Copyright Act Section 110(5)*]; TRIPS, *supra* note 4, art. 13. For a discussion of the "minor exception" doctrine in this report *see U.S. Copyright Act Section 110(5)*, *supra*, at para. 6.82; KENNEDY, *supra* note 56, at 194–95; *see also* General Report, Records of the Conference Convened in Brussels 5–26 June 1948, reprinted in RICKETSON & GINSBURG, *supra* note 7, at 256–70.

233. Trans-Pacific Strategic Economic Partnership Agreement, 2005, art. 10.2(2), May 28, 2006, 2592 U.N.T.S. 46151 [hereinafter TPSEP]; Malaysia-Pakistan FTA, *supra* note 51, art. 104(2); Australia-Chile FTA, *supra* note 136, art. 17.2; Free Trade Agreement, China-Costa Rica, art. 109(2), Apr. 8, 2010, http://www.sice.oas.org/Trade/CRI_CHN_FTA/Texts_Apr2010_e/CRI_CHN_ToC__PDF_e.asp [https://perma.cc/UZ67-8FW9] [hereinafter China-Costa Rica FTA]; China-New Zealand FTA, *supra* note 166, art. 160(2); Free Trade Agreement, Costa Rica-Sing., art. 13.1(2), Apr. 6, 2010, https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/Singapore_Costa_Rica_FTA/Legal_text/Chapter_13_Intellectual_Property_and_Innovation [https://perma.cc/V9JN-4CKV] [hereinafter Costa Rica-Singapore FTA]; Free Trade Agreement, S. Kor.-Viet., art. 12.1(c), May 5, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3584/download [https://perma.cc/NHX5-7ST2] [hereinafter Korea-Vietnam FTA]; Georgia-Hong Kong FTA, *supra* note 67, art. 2(d); Australia-Hong Kong FTA,

legitimate interests of . . . the community"[234] or "the society" as a whole,[235] or refer to "the public interest" in general.[236] The EU-Japan FTA mentions the need to "tak[e] into account the interests of relevant stakeholders including right holders and users."[237] More specifically, the CPTPP acknowledges the countries' recognition of "the importance of a rich and accessible public domain."[238]

Some particular goals—if truly pursued by the countries—may steer national IP legislation to set appropriate limits on IP protection. In general, the EU-Korea FTA, the EU-Singapore FTA, and the EU-Vietnam FTA refer to the objective of achieving not only an effective but also an adequate level of protection and enforcement of IP rights.[239]

Some FTAs mention among their objectives that national IP laws promote "social and economic welfare";[240] the EFTA's FTAs with Colombia and Peru, the Australia-Peru FTA, the CPTPP, and the USMCA refer to "a manner conducive to social and economic welfare, and to a balance of rights and obligations."[241] The CPTPP and the USMCA recognize that countries may have to adopt "measures necessary . . . to promote the public interest in sectors of vital importance to their socio-economic and technological

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supra note 67, art. 14.2(1)(d); *see also* EU-Vietnam FTA, *supra* note 162, art. 12.1(2) (stating that an objective of intellectual property rights is contributing "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare").

234. TPSEP, *supra* note 233, art. 10.2(2); Malaysia-Pakistan FTA, *supra* note 51, art. 104(2); China-Peru FTA, *supra* note 51, art. 144(2); China-New Zealand FTA, *supra* note 166, art. 160(2); Costa Rica-Singapore FTA, *supra* note 233, art. 13.1(2); Korea-Vietnam FTA, *supra* note 233, art. 12.1(c).

235. China-Costa Rica FTA, *supra* note 233, art. 109(2).

236. EU-Colombia and Peru FTA, *supra* note 67, art. 195(b); Georgia-Hong Kong FTA, *supra* note 67, art. 2(d); Australia-Hong Kong FTA, *supra* note 67, art. 14.2(d).

237. EU-Japan FTA, *supra* note 70, art. 14.2.

238. CPTPP, *supra* note 66, art. 18.15(1).

239. EU-Korea FTA, *supra* note 170, art. 10.1(b); EU-Singapore FTA, *supra* note 73, art. 10.1(1)(b); EU-Vietnam FTA, *supra* note 162, art. 12.1(1)(b); EU-Moldova FTA, *supra* note 69, art. 277(b); EU-Ukraine FTA, *supra* note 69, art. 157(b).

240. EU-Colombia and Peru FTA, *supra* note 67, art. 195(b); EU-Vietnam FTA, *supra* note 162, art. 12.1(2).

241. EFTA-Colombia FTA, *supra* note 67, art. 6.2(1); EFTA-Peru FTA, *supra* note 67, art. 6.2(1); Australia-Peru FTA, *supra* note 67, art. 17.2; CPTPP, *supra* note 66, art. 18.2; USMCA, *supra* note 66, art. 20.2.

development."[242] The EU-Vietnam FTA includes the goal of "contributing to a more sustainable and inclusive economy."[243]

Some FTAs refer to the objective that national IP laws "contribute[. . .] to transfer and dissemination of technology";[244] numerous EU-concluded FTAs refer to the "commercialisation of innovative and creative products."[245] The EFTA's FTAs with Colombia and Peru, the Australia-Peru FTA, the CPTPP, and the USMCA refer to "the mutual advantage of producers and users of technological knowledge."[246] The Australia-Peru FTA, the CPTPP, and the USMCA also state a need to "facilitate the diffusion of information, knowledge, technology, culture[,] and the arts."[247]

Recently, FTAs have recognized competition and market efficiency as significant goals that IP laws should support. The Georgia-Hong Kong FTA and the Australia-Hong Kong FTA mention the IP system's "support [of] open, innovative and efficient markets,"[248] and, similarly, the EU-Japan FTA, the Australia-Peru FTA, the CPTPP, and the USMCA refer in the IP chapter to, among other needs, "the need to . . . foster competition and open and efficient markets."[249] The U.K.-CARIFORUM FTA declares the countries' interest in "foster[ing] competitiveness . . . and in particular micro-, small and medium-sized enterprises."[250]

Given the insufficient adoption of flexibilities in many countries,[251] a reminder of possible flexibilities and a declaration that countries are

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242. CPTPP, *supra* note 66, art. 18.3(1); USMCA, *supra* note 66, art. 20.3(1).

243. EU-Vietnam FTA, *supra* note 162, art. 12.1(1)(a).

244. EU-Colombia and Peru FTA, *supra* note 67, art. 195(b).

245. EU-Vietnam FTA, *supra* note 162, art. 12.1(1)(a).

246. EFTA-Colombia FTA, *supra* note 67, art. 6.2(1); EFTA-Peru FTA, *supra* note 67, art. 6.2(1); Australia-Peru FTA, *supra* note 67, art. 17.2; CPTPP, *supra* note 66, art. 18.2; USMCA, *supra* note 66, art. 20.2.

247. Australia-Peru FTA, *supra* note 67, art. 17.4(b); CPTPP, *supra* note 66, art. 18.4; USMCA, *supra* note 66, art. 20.4(b).

248. Georgia-Hong Kong FTA, *supra* note 67, art. 2(d); Australia-Hong Kong FTA, *supra* note 67, art. 14.2(1)(d).

249. EU-Japan FTA, *supra* note 70, art. 14.2(c); Australia-Peru FTA, *supra* note 67, art. 17.4(c); CPTPP, *supra* note 66, art. 18.4(c); USMCA, *supra* note 66, art. 20.4(c).

250. Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, art. 132(b), Mar. 22, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803413/1._CARIFORUM_Command_Paper_Part_One.pdf [https://perma.cc/TQT2-6BPF] [hereinafter U.K.-CARIFORUM FTA].

251. *See supra* notes 63–71 and accompanying text.

expected to make use of flexibilities are useful components of FTAs. An affirmation of countries' options to utilize flexibilities appears in numerous FTAs that specifically point to the principles of IP legislation included in TRIPS Article 8(1), which mentions the use of exceptions and flexibilities for adopting "measures necessary to protect public health and nutrition."[252] The CPTPP and the USMCA reassure countries that the FTAs "do[] not reduce or extend the scope of applicability of the limitations and exceptions permitted by the TRIPS Agreement, the Berne Convention, and the WCT[,] or the WPPT."[253] Some FTAs mention that countries may utilize flexibilities to reflect the circumstances of the digital environment.[254] There are even references to concrete flexibilities in some FTAs, such as the reference in a footnote in the CPTPP that explains that if a country protects copyright for more than the life of the author plus seventy years, the country may apply the rule of the shorter term under the Berne Convention.[255]

FTAs can pay particular attention to public health and access to medicines, which were subject to the Doha Round and the resulting Declaration on the TRIPS Agreement and Public Health ("the Declaration").[256] The Australia-Peru FTA, the CPTPP, and the USMCA include a separate article with "[u]nderstandings [r]egarding [c]ertain [p]ublic [h]ealth [m]easures" and repeat much of the language from the Declaration.[257] These FTAs declare that the obligations in the FTA IP chapters "do not and should not prevent a [country] from taking measures to protect public health";[258] therefore, the chapters should be "interpreted and implemented in a manner supportive of each [country's] right to protect public health and, in particular, to promote access to medicines for all."[259] The FTAs state

252. Free Trade Agreement, S. Kor.-Peru., art. 17.4(5), Mar. 21, 2011 [hereinafter Korea-Peru FTA].

253. CPTPP, *supra* note 66, art. 18.65(2); USMCA, *supra* note 66, art. 20.64(2).

254. TPSEP, *supra* note 233, art. 10.3(4).

255. CPTPP, *supra* note 66, art. 18.63, n.75.

256. WORLD TRADE ORG. MINISTERIAL CONF., *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (adopted Nov. 20, 2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm [https://perma.cc/X5Y3-R66Z].

257. Australia-Peru FTA, *supra* note 67, art. 17.6; CPTPP, *supra* note 66, art. 18.6; USMCA, *supra* note 66, art. 20.6.

258. Australia-Peru FTA, *supra* note 67, art. 17.6(a); CPTPP, *supra* note 66, art. 18.6(a); USMCA, *supra* note 66, art. 20.6(a).

259. Australia-Peru FTA, *supra* note 67, art. 17.6(a); CPTPP, *supra* note 66, art. 18.6(a); USMCA, *supra* note 66, art. 20.6(a).

that the countries should enter into consultations about any amendments that might be necessitated by a waiver or amendment of any TRIPS provision.[260] Concerns about public health have also found expression in other FTAs; provisions on "Patents and Public Health" appear in the Costa Rica-Singapore FTA,[261] and provisions on "Intellectual Property and Public Health" are in several FTAs that China and Hong Kong have concluded.[262]

In some instances, a clarification of a TRIPS requirement may lead to an increase in IP protection,[263] but in other instances, a clarification may assist in limiting IP protection increases. An FTA provision that establishes a specific exception or limitation to IP rights within TRIPS flexibilities may guide countries by clarifying the scope of the flexibilities and ensuring that countries utilize a particular aspect of the flexibilities. For example, the CPTPP and the USMCA mandate that countries "adopt or maintain a regulatory review exception for pharmaceutical products."[264] The EU-Colombia and Peru FTA mandates that the countries provide for an exception to trademark rights that allows "a person to use the trademark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts, provided that it is used in accordance with honest practices in industrial or commercial matters."[265] The EU-Ukraine FTA lists "[e]xceptions to the restricted acts relating to computer programs," which include use by the lawful acquirer for an intended purpose, "including for error correction," and the observation, study, or testing for the purposes of "determin[ing] the ideas and principles which underlie any element of the programme."[266] The same FTA permits decompilation of a computer program under

260. Australia-Peru FTA, *supra* note 67, art. 17.6(c); CPTPP, *supra* note 66, art. 18.6(c); USMCA, *supra* note 66, art. 20.6(c). The U.S.-concluded FTAs, with the exception of the USMCA, refer only to a possible amendment to TRIPS and not to a waiver. Peru-U.S. FTA, *supra* note 67, art. 16.13(2)(c); Colombia-U.S. FTA, *supra* note 67, art. 16.13(2)(c); Panama-U.S. FTA, *supra* note 67, art. 15.12(2)(c).

261. Costa Rica-Singapore FTA, *supra* note 233, art. 13.4.

262. China-Costa Rica FTA, *supra* note 233, art. 112; Georgia-Hong Kong FTA, *supra* note 67, art. 5; China-Mauritius FTA, *supra* note 37, art. 10.3; Australia-Hong Kong FTA, *supra* note 67, art. 14.4.

263. *See supra* note 71 and accompanying text.

264. CPTPP, *supra* note 66, art. 18.49; USMCA, *supra* note 66, art. 20.47.

265. EU-Colombia and Peru FTA, *supra* note 67, art. 206(2).

266. EU-Ukraine FTA, *supra* note 69, art. 183(3).

specific conditions[267] and prohibits a right holder from using a contract to exclude the possibility of the creation of a backup copy.[268]

To maintain countries' flexibilities, it is important for any exceptions and limitations listed in FTAs to be non-exhaustive so that they do not limit countries' adoption of additional exceptions and limitations that are permitted by the flexibilities in multilateral treaties. In its subsection on trade secrets, the EU-Japan FTA lists conduct that countries shall not consider as contrary to honest commercial practices; on the list are independent discovery, reverse engineering, use required or allowed by law, use by employees, and "disclosure of information in the exercise of the right to freedom of expression and information."[269] However, the list refers only to the mandatory exceptions that countries must introduce into their national laws; the FTA clearly leaves open the option for the countries to implement additional exceptions.[270] The EU-Singapore FTA and the EU-Vietnam FTA list "the fair use of descriptive terms" as a mandatory exception to trademark rights, but they also expressly state that countries "may provide for other limited exceptions" (and repeat TRIPS Article 17 language on the limitations of exceptions).[271]

An adjustment to the level of IP protection may also occur through remedies. The EU-CARIFORUM FTA states that countries may "in appropriate cases and at the request of the [infringer]" allow courts to "order [only] pecuniary compensation to be paid to the injured person" "if that person acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory."[272] The CAFTA-DR eliminates damages as a form of remedy in cases of copyright and neighboring rights infringements by "a nonprofit library, archives, educational institution, or public broadcasting entity" if these entities are innocent

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267. *Id.* art. 184(1).

268. *Id.* art. 183(2); *see also* Ukraine-U.K. FTA, *supra* note 73, art. 173(2).

269. EU-Japan FTA, *supra* note 70, art. 14.36(4)(e). The influence of the 2016 EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure is apparent in the text. *See generally* Council Directive 2016/943, 2016 O.J. (L 157) (EU).

270. *See* Japan-U.K. FTA, *supra* note 70, art. 14.41(4).

271. EU-Singapore FTA, *supra* note 73, art. 10.15; EU-Vietnam FTA, *supra* note 162, art. 12.21.

272. EU-CARIFORUM FTA, *supra* note 70, art. 159; EU-Colombia and Peru, *supra* note 67, art. 243; EU-Georgia FTA, *supra* note 69, art. 195(4).

infringers.[273] The USMCA also limits remedies against such institutions in cases of violations of technological protection measures and rights management information.[274] In cases of corrective measures, the EU-Central America FTA allows the countries to enable their courts "to take into account, inter alia, the gravity of the infringement, as well as the interests of third parties holding ownership, possessory, contractual, or secured interests."[275]

Some FTAs reinforce the space for exceptions and limitations to IP rights that are not included in TRIPS. For example, the EU-Colombia and Peru FTA specifies breeder's rights as possible exceptions and limitations.[276] The EU-CARIFORUM FTA, the EU-Central America FTA, and the U.K.-CARIFORUM FTA expressly state that countries "shall have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected farm-saved seed or propagating material."[277]

5. Updating existing TRIPS provisions

FTAs may be useful in updating and clarifying TRIPS;[278] if designed properly, FTAs may "make[. . .] the [TRIPS's] provisions sharper and more specific."[279] FTAs can reflect the latest technological developments and clarify TRIPS in order to adjust IP rules to reflect the developments.[280] It is in this category that many disagree about the positive nature of FTA contributions; for example, the strengthening of moral rights in the EU and EFTA FTAs might be perceived as positive by creators and authors but as negative by other

273. CAFTA-DR, *supra* note 67, art. 15.11(14).

274. USMCA, *supra* note 66, 20.81(18)(b).

275. Agreement Establishing an Association Between the European Union and Its Member States, on the One Hand, and Central America on the Other, art. 266(3), June 29, 2012, 2012 O.J. (L346) 3 [hereinafter EU-Central America FTA].

276. EU-Colombia and Peru FTA, *supra* note 67, art. 232.

277. EU-CARIFORUM FTA, *supra* note 70, art. 149(1); EU-Central America FTA, *supra* note 275, art. 259(3); U.K.-CARIFORUM FTA, *supra* note 250, art. 149(1).

278. Correa refers to this category of FTA provisions as "TRIPS-plus." Correa, *supra* note 60, at 181–82.

279. Pedro Roffe, *Preferential Trade Agreements and the Protection of Genetic Resources and Associated Traditional Knowledge*, *in* PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 303 (Daniel F. Robinson et al. eds, 2017).

280. Yu, *supra* note 56, at 111–12.

stakeholders.[281] Similarly, stakeholders are likely to disagree about the benefits of mandatory implementation of the resale right, which some EU FTAs impose.[282] Nonetheless, some updates to TRIPS might be broadly beneficial.

Some countries have used FTAs to clarify the details of the protection of geographical indications (GIs). Not surprisingly given its interest in GIs, the European Union in particular has included extensive provisions on GIs in some of its FTAs,[283] but the USMCA also

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281. TRIPS excludes moral rights from the Berne Convention provisions that TRIPS incorporates, but countries may address moral rights in their FTAs within the framework left by the Berne Convention and the Beijing Treaty. The EFTA's FTAs with Colombia and Peru and the EU-Colombia and Peru FTA reiterate the obligation to provide for the right of attribution and integrity to authors and performers and a stipulation of the duration of moral rights "at least until the expiry of the economic rights." EFTA-Colombia FTA, *supra* note 67, art. 6.8(3); EFTA-Peru FTA, *supra* note 67, art. 6.8(3); EU-Colombia and Peru FTA, *supra* note 67, art. 216(2). The EFTA's FTAs make the rights "exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed." EFTA-Colombia FTA, *supra* note 67, art. 6.8(3); EFTA-Peru FTA, *supra* note 67, art. 6.8(3). On the exclusion of moral rights from the incorporation provision in TRIPS see DANIEL J. GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 245–46 (2012).

282. The resale right, which is optional under Berne Article 14, and which remains optional under TRIPS, is made mandatory in the EU-Colombia and Peru FTA, the EU-Moldova FTA, and the EU-Georgia FTA. The right under the FTAs must be "inalienable and unwaivable" and apply to "all acts of resale made by auction or through art market professionals, such as salesrooms, art galleries, or other dealers in works of art." EU-Colombia and Peru FTA, *supra* note 67, art. 223; EU-Moldova FTA, *supra* note 69, art. 290; EU-Georgia FTA, *supra* note 69, art. 163; *see also* Georgia-U.K. FTA, *supra* note 69, art. 155; Ukraine-U.K. FTA, *supra* note 73, art. 180. *Cf.* EU-Vietnam FTA, *supra* note 162, art. 12.15 (making the introduction of the resale right optional). Many FTAs include detailed provisions on neighboring rights. EU-Korea FTA, *supra* note 170, arts. 10.7–10.9; EU-Georgia FTA, *supra* note 69, arts. 155–158; EU-Moldova FTA, *supra* note 69, art. 282–285; EU-Japan FTA, *supra* note 70, arts. 14.9–14.12; EU–Vietnam FTA, *supra* note 162, arts. 12.7–12.10; USMCA, *supra* note 66, arts. 20.56–20.63.

283. For instance, the EU-Ukraine FTA, the EU-Georgia FTA, the EU-Moldova FTA, and the EU-Vietnam FTA include eleven articles; the EU-Korea FTA, the EU-Central America FTA, and the EU-Japan FTA nine articles; and the EU-Colombia and Peru FTA and the EU-Singapore FTA eight articles on geographical indications. EU-Ukraine FTA, *supra* note 69, arts. 201–211; EU-Georgia FTA, *supra* note 69, arts. 169–179; EU-Moldova FTA, *supra* note 69, arts. 296–306; EU-Vietnam FTA, *supra* note 162, arts. 12.23–12.33; EU-Korea FTA, *supra* note 170, arts. 10.18–10.26; EU-Japan FTA, *supra* note 70, arts. 14.22–14.30; EU-Central America FTA, *supra* note 275, arts. 242–250; EU-Colombia and Peru FTA, *supra* note 67, arts. 207–214; EU-Singapore FTA, *supra* note 73, arts. 10.16–10.23.

includes several articles on GIs.[284] The FTAs may encompass a broad scope of clarifications of GI protection: the Eurasian-Vietnam FTA states that the protection of appellations of origin extends even to names that do not contain the name of the particular geographical area.[285] The New Zealand-Taiwan FTA recognizes the possibility that geographical indications may be protected through a trademark system,[286] and lists several possible "grounds for opposing or cancelling the registration or designation of a geographical indication."[287] According to the CAFTA-DR, the countries must allow persons from another contracting country to "apply for protection or petition for recognition of geographical indications" without requiring "intercession by that [country] on behalf of its persons."[288] Some FTAs list particular geographical indications that countries must mutually recognize and agree to protect; examples include Tequila and Mezcal in the Israel-Mexico FTA,[289] and Pisco, Maíz Blanco Gigante Cusco, and Chulucanas in the Peru-Singapore FTA.[290] Some FTAs specifically

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284; CPTPP, *supra* note 66, arts. 18.30–18.36; USMCA, *supra* note 66, arts. 20.29–20.35.

285. Free Trade Agreement Between the Eurasian Economic Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part, 2015, art. 9.8(2), May 29, 2015, http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/%D0%92%D1%8C%D0%B5%D1%82%D0%BD%D0%B0%D0%BC/EAEU-VN_FTA.pdf [https://perma.cc/QHD2-EATB] [hereinafter Eurasian-Vietnam FTA]; *see, e.g.*, Joined Cases C-465/02 & C-466/02, Fed. Republic of Germany v. Comm'n of the European Cmmtys., 2005 E.C.R. 1-09115.

286. Agreement on Economic Cooperation, N.Z.-Taiwan, ch. 10, art. 7(2), July 10, 2013, https://www.nzcio.com/assets/NZCIO-documents/ANZTEC-Final-Text-10-July-2013-NZ.pdf [https://perma.cc/M69L-BQQD] [hereinafter New Zealand-Taiwan FTA].

287. *Id.* art. 7(3).

288. CAFTA-DR, *supra* note 67, art. 15.3(2).

289. Free Trade Agreement, Isr.-Mex., Annex 2-05(1), Apr. 10, 2000, 2128 U.N.T.S. 3.

290. Free Trade Agreement, Peru-Sing., art. 2.17(2), May 29, 2008, https://www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/singapore-ftas/pesfta [https://perma.cc/4RU7-VQNX]; *see also* Chile-MexicoFTA, *supra* note 41, arts. 15–24 & Annexes (listing particular geographical indications); Chile-Korea FTA, *supra* note 51, art. 16.4, Annexes (same); Japan-Mexico FTA, *supra* note 33, art. 8, Annex 3 (same); TPSEP, *supra* note 233, art. 10.5, Annex 10.A (same); Free Trade Agreement, Pan.-Chile, art. 3.12, June 2, 2006, http://www.sice.oas.org/tpd/chl_panchl_pan_e.asp [https://perma.cc/TT42-TSS5] (same); Chile-Japan FTA, *supra* note 70, art. 163(1), Annex 15 (same); China-Peru FTA, *supra* note 51, art. 146, Annex 10

mention protection of country names against commercial uses that would likely mislead consumers.[291]

FTAs may address countries' approaches to abuses of IP rights and anti-competitive conduct. No multilateral treaty on competition law has yet been concluded, and TRIPS addresses anti-competitive practices in a limited manner. TRIPS Article 40 concerns "anti-competitive practices in contractual licences" and recognizes countries' agreement that some licensing practices or conditions may be anti-competitive and that countries may act to "prevent or control such practices."[292] The provision makes it mandatory for countries to cooperate in investigations of such practices.[293] Further, TRIPS mentions anti-competitive practices in Article 31; Article 31 suspends in cases of a patent holder's anti-competitive practices some of the conditions for issuing a compulsory license to a patent.[294] Some FTAs include provisions on competition law in general,[295] and FTAs may also fill some of the gaps left by TRIPS by adding provisions concerning anti-competitive conduct that concerns IP rights.

FTAs frequently mention enforcement of IP rights on the internet, which is a topic that TRIPS did not specifically address.[296] Some FTAs add provisions on intermediary liability, which are discussed in the following subsection, and some FTAs mention enforcement in the digital realm. The Canada-Korea FTA requires that the countries adopt "measures to curtail copyright and related right infringement on the Internet or other digital network,"[297] and the China-Korea FTA refers to the need to take "effective measures to curtail *repetitive* infringement of copyright and related rights on the Internet or other digital

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(same); China-Costa Rica FTA, *supra* note 233, art. 116, Annexes (same); Korea-Peru FTA, *supra* note 252, art. 17.6, Annex 17A (same); Costa Rica-Peru FTA, *supra* note 213, art. 9.4, Annex 9.4 (same); Colombia-Costa Rica FTA, *supra* note 213, art. 9.4, Annex 9-A (same); Canada-Korea FTA, *supra* note 67, art. 16.10 (same); EU-Canada FTA, *supra* note 51, art. 20.18, Annex 20-A (same); Canada-Ukraine FTA, *supra* note 70, art. 11.3, Annexes (same).

291. Australia-Chile FTA, *supra* note 136, art. 17.18; CPTPP, *supra* note 66, art. 18.29; USMCA, *supra* note 66, art. 20.28.

292. TRIPS, *supra* note 4, arts. 40(1)–(2).

293. *Id.* arts. 40(3)–(4).

294. *Id.* art. 31(k).

295. EU-Georgia FTA, *supra* note 69, arts. 203–09.

296. *See infra* note 385 and accompanying text. On the lack of treatment of internet-specific issues in TRIPS see Marketa Trimble, *TRIPS in the Field of Copyright*, *in* THE FIRST 25 YEARS OF THE TRIPS AGREEMENT IN CONTEXT 12–13 (Christopher Heath & Anselm Kamperman Sanders eds., 2022).

297. Canada-Korea FTA, *supra* note 67, art. 16.16(4).

network."[298] The Eurasian-Vietnam FTA stipulates that countries "shall aim" to effectively protect and enforce copyright and related rights in "the digital environment."[299] The Canada-Korea FTA article on "special measures against copyright infringers on the internet" states that the civil and criminal enforcement procedures outlined in the FTA also apply to "infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes."[300] The Canada-Korea FTA makes it optional for countries to give their agencies the authority to "order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement."[301] The Canada-Korea FTA also states that both countries "shall endeavour to promote cooperative efforts within the business community to effectively address copyright or related rights infringement while preserving legitimate competition and, consistent with that [country's] domestic law, preserving fundamental principles such as freedom of expression, fair process, and privacy."[302]

FTAs may reflect countries' commitment to safeguard fundamental rights as they embark on enforcement of IP rights on the internet. The Canada-Ukraine FTA requires the countries to implement measures against copyright infringers on the internet but do so "in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce and, consistent with that [country's] law, preserves fundamental principles such as freedom of expression, fair process, and privacy."[303] The EU-Colombia and Peru FTA refers to the need to "ensure the free movement of information services."[304]

Some FTAs focus on the protection of trade secrets in court proceedings. TRIPS requires that countries' civil judicial procedures to enforce IP rights "provide a means to identify and protect confidential information,"[305] that orders to produce evidence "ensure the protection of confidential information,"[306] and that the right of

298. China-Korea FTA, *supra* note 67, art. 15.28 (emphasis added).
299. Eurasian-Vietnam FTA, *supra* note 285, art. 9.6(2).
300. Canada-Korea FTA, *supra* note 67, art. 16.16(1).
301. *Id.* art. 16.16(2).
302. *Id.* art. 16.16(3).
303. Canada-Ukraine FTA, *supra* note 70, art. 11.7(5).
304. EU-Colombia and Peru FTA, *supra* note 67, art. 250.
305. TRIPS, *supra* note 4, art. 42.
306. *Id.* art. 43(1).

inspection and information in customs proceedings is "[w]ithout prejudice to the protection of confidential information."[307] The general transparency obligations in TRIPS Article 63 are subject to countries' discretion to withhold information that would "prejudice the legitimate commercial interests of particular enterprises," which could protect trade secrets;[308] the cooperation obligation in investigations of anti-competitive practices does not concern confidential information.[309] TRIPS also mentions protection of "manufacturing and business secrets" in its provision concerning process patents, where it makes mandatory the judicial authority to order an alleged infringer to prove that the process it is using is different from the patented process.[310] In this context TRIPS says that "the legitimate interest of defendants in protecting their manufacturing and business secrets shall be taken into account."[311] In addition to emphasizing TRIPS rules, FTAs may enhance the rules concerning confidentiality in IP rights proceedings by focusing on the enforcement of the rules.[312] The Canada-Korea FTA, the China-Korea FTA, the CPTPP, and the USMCA make it mandatory for countries to make sanctions available for authorities to impose "on a party, counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders concerning the protection of confidential information produced or exchanged in connection with that proceeding."[313]

FTAs are an opportunity to address remedies. TRIPS includes several articles concerning remedies,[314] but the articles do not cover all aspects of remedies. Some FTAs address the calculation of damages; the Australia-Chile FTA requires that courts "consider, *inter alia*, any legitimate measure of the value of the infringed goods or services including the retail price."[315] The CAFTA-DR refers to the

307. *Id.* art. 57.
308. *Id.* art. 63(4).
309. *Id.* art. 40(3).
310. *Id.* art. 34(3).
311. *Id.* art. 34(3).
312. Japan-U.K. FTA, *supra* note 70, art. 14.56(2).
313. Canada-Korea FTA, *supra* note 67, art. 16.13(19); China-Korea FTA, *supra* note 67, arts. 15.24(8), 20.81(16); CPTPP, *supra* note 66, art. 18.74(14); USMCA, *supra* note 66, art. 20.74(b); *see also* Australia-Korea FTA, *supra* note 67, art. 13.9(11)(b).
314. *See* TRIPS, *supra* note 4, arts. 43–49 (covering evidence, injunctions, damages, other remedies, right of information, indemnification of the defendant, and administrative procedures).
315. Australia-Chile FTA, *supra* note 136, art. 17.36(2)(b).

consideration of "suggested retail price or other legitimate measure of value that the right holder presents,"[316] and the Canada-Korea FTA states that the "legitimate measure of value the right holder submits . . . may include lost profits."[317] The EU-Canada FTA mentions the possibility for a court to award "a royalty or fee, to compensate a right holder for the unauthorised use of the right holder's intellectual property."[318] The EU-Georgia FTA states that damages should be "appropriate to the actual prejudice suffered by [the] right holder as a result of the infringement."[319] The EU-Georgia FTA and the EU-Singapore FTA mention "lump sum" damages that may be awarded "on the basis of elements such as at least the amount of royalties or fees" that the infringer would have been required to pay if the infringer had obtained authorization from the right holder.[320]

FTAs may include provisions on statutory damages, which are not available in all countries and which TRIPS mentions only as an option in certain cases.[321] The CAFTA-DR mandates that countries "establish or maintain pre-established damages as an alternative to actual damages"; this obligation applies "at least with respect to civil judicial proceedings concerning copyright or related rights infringement and trademark counterfeiting."[322] A similar provision which states that pre-established damages must be sufficient to meet both the compensatory and the deterrent functions exists in both the China-Korea FTA and the CAFTA-DR.[323] The Canada-Korea FTA lists pre-established damages as one of the forms of remedies that must be available, "[a]t least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting."[324]

Publication of a decision may be a remedy that is available to the prevailing party. According to the EU-Colombia and Peru FTA, the

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316. CAFTA-DR, *supra* note 67, art. 15.11(7)(b); *accord* China-Korea FTA, *supra* note 67, art. 15.24(2)(b).

317. Canada-Korea FTA, *supra* note 67, art. 16.13(10); *accord* EU-Canada FTA, *supra* note 51, art. 20.40(1)(b).

318. EU-Canada FTA, *supra* note 51, art. 20.40(2).

319. EU-Georgia FTA, *supra* note 69, art. 196(1).

320. *Id.* art. 196(1)(b); EU-Singapore FTA, *supra* note 73, art. 10.44(3).

321. TRIPS, *supra* note 4, art. 45(2).

322. CAFTA-DR, *supra* note 67, art. 15.11(8).

323. China-Korea FTA, *supra* note 67, art. 15.24(3); CAFTA-DR, *supra* note 67, art. 15.11(8).

324. Canada-Korea FTA, *supra* note 67, art. 16.13(12).

EU-Georgia FTA, and the EU-Moldova FTA the countries must ensure that their "judicial authorities may order . . . appropriate measures for the dissemination of the information concerning the decision."[325] Such dissemination is to be requested by the applicant and ordered at the expense of the infringer, and it could include "displaying the decision and publishing it in full or in part."[326] The EU-Central America FTA says that the countries may "provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising."[327]

Many FTAs address the issue of costs and fees, which TRIPS addresses and disposes of in a single paragraph.[328] FTAs may require that judicial authorities have the power to award the prevailing party court costs and fees, and reasonable attorney's fees, other than in exceptional circumstances.[329] The EU-Central America FTA, the EU-Ukraine FTA, the EU-Georgia FTA, and the EU-Moldova FTA refer to "reasonable and proportionate legal costs and other expenses."[330] The Australia-Chile FTA limits the provision to an order against "the infringing party,"[331] while under the CAFTA-DR, the CPTPP, and the USMCA, the order may be issued against any "losing party."[332] The provisions in the Australia-Chile FTA are limited to "civil judicial proceedings concerning infringement of copyright or related rights or trade mark counterfeiting";[333] the CAFTA-DR states that reasonable attorney's fees may be awarded also in "civil judicial proceedings concerning patent infringement."[334] Other FTAs extend their provisions on costs and fees to civil judicial proceedings concerning

325. EU-Colombia and Peru FTA, *supra* note 67, art. 246; EU-Georgia FTA, *supra* note 69, art. 198; EU-Moldova FTA, *supra* note 69, art. 328.

326. EU-Colombia and Peru FTA, *supra* note 67, art. 246; EU-Georgia FTA, *supra* note 69, art. 198.

327. EU-Central America FTA, *supra* note 275, art. 269.

328. TRIPS, *supra* note 4, art. 45(2).

329. Australia-Chile FTA, *supra* note 136, art. 17.36(3).

330. EU-Central America FTA, *supra* note 275, art. 268; EU-Ukraine FTA, *supra* note 69, art. 241; EU-Georgia FTA, *supra* note 69, art. 197; EU-Moldova FTA, *supra* note 69, art. 327.

331. Australia-Chile FTA, *supra* note 136, art. 17.36(3).

332. CAFTA-DR, *supra* note 67, art. 15.11(9); CPTPP, *supra* note 66, art. 18.74(10); *see also* China-Korea FTA, *supra* note 67, art. 15.24(4); EU-Canada FTA, *supra* note 51, art. 20.41.

333. CAFTA-DR, *supra* note 67, art. 15.11(9); Australia-Chile FTA, *supra* note 136, art. 17.36(3).

334. CAFTA-DR, *supra* note 67, art. 15.11(9).

infringements of copyright and related rights, patents, and trademarks,[335] and the EU-Canada FTA refers to enforcement of all IP rights.[336]

Some countries permit the donation of infringing goods for charitable causes; typically, the option exists for counterfeit trademark goods. FTAs may set rules for these donations. According to the CAFTA-DR, the donation requires an authorization from the right holder, with the exception of donations made to "charity for use outside the channels of commerce when the removal of the trademark eliminates the infringing characteristic of the good and the good is no longer identifiable with the removed trademark."[337] The EU-Central America FTA requires an authorization from the right holder or compliance with other conditions of national legislation.[338]

TRIPS does not cover alternative dispute resolution, which is mentioned in the Korea-U.S. FTA, the Australia-Korea FTA, and the China-Korea FTA. These FTAs state that each country "may permit use of alternative dispute resolution procedures to resolve civil disputes concerning intellectual property rights."[339] The 2020 Japan-U.K. FTA mentions the need to have effective alternative dispute resolution mechanisms as one of the means of ensuring access to justice for right holders.[340]

The TRIPS's article on criminal procedures[341] is enhanced by some FTAs, typically by enlarging the scope of acts that should be punishable as crimes, but other FTA provisions on criminal enforcement exist as well. The EU-Korea FTA requires that the countries adopt measures necessary to establish the criminal liability of legal persons, at least in cases of willful trademark counterfeiting and copyright and related rights piracy that occur on a commercial scale,[342] and the FTA also

335. Canada-Korea FTA, *supra* note 67, art. 16.13(14); China-Korea FTA, *supra* note 67, art. 15.24(4); CPTPP, *supra* note 66, art. 18.74(10).

336. EU-Canada FTA, *supra* note 51, art. 20.41.

337. CAFTA-DR, *supra* note 67, art. 15.11(11)(c).

338. EU-Central America FTA, *supra* note 275, art. 266(2).

339. Korea-U.S. FTA, *supra* note 56, art. 18.10(16); Australia-Korea FTA, *supra* note 67, art. 13.9(15); China-Korea FTA, *supra* note 67, art. 15.24(9).

340. Japan-U.K. FTA, *supra* note 70, art. 14.55.

341. TRIPS, *supra* note 4, art. 61.

342. EU-Korea FTA, *supra* note 170, art. 10.56(1).

requires the countries to extend criminal liability to acts of aiding and abetting the criminal activity.[343]

FTAs may also promote the exchange of information on enforcement.[344] For example, according to the Malaysia-New Zealand FTA, the countries should exchange information about IP rights enforcement through a "designated Contact Point."[345] Canada and Ukraine have agreed to "endeavour to exchange information and share best practices in areas of mutual interest relating to the enforcement" of IP rights and have committed to "cooperate . . . [to] better identify and target the inspection of shipments suspected of containing certain counterfeit trademark or pirated copyright."[346] The Chile-Japan FTA includes a general obligation to make available to the public "information on [the country's] efforts to provide effective enforcement of intellectual property rights."[347] Some FTAs have recognized the importance of collecting and analyzing statistical data on infringements and enforcement.[348]

6. Matters not addressed in TRIPS

The scope of TRIPS is significant, but TRIPS was not intended to be exhaustive in either its scope or depth. The non-exhaustive nature of TRIPS was inevitable; as Taubman recalls, in TRIPS negotiations, as in other international law negotiations, "'constructive ambiguity' [was] necessary to forge a delicate and finely balanced agreement."[349] With fewer countries involved in FTAs, the need for "constructive ambiguity" decreases and the possibilities for agreement increase. A greater level of agreement can result in FTAs expanding the depth of TRIPS provisions, and FTAs can also often complement TRIPS by adding matters not addressed by TRIPS. Even such provisions have the potential to be positive TRIPS-plus developments, as this Subsection suggests.[350]

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343. *Id.* art. 10.57; *see also* Japan-U.K. FTA, *supra* note 70, art. 14.58(5); USMCA, *supra* note 66, art. 20.84(5).

344. For FTA provisions on information sharing in general see *infra* Section III.B.8.

345. Malaysia-New Zealand FTA, *supra* note 137, art. 11.5(a).

346. Canada-Ukraine FTA, *supra* note 70, art. 11.9(2)–(3).

347. Chile-Japan FTA, *supra* note 70, art. 160.

348. CPTPP, *supra* note 66, art. 18.73(2).

349. Taubman, *supra* note 62, at 41.

350. Correa refers to these provisions as "TRIPS-extra." *See supra* note 114.

a. Genetic resources, traditional knowledge, and folklore

Some FTA additions are beneficial because they reflect countries' recognition of the importance of the additions for either themselves or their FTA counterparties. The IP negotiation landscape has changed since TRIPs; many countries now have experience and have found their voice in international IP negotiations, and FTAs have begun to represent the diverse perspectives of a greater variety of countries.[351]

Among the interests of particular concern to many developing countries is the protection of genetic resources, traditional knowledge, and folklore.[352] During the TRIPS negotiations some countries proposed that protection for traditional knowledge be included in TRIPS, but Paul Kuruk blames on "the erratic and inconclusive nature of the proceedings at the conference [that] these proposals were given rather short shrift and no specific actions were ever taken with regard to them."[353] On the one hand, the inclusion of the matters in FTAs is beneficial because the inclusion moves FTA countries toward mutual goals in the absence of an agreement at the multilateral level.[354] On the other hand, the inclusion of the matters in FTAs can be problematic because FTAs can, if not drafted carefully, complicate or even impede future multilateral agreements on these matters.

Concern about the protection of traditional knowledge and genetic resources is particularly apparent in the FTAs that have been concluded by some Latin American countries,[355] but the concern is not unique to Latin American countries. By now, many FTAs include some provisions concerning genetic resources, traditional knowledge, and

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351. *See, e.g.*, Peter K. Yu, *Are Developing Countries Playing a Better TRIPS Game?*, 16 UCLA J. INT'L L. & FOREIGN AFFS. 311, 313 (2011) ("[E]xamining the performance of less developed countries at various stages of development of [TRIPS].").

352. *See, e.g.*, Roffe, *supra* note 279, at 303 (discussing the recent "receptiveness to some of the concerns raised by developing countries multilaterally").

353. Paul Kuruk, TRADITIONAL KNOWLEDGE, GENETIC RESOURCES, CUSTOMARY LAW AND INTELLECTUAL PROPERTY: A GLOBAL PRIMER 60 (2020).

354. For multilateral negotiations see the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/tk/en/igc [https://perma.cc/TH5L-A7DE].

355. Roffe, *supra* note 279, at 304 (noting that "[w]hile genetic resources and associated traditional knowledge were not finally incorporated in the IP chapters concluded between the US and [Colombia, Panama, and Peru], these are the subject of specific annexes in the form of side letters that gave credit to the significance of these issues particularly for the *demandeur* countries").

folklore.[356] These provisions may be located in the FTA section on the environment[357] or on the protection of biodiversity, or both.[358] Some countries' views on the form of protection and the content of protection are influenced by their adherence to related treaties, particularly the Convention on Biological Diversity[359] and its Nagoya Protocol.[360]

Even general recognition of the gravity of the concerns about traditional knowledge and genetic resources can be regarded as progress. For instance, in the EU-Central America FTA, the countries "recognise the importance of respecting, preserving and maintaining the indigenous and local communities' knowledge, innovations and

356. TPSEP, *supra* note 233, art. 10.3(3)(d); *see also* China-Costa Rica FTA, *supra* note 233, art. 111 (including provisions on "Genetic Resources, Traditional Knowledge and Folklore"); China-Georgia FTA, *supra* note 67, art. 11.16 (same); Costa Rica-Singapore FTA, *supra* note 233, art. 13.3 (same); China-New Zealand FTA, *supra* note 166, art. 165 (same); Australia-Hong Kong FTA, *supra* note 67, art. 14.12 (same); Georgia-Hong Kong FTA, *supra* note 67, ch. 11, art. 16 (same); Closer Economic Partnership Agreement, H.K.-N.Z., Mar. 29, 2010, https://mfatgovtnz 2020.cwp.govt.nz/assets/Trade-agreements/Hong-Kong-China-CEP/NZ-HK-CEP.pdf [https://perma.cc/CR35-ECE5] [hereinafter Hong Kong-New Zealand FTA] (same); Korea-New Zealand FTA, *supra* note 67, art. 11.10, (same); China-Peru FTA, *supra* note 51, art. 145 (same); EU-CARIFORUM FTA, *supra* note 70, art. 150 (same); New Zealand-Taiwan FTA, *supra* note 286, ch. 10, art. 6 (same); China-Korea FTA, *supra* note 67, art. 15.17 (same); Australia-China FTA, *supra* note 161, art. 11.17 (same); Korea-Peru FTA, *supra* note 252, art. 17.5 (including a provision on "Genetic Resources and Traditional Knowledge"); Malaysia-New Zealand FTA, *supra* note 137, art. 11.6 (including a provision on "Traditional Knowledge").

357. Roffe, *supra* note 279, at 305.

358. *E.g.*, provisions entitled "Measures Related to Biodiversity" in EFTA-Colombia FTA, *supra* note 67, art. 6.5; EFTA-Peru FTA, *supra* note 67, art. 6.5; *see also* provisions entitled "Measures Related to the Protection of Biodiversity and Traditional Knowledge" in Colombia-Costa Rica FTA, *supra* note 213, art. 9.5; Costa Rica-Peru FTA, *supra* note 213, art. 9.5; and provisions entitled "Protection of Biodiversity and Traditional Knowledge" in EU-Colombia and Peru FTA, *supra* note 67, art. 201.

359. Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993), https://www.cbd.int/convention/text.

360. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, U.N.T.S. No. A-30619, https://www.cbd.int/abs/text. For an example of FTA provisions influenced by the obligations from the multilateral treaties see Tratado de Libre Comercio [Free Trade Agreement], Pan.-Peru, art. 9.6(4)–(5), May 25, 2011, http://www.sice.oas.org/Trade/PAN_PER_FTA_s/PAN_PER_ ToC_s.asp#PDF [https://perma.cc/R4JZ-WSDG] [hereinafter Panama-Peru FTA].

practices that involve traditional practices related to the preservation and the sustainable use of biological diversity."[361]

The Panama-Taiwan FTA and the Nicaragua-Taiwan FTA include three articles on "collective rights, protection of folklore and genetic resources."[362] These FTAs mandate the countries' protection of the rights through "a special *sui generis* intellectual property registration system,"[363] and the FTAs list the forms of traditional expressions that the countries must recognize as part of their indigenous peoples' heritage, including customs, religiosity, and cosmos vision.[364] The countries must protect this heritage from attempts by third parties to monopolize the objects of the heritage but must allow the peoples to "authorize third parties to make use of such heritage, in the understanding that this shall not be an exclusive right."[365]

Provisions on genetic resources, traditional knowledge, and folklore also appear in the EU-Ukraine FTA, in which the countries agree, for example, to "promote [a] wider application [of knowledge, innovations and practices of indigenous and local communities] with the involvement and approval of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices."[366]

How genetic resources, traditional knowledge, and folklore should be protected has been disputed in multilateral negotiations. The EU-Ukraine FTA includes an agreement by the parties to "continue working towards the development of internationally agreed *sui generis* models for the legal protection of traditional knowledge,"[367] suggesting the parties' preference for the creation of a new sui generis type of protection, as opposed to extending the existing IP protection to genetic resources, traditional knowledge, and folklore. The Australia-Peru FTA avoids controversy concerning the form of protection and refers to the countries' "continuing commitment to working towards a

361. EU-Central America FTA, *supra* note 275, art. 229(5).

362. Nicaragua-Taiwan FTA, *supra* note 67, arts. 17.17–17.19; *see also* Free Trade Agreement, Pan.-Taiwan, arts. 16.05–16.07, Aug. 21, 2003, https://rtais.wto.org/rtadocs/425/TOA/English/Panama-Chinese%20Taipei%20Agreement.pdf [https://perma.cc/E7PL-XU2P].

363. Nicaragua-Taiwan FTA, *supra* note 67, art. 17.17(2).

364. *Id.* art. 17.17(3).

365. *Id.* art. 17.17(4).

366. EU-Ukraine FTA, *supra* note 69, art. 229(1).

367. *Id.* art. 229(2); *see also* U.K.-CARIFORUM FTA, *supra* note 250, art. 150(2).

multilateral outcome on [IP]" through their participation in negotiations in WIPO.[368]

The relationship between traditional knowledge and genetic resources on the one hand and patent protection on the other hand has been a controversial point in multilateral negotiations. In the Korea-Peru FTA, the countries pledge to "seek ways to share information on patent applications based on genetic resources or traditional knowledge"; they also promise to provide "opportunities to file prior art to the appropriate examining authority in writing."[369] In the EFTA's FTAs with Colombia and Peru the countries went as far as setting a procedural minimum that mandates that patent applicants include in their applications "a declaration of the origin or source of a genetic resource, to which the inventor or the patent applicant has had access."[370] Countries may also require "the fulfilment of prior informed consent."[371] According to the Panama-Peru FTA, if national law so requires, patent applicants must demonstrate that they had "legal access" to any "biological [and] genetic resources and/or associated traditional knowledge" and disclose the origin of the resources or knowledge.[372] The Australia-Peru FTA and the CPTPP state that "quality patent examination" may include taking into account "relevant publicly available documented information related to traditional knowledge," "an opportunity for third parties to cite . . . prior art," and "the use of databases and digital libraries containing traditional knowledge."[373]

b. Collective management of copyright

An area that TRIPS does not address is the collective management of copyright; this area is also missing from subsequent WIPO treaties.[374]

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368. Australia-Peru FTA, *supra* note 67, art. 17.18(2).

369. Korea-Peru FTA, *supra* note 252, art. 17.5(4)(b).

370. EFTA-Colombia FTA, *supra* note 67, art. 6.5(5); EFTA-Peru FTA, *supra* note 67, art. 6.5(5).

371. EFTA-Colombia FTA, *supra* note 67, art. 6.5(5); EFTA-Peru FTA, *supra* note 67, art. 6.5(5).

372. Panama-Peru FTA, *supra* note 360, art. 9.6(8).

373. Australia-Peru FTA, *supra* note 67, art. 17.16(2)(a)–(c); CPTPP, *supra* note 66, art. 18.16(3)(a)–(c).

374. EU directives address aspects of collective management of copyright. *See* Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial

FTAs may focus on the establishment of collective management bodies in the countries and safeguarding the basic principles of their operation. Some FTAs include countries' commitments to "foster the establishment of appropriate bodies for the collective management of copyright and encourage such bodies to operate in a manner that is efficient, publicly transparent and accountable to their members."[375]

In the EU-Japan FTA the countries "agree to promote the transparency of collective management organisations" and "endeavour to facilitate non-discriminating treatment . . . of right holders."[376] The EU-Ukraine FTA recognizes "the need for [the countries'] respective collecting societies [to] achieve a high level of rationalisation and transparency with respect to the execution of their tasks."[377]

Some FTAs address the distribution of royalties through collective management bodies. In the Korea-Peru FTA the countries agree to

> endeavor to promote the activities of collective management associations of copyrights and related rights for the effective distribution of royalties, so that they may be fair and proportional to the use of the works, performances, phonograms, or broadcasts of the right holders of the Parties, in a transparent and good business practices frame, in accordance with their domestic legislation.[378]

The EU-Colombia and Peru FTA formulates the need for "an equitable distribution of remunerations collected, which are proportional to the utilization of the works, performances or phonograms, in a context of transparency and good management practices."[379] The EU-CARIFORUM FTA mentions, in the context of collective management of copyright, the goal of an adequate reward to right holders for the use of their content.[380] The CPTPP and the

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licensing of rights in musical works for online use in the internal market, 2014 O.J. (L 84) 72; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, art. 12, 2019 O.J. (L130) 92 [hereinafter DSM Directive].

375. ASEAN-Australia-New Zealand FTA, *supra* note 39, ch. 13 art. 5(1)(c); *see also* Australia-China FTA, *supra* note 161, art. 11.19; China-Georgia FTA, *supra* note 67, art. 11.15; Georgia-Hong Kong FTA, *supra* note 67, art. 15; Australia-Hong Kong FTA, *supra* note 67, art. 14.14(1); Australia-Malaysia FTA, *supra* note 68, art. 13.13.

376. EU-Japan FTA, *supra* note 70, art. 14.16.

377. EU-Ukraine FTA, *supra* note 69, art. 168; *see also* Ukraine-U.K. FTA, *supra* note 73, art. 158 (including the same language).

378. Korea-Peru FTA, *supra* note 252, art. 17.7(9).

379. EU-Colombia and Peru FTA, *supra* note 67, art. 217.

380. EU-CARIFORUM FTA, *supra* note 70, art. 143(B); *see also* U.K.-CARIFORUM FTA, *supra* note 250, art. 143 (using language similar to the EU-CARIFORUM FTA).

USMCA state that practices must be "fair, efficient, transparent and accountable," and mention in particular "appropriate record keeping and reporting mechanisms."[381]

Some FTAs also focus on cross-border cooperation among collective management organizations. In the EU-CARIFORUM FTA the countries are committed to "facilitate the establishment of arrangements between their respective collecting societies with the purpose of mutually ensuring easier access to and delivery of licences for the use of content at the regional level throughout the territories of the [countries]."[382] The EU-Central America FTA recognizes "the importance of . . . the establishment of arrangements between them, with the purpose of mutually ensuring easier access and delivery of content between the territories of the Parties, and the achievement of a high level of development with regard to the execution of their tasks."[383] The EU-Georgia FTA lists as the purpose of the cooperation between their collective management societies the "promoting [of] the availability of works and other protected subject matter and the transfer[ing] of royalties for the use of such works or other protected subject matter."[384]

c. Internet service providers

Online enforcement and internet service provider (ISP) liability are missing from TRIPS, which did not consider copyright issues raised by the internet.[385] The new "digital agenda" was considered during the negotiations of subsequent WIPO treaties, but ISP liability was also not included in those treaties notwithstanding the fact that the treaties took the internet and some associated IP-related issues into account. The absence of provisions on ISP liability in the WIPO treaties is not surprising; current discussions within individual countries, including

381. CPTPP, *supra* note 66, art. 18.70; USMCA, *supra* note 66, art. 20.68.

382. EU-CARIFORUM FTA, *supra* note 70, art. 143(B).

383. EU-Central America FTA, *supra* note 275, art. 236.

384. EU-Georgia FTA, *supra* note 69, art. 164; *see also* EU-Ukraine FTA, *supra* note 69, art. 168; Korea-Vietnam FTA, *supra* note 233, art. 12.8(4) (same); Singapore-Turkey FTA, *supra* note 73, art. 15.6 (same).

385. *See, e.g.*, Lars Anell, *Keynote Speech at the TRIPS Symposium, 26 February 2015*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 365–68 (Jayashree Watal & Antony Taubman eds., 2015).

the United States and the countries of the European Union, demonstrate the complexity of these questions.[386]

While FTAs provide an opportunity for countries to agree on rules on ISP liability, what these rules should be is a matter of fierce debate in countries domestically, and also in the European Union, where the Directive on Copyright in the Digital Single Market awaits its full implementation in the individual EU member states while it is at the same time attacked in the Court of Justice of the European Union.[387] Finding a common language on ISP liability might be difficult if not impossible, and any common language will undoubtedly not please all stakeholders.

Some FTAs draw at least the contours of ISP liability regulation. The Australia-Chile FTA requires the countries to "limit remedies that may be available against service providers for infringement of copyright or related rights that they do not control, initiate or direct and that take place through their systems or networks."[388] The FTA includes further details, such as the rough outline of a notice and takedown or a notice and notice system.[389] The Australia-China FTA expressly permits countries to

> take appropriate measures to limit the liability of, or remedies available against, internet service providers for copyright infringement by the users of their online services or facilities, where the internet service providers take action to prevent access to the materials infringing copyright in accordance with the laws and regulations of the [country].[390]

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386. *See, e.g.*, Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice & Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC'Y 371, 373–74 (2017); U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

387. DSM Directive, *supra* note 374; Communication from the Commission to the European Parliament and the Council, Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, EUROPEAN COMMISSION, COM(2021) 288 final (June 4, 2021); Case C-401/19, Republic of Poland v. European Parliament and Council, 2019 O.J. (C 270) 21; *see also* Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, EUROPEAN COMMISSION, COM(2020) 825 final (Dec. 15, 2020).

388. Australia-Chile FTA, *supra* note 136, art. 17.40(1).

389. *Id.* art. 17.40(2).

390. Australia-China FTA, *supra* note 161, art. 11.20.

Other FTAs include provisions on ISP liability that go into significantly greater detail;[391] these provisions bear the clear imprint of the law in the particular FTA countries. The provisions in EU-concluded FTAs resemble the EU Electronic Commerce Directive and its provisions on "[liability] of intermediary service providers,"[392] and U.S.-concluded FTAs resemble the provisions on safe harbor for service providers in the Digital Millennium Copyright Act.[393] The adoption of either model in FTAs is problematic because of the ongoing discussions about the suitability of the models; currently, general provisions in FTAs may be more beneficial than a transplantation of any particular national model.

d. Internet domain names

TRIPS does not address internet domain names. The regulation of the domain name system (DNS) through national laws is complicated. The DNS was not established under any national law and has been governed by the Internet Corporation for Assigned Names and Numbers (ICANN) with limited government intervention. Nevertheless, even the ICANN dispute resolution policy accounts for influences from national laws, which have, to a various degree, affected the functioning of the DNS.[394]

Some FTAs declare only generally countries' interest in the domain name space. The 2003 Australia-Singapore FTA includes a general obligation for countries to "monitor and support . . . endeavours to

391. *See* CAFTA-DR, *supra* note 67, art. 15.11(27); EU-Korea FTA, *supra* note 170, arts. 10.62–10.66; EU-Ukraine FTA, *supra* note 69, arts. 244–249; EU-Canada FTA, *supra* note 51, art. 20.11; CPTPP, *supra* note 66, Section J & Annexes (noting Annex 18-F directs the Parties to the Chile-U.S. FTA as a method of implementation); USMCA, *supra* note 66, arts. 20.87–88 & Annex to Section J.

392. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) 1, § 4; EU-Korea FTA, *supra* note 170, arts. 10.62–10.66; EU-Colombia and Peru FTA, *supra* note 67, arts. 250–54.

393. 17 U.S.C. § 512; Chile-U.S. FTA, *supra* note 56, art. 17.11(23); Singapore-U.S. FTA, *supra* note 73, art. 16.9(22); USMCA, *supra* note 66, arts. 20.86–20.88.

394. *Uniform Domain Name Dispute-Resolution Policy*, ICANN (Aug. 26, 1999) https://www.icann.org/resources/pages/policy-2012-02-25-en [hereinafter UDRP]; Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617, 621, 625 (4th Cir. 2003); *see* Marketa Trimble, *Territorialization of the Internet Domain Name System*, 45 PEPPERDINE L. REV. 623, 644–50 (2018) (analyzing the effects of national law on the UDRP law and process).

develop international policy or guidelines governing the resolution of disputes relating to domain names."[395] The 2003 Singapore-U.S. FTA states that the countries shall participate in ICANN's Governmental Advisory Committee.[396]

The provisions in FTAs that concern the DNS in greater detail pertain to countries' country-code top-level domains (ccTLDs);[397] these are the domains over which countries exercise some degree of power because of their governments' involvement in the delegation and maintenance of ccTLDs.[398] Several FTAs mandate the adoption of "an appropriate procedure for the settlement of disputes" concerning their respective ccTLDs; the procedure should be based on the principles in ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP).[399] The same FTAs also call for "online public access to a reliable and accurate database" of domain-name registration information that respects countries' laws concerning personal data protection.[400]

The CPTPP and the USMCA include a more lengthy provision on domain names that recognizes the possibility that the dispute

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395. Free Trade Agreement, Austl.-Sing., ch. 13, art. 15, Feb. 17, 2003, https://www.dfat.gov.au/trade/agreements/in-force/safta/official-documents/Pages/default.

396. Singapore-U.S. FTA, *supra* note 73, art. 16.3(1).

397. "A country code top level domain [is] assigned according to the two-letter codes in the ISO 3166 standard codes for the representation of names of countries or territories." *ccTLD Constituency Best Practices Guidelines for ccTLD Managers*, ICANN (Mar. 10, 2001), https://archive.icann.org/en/cctlds/cctldconst-4th-best-practices-10mar01.htm.

398. *See Delegating or Transferring a Country-code Top-level Domain (ccTLD)*, IANA, https://www.iana.org/help/cctld-delegation (last visited Apr. 15, 2022).

399. Singapore-U.S. FTA, *supra* note 73, art. 16.3(2); Australia-U.S. FTA, *supra* note 73, art. 17.3(1); CAFTA-DR, *supra* note 67, art. 15.4(1); Bahrain-U.S. FTA, *supra* note 66, art. 14.3(1); Korea-U.S. FTA, *supra* note 56, art. 18.3(1); Australia-Chile FTA, *supra* note 136, art. 17.24(1); Australia-Korea FTA, *supra* note 67, art. 13.4(1); Morocco-U.S. FTA, *supra* note 66, art. 15.4(1); Colombia-U.S. FTA, *supra* note 67, art. 16.4(1); Peru-U.S. FTA, *supra* note 67, art. 16.4(1); Oman-U.S. FTA, *supra* note 67, art. 15.3(1); Nicaragua-Taiwan FTA, *supra* note 67, art. 17.12; Panama-U.S. FTA, *supra* note 67, art. 15.4(1); *see also* UDRP, *supra* note 394.

400. Singapore-U.S. FTA, *supra* note 73, art. 16.3(2); Chile-U.S. FTA, *supra* note 56, art. 17.3(2); Australia-U.S. FTA, *supra* note 73, art. 17.3(2); CAFTA-DR, *supra* note 67, art. 15.4(2); Bahrain-U.S. FTA, *supra* note 66, art. 14.3(2); Korea-U.S. FTA, *supra* note 56, art. 18.3(2); Australia-Chile FTA, *supra* note 136, art. 17.24(2); Australia-Korea FTA, *supra* note 67, art. 13.4(2); Morocco-U.S. FTA, *supra* note 66, art. 15.4(2); Colombia-U.S. FTA, *supra* note 67, art. 16.4(2); Peru-U.S. FTA, *supra* note 67, art. 16.4(2); Oman-U.S. FTA, *supra* note 67, art. 15.3(2); Panama-U.S. FTA, *supra* note 67, art. 15.4(2).

resolution mechanism may be either modeled after the ICANN UDRP or designed separately, but in the latter case, the CPTPP and USMCA specify the requirements of the design: expeditious dispute resolution that "is fair and equitable," that "is not overly burdensome," that does not preclude the option to go to court, and that is available at a low cost.[401] As opposed to earlier FTAs, the CPTPP and the USMCA also address substantive law. They follow UDRP language in their provisions that require that appropriate remedies be made available at least in cases when a registrant has registered or holds a domain name that is identical or confusingly similar to a trademark and has done so with a bad faith intent to profit.[402]

e. Utility models

Some FTAs include provisions on utility models. The Paris Convention covers utility models, but TRIPS does not contain any provision concerning them. Countries that have utility model protection can use FTAs to find compatibilities between utility model protection and similar protections offered in other FTA countries, or at least to educate other countries about utility model protection.[403]

Some FTAs simply extend all or some of their general IP-related provisions to utility models, which is consistent with the Paris Convention's inclusion of utility models in the definition of industrial property.[404] The EU-CARIFORUM FTA includes utility models in its definition of IP rights and contains special provisions on utility models—which specify requirements for protection, possible exception to protectability, and term of protection—and details the relationship between utility model protection and patent protection.[405] The provision has been replicated in the U.K.-CARIFORUM FTA.[406]

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401. CPTPP, *supra* note 66, art. 18.28(1)(a); USMCA, *supra* note 66, art. 20.27(1)(a).

402. CPTPP, *supra* note 66, art. 18.28(2); USMCA, *supra* note 66, art. 20.27(1)(b).

403. *See* Henning Grosse Ruse-Khan, *The International Legal Framework for the Protection of Utility Models,* 4 WIPO J. 175, 176–85 (2013)(discussing the treatment of utility models in the Paris Convention, TRIPS, and FTAs).

404. Japan-Thailand FTA, *supra* note 216, arts. 126(3), 127(a), 140(1), 140(4); EU-Ukraine FTA, *supra* note 69, art. 230(1) (including utility models in the definition of IP rights); EU-Georgia FTA, *supra* note 69, art. 190(1); (same); TEEU, *supra* note 38, art. 12.43(1); EU-Vietnam FTA, *supra* note 162, art. 12.43, para. 1 n.65; (sames); Ukraine-U.K. FTA, *supra* note 73, art. 220(1) (same); *see also* Paris Convention, *supra* note 45, art. 1(2).

405. EU-CARIFORUM FTA, *supra* note 70, art. 148.

406. U.K.-CARIFORUM FTA, *supra* note 250, art. 148.

China and Korea have included utility models in their FTA's definition of IP rights[407] and also agreed on an article specifically about utility models, in which they express their desire to enhance their cooperation in this area "by exchanging information and experience on laws and regulations concerning utility model[s]."[408] In cases where the countries' agencies do not conduct substantive examinations of utility models, the FTA allows courts to require that the complainant submit "an evaluation report made by the competent authority based on a result of prior art searches."[409]

7. Experimentation

In their substance and processes of their negotiation, adoption, and implementation, FTAs present a useful opportunity to experiment. Countries may have problems negotiating and adopting FTA provisions at the multilateral level when the provisions do not reflect their individual policies, their stage of development, or for some other reasons. Bilateral or regional negotiations might be more conducive to agreement and allow experimentation in a smaller bilateral or regional setting. Critics argue that resorting to bilateral and regional agreements contributes to the fragmentation of international IP law;[410] however, even some of the critics admit that there are certain benefits in this fragmentation, particularly insofar as it permits experimentation.[411]

International law can benefit from experimentation at a smaller than multilateral scale. If a provision is successful in two or a small number of FTA countries, the provision might later be introduced in a multilateral setting where lessons from the bilateral or regional experiment might be valuable. Engelhardt noted that the European Union has used bilateral and regional negotiations "as a 'stepping stone' for further negotiations in multilateral fora,"[412] and Roffe suggested that "[d]evelopments of this type could set important precedents and thus establish state practices that one day could find a place in international law."[413]

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407. China-Korea FTA, *supra* note 67, art. 15.2(2).
408. *Id.* art. 15.16(1).
409. *Id.* art. 15.16(2).
410. *See supra* notes 96–99 and accompanying text.
411. DINWOODIE & DREYFUSS, *supra* note 62, at 146–47.
412. Engelhardt, *supra* note 97, at 782.
413. Roffe, *supra* note 279, at 314.

National law can benefit from experimentation in FTAs as well. Experimentation can provide opportunities to explore forms of cross-border cooperation; cross-border measures are unlikely to emerge through unilateral actions, and such measures benefit from international cooperation and international instruments. FTAs may suggest areas where experimentation within an FTA country could be pursued, without necessarily mandating that countries adopt the experiment. For example, the Korea-Vietnam FTA permits the countries to provide for accelerated examinations of patent applications as an incentive to patent working.[414] Countries also use FTAs to promote the interests of their nationals in other FTA countries; because IP treaties operate on the basis of the principle of national treatment, countries cannot (with few exceptions)[415] rely on the principle of reciprocity to incentivize other countries to match the former countries' IP standards.

Kennedy highlighted an FTA function that is often overlooked; he concluded that "FTAs have delivered results through negotiation that could not have been obtained through TRIPS dispute settlement."[416] He has observed "a close relationship between the contents of US FTAs and the issues covered in the USTR's Special 301 reports,"[417] which express the United States' displeasure with other countries' IP enforcement and policies. This perspective gives FTA experimentation yet another meaning; it is an alternative to escalating the relations between and among countries.[418] Critics might doubt this "peacekeeping" function of FTAs given the power imbalance that exists between or among countries in many FTA negotiations. However, weaker countries might not fare better in dispute resolution processes based on multilateral treaties if the countries are disadvantaged in the processes by a lack of legal expertise and fewer resources in general.

Critics have rightly warned that, rather than providing space for experimentation, FTAs can narrow or eliminate the space if they limit

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414. Korea-Vietnam FTA, *supra* note 233, art. 12.7(5).

415. *See* Berne Convention, *supra* note 45, arts. 14*ter*(2), 7(8) (exceptions to the principle of national treatment being reciprocity in the case of the resale right and the rule of the shorter term); TRIPS, *supra* note 4, art. 3(2) (exceptions for aspects of judicial and administrative procedures).

416. KENNEDY, *supra* note 56, at 99.

417. *Id.* at 99.

418. *Id.* at 100 ("FTAs can create an alternative avenue for dispute settlement.").

countries' abilities to take advantage of the flexibilities in TRIPS.[419] Countries need to be aware of the effects that FTAs can have on future negotiations, whether they are developed, developing, or least-developed countries. Even a developed country can be locked in bilateral IP commitments that the country must extend to all WTO countries because of most-favored-nation treatment, and that might be difficult to change in, or coordinate with, future instruments.

Critics have pointed out that bilateral and regional settings make it easier for developed countries and powerful stakeholders to exert pressure on developing countries; they argue that multilateral fora make it easier for countries to resist the pressure.[420] Reichman argues that "[i]n multilateral forums . . . no single cohort of special interests can readily impose its will on the assembly as a whole without deep and significant compromises on all sides."[421] Whether multilateral fora protect countries from lobbying pressures is debatable; industry pressures are not reduced when negotiations are multilateral, and the pressures may be greater when a country's vote can be decisive in a multilateral setting, particularly when international bodies act through consensus, as has been the informal practice in the WIPO Standing Committee on Copyright and Related Rights.[422]

8. Increased mutual understanding

The process of FTA negotiations provides an educational opportunity; through negotiations countries can improve their knowledge of each other's legal systems and practice, interests, and concerns. Much learning occurs in multilateral settings; WIPO is an important venue for recurring interaction among national IP law experts and diplomatic representatives who might be aware of IP matters. Countries enhance their understanding of each other's positions through repeat interactions, active participation in meetings, and contributions to documents. However, interactions in large multilateral settings cannot match the intense experience of bilateral and regional negotiations, particularly if national IP experts are

419. *See supra* notes 63–71 and accompanying text.

420. *See supra* notes 79–84, 93–95 and accompanying text.

421. Reichman, *supra* note 79, at 83; *see also* Cottier & Foltea, *supra* note 52, at 164 (observing that "[t]he declination of IPR structure pairings in multilateral, bilateral and plurilateral fora allow the conclusion to be drawn that the fora of negotiations truly matter in terms of achieving an appropriate balance of rights and obligations").

422. *Cf. Standing Committee on Copyright and Related Rights (SCCR)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/policy/en/sccr [https://perma.cc/FX9S-2X86].

involved and interact directly during negotiations. The smaller setting can be more conducive to effective information gathering and mutual learning about each other's IP law systems. Negotiators benefit from a greater awareness of IP issues and the greater IP law expertise of their negotiating partners.

Critics argue that FTA negotiations have limited, if any, educational value because they perpetuate the practice of IP negotiations being conducted by trade law experts rather than IP law experts. Without the right experts at the table, both international negotiations and mutual learning suffer, and a key opportunity is missed to build stronger ties among the countries.

The educational objectives have found expression in FTA provisions that pledge countries' readiness to learn and share information about each other's legal systems. Many FTAs include provisions on the future exchange of information and cooperation.[423] Some FTAs specify learning goals; for example, the EU-Chile FTA covers technical cooperation in the form of legislative advice, mentioning specifically the "comments on draft laws relating to the general provisions and basic principles of the international conventions" and "advice on the ways of organising administrative infrastructure, such as patent offices and collecting societies."[424]

To keep an FTA partner updated, countries agree on mutual notifications on new IP legislation and other IP law-related developments.[425] For example, in several FTAs, New Zealand and its partners agreed to notify each other not only about any new IP legislation, but also about other developments in IP enforcement and IP policy.[426] The European Union and Korea, the European Union and Ukraine, and Mexico and Panama agreed to exchange information not only about "the legal framework concerning [IP] rights" but also about

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423. Free Trade Agreement, Chile-Turk., art. 35(5)(b), July 14, 2009, http://www.sice.oas.org/Trade/CHL_TUR_Final/Text_FTA_e.pdf [https://perma.cc/WDT2-XH3Y].

424. EU-Chile FTA, *supra* note 169, art. 32(2).

425. *E.g.*, China-New Zealand FTA, *supra* note 166, art. 163(a); Malaysia-New Zealand FTA, *supra* note 137, art. 11.4(2)(a) (same); Korea-New Zealand FTA, *supra* note 67, art. 11.8(1)(a) (same).

426. China-New Zealand FTA, *supra* note 166, art. 163(b); Malaysia-New Zealand FTA, *supra* note 137, art. 11.4(2)(b).

"experiences on legislative progress."[427] Technical and capacity-building cooperation also appears in FTAs. For example, the Singapore-Turkey FTA mentions cooperation as to "management, licensing, valuation and exploitation of [IP] rights; technology and market intelligence; facilitation of industry collaborations . . .; and public private partnerships to support culture and innovation."[428]

Countries may agree in FTAs to cooperate in international negotiations; natural and formal alliances have emerged in WIPO, and FTAs can strengthen the existing alliances or form new alliances.[429] For example, China and New Zealand have agreed to "exchange information regarding enhancement of intellectual property rights enforcement and related initiatives in multilateral and regional fora."[430] The Chile-China FTA sets up "notification of policy dialogue on initiatives on intellectual property in multilateral and regional fora,"[431] and the China-Switzerland FTA mentions the "exchange of information relating to . . . activities in international organisations."[432] The Japan-Switzerland FTA and the EU-Japan FTA commit the parties to cooperate on, among other things, the exchange of information about the countries' relations with third countries as regards IP matters;[433] this exchange of information could help the countries map the complex web of bilateral and regional obligations that the countries enter into.

Specific areas of interest that are mentioned in FTAs signal the countries' priorities for the future. Traditional knowledge, genetic

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427. EU-Korea FTA, *supra* note 170, art. 10.69(1); EU-Ukraine FTA, *supra* note 69, art. 230(1); *see also* Tratado de Libre Comercio [Free Trade Agreement], Mex.-Pan., art. 15.11(2)(a), Apr. 3, 2014, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text [https://perma.cc/MLL3-8WRG].

428. Singapore-Turkey FTA, *supra* note 73, art. 15.24(1)(e).

429. In WIPO, countries coordinate within various groups, such as the Asia and the Pacific Group, BRICS (Brazil, Russian Federation, India, China, and South Africa), GRULAC (the Group of Latin American and Caribbean Countries), and CACEEC (the Group of Central Asian, Caucasus and Eastern European Countries). *General Statements by Delegations, Assemblies of the Member States of WIPO, Sixty-First Series of Meetings*, WORLD INTELL. PROP. ORG., (Sept. 2020), https://www.wipo.int/meetings/en/statements.jsp [https://perma.cc/GV2C-6QP6].

430. China-New Zealand FTA, *supra* note 166, art. 163(d); *see also* Malaysia-New Zealand FTA, *supra* note 137, art. 11.4(2)(b) (including a provision covering "policy dialogue on initiatives for the improvement of enforcement of intellectual property rights in multilateral and regional fora").

431. Chile-China FTA, *supra* note 173, art. 111(2)(d).

432. China-Switzerland FTA, *supra* note 67, art. 11.4(c).

433. Japan-Switzerland FTA, *supra* note 73, art. 14.52(1).

resources, and folklore are among these foci; for example, China and Peru have agreed to exchange information on "internal procedures regarding sharing equitable benefits arising from the use of genetic resources, traditional knowledge, innovations and practices."[434] New Zealand and Thailand mention these as areas for "enhanced understanding" and recognize that in these areas the countries "may wish, consistent with [their] obligations under the WTO Agreement, to establish appropriate measures."[435] The Australia-China FTA recognizes the opportunity to "establish appropriate measures" in these areas and commits the parties to further discussions of the areas.[436] The Korea-Peru FTA is more specific about the countries' collaboration; it states that the countries agree to "share views and information on discussions in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, the WTO TRIPS Council, and any other relevant fora in addressing matters related to genetic resources and traditional knowledge."[437]

FTAs may enumerate other areas for future collaboration: customs procedures are mentioned as an area of cooperation and exchange of information in the Brunei-Japan FTA, which specifically lists "enforcement against the trafficking of prohibited goods and the importation and exportation of goods suspected of infringing intellectual property rights."[438] Some FTAs that China has concluded mention the exhaustion of patent rights as a point for future discussion; although the FTAs recognize that the countries are free to determine the conditions of IP rights exhaustion, the FTAs nevertheless flag patent exhaustion.[439] The Australia-China FTA includes the countries' pledge to "contribut[e] to the reform and further development of the international plant breeders' rights laws, standards and practices, including within the South East Asian region."[440] The EU-Ukraine FTA notes the countries' preference for sui generis protection for genetic resources, traditional knowledge, and folklore, and includes a pledge by the countries to "regularly

434. China-Peru FTA, *supra* note 51, art. 148.
435. New-Zealand-Thailand FTA, *supra* note 51, art. 12.5(1)(d).
436. Australia-China FTA, *supra* note 161, art. 11.17.
437. Korea-Peru FTA, *supra* note 252, art. 17.5(5).
438. Brunei-Japan FTA, *supra* note 167, art. 53(1).
439. Australia-China FTA, *supra* note 161, art. 11.8; *see also* China-Georgia FTA, *supra* note 67, art. 11.6; Georgia-Hong Kong FTA, *supra* note 67, art. 6.
440. Australia-China FTA, *supra* note 161, art. 11.16(c).

exchange views and information on relevant multilateral discussions" on this subject.[441]

Some FTAs with detailed IP chapters establish a committee or subcommittee designed to oversee the implementation and operation of the IP chapter.[442] The committee has general functions, such as "reviewing and monitoring" the implementation of the chapter, enhancing IP protection and enforcement, and promoting the efficient administration of IP systems, and it may also have specific assignments, such as the EU-Japan FTA IP committee that performs certain tasks concerning geographical indications.[443] The EU-Korea FTA establishes a separate Working Group on Geographical Indications "for the purpose of intensifying cooperation between the [countries] and dialogue on geographical indications";[444] in the EU-Ukraine and the EU-Moldova FTAs the titles of the bodies are the Sub-Committee on Geographical Indications and the Geographical Indications Sub-Committee, respectively.[445] The role of the committees may be problematic, but as long as their competences are appropriately constrained, they may contribute to the educational value of FTAs.[446]

9. Incentives to calibrate

FTA negotiations at the bilateral or regional level and the subsequent process of implementation at the national levels provide incentives to calibrate national IP systems to the FTAs. Because IP law operates within a larger national legal system, its components should

441. EU-Ukraine FTA, *supra* note 69, art. 229; *see also supra* Section III.B.6.a.

442. *E.g.*, Nicaragua-Taiwan FTA, *supra* note 67, art. 17.06; Australia-Korea FTA, *supra* note 67, art. 13.12 (same); Australia-Japan FTA, *supra* note 202, art. 16.21 (same); Agreement for an Economic Partnership, Japan-Mong., art. 12.18, Feb. 10, 2015, https://www.mofa.go.jp/files/000067716.pdf [https://perma.cc/MYW8-42L5] (same); USMCA, *supra* note 66, art. 20.14 (same).

443. EU-Japan FTA, *supra* note 70, art. 14.53(2).

444. EU-Korea FTA, *supra* note 170, art. 10.25(1).

445. EU-Ukraine FTA, *supra* note 69, art. 211; EU-Moldova FTA, *supra* note 69, art. 306.

446. *But see* Wolfgang Weiß, *Joint Organs in EU Free Trade Agreements as a Threat to Democracy*, *in* THE CONCLUSION AND IMPLEMENTATION OF EU FREE TRADE AGREEMENTS 222–23 (Isabelle Bosse-Platière & Cécile Rapoport eds., 2019) (noting in the context of European Union's FTAs that "[t]he amount and extent of [the committees'] competences may threaten democracy as the Committees exercise public powers that go beyond mere executive implementation, without sufficient parliamentary control").

be calibrated to achieve a country's IP policy objectives. International law obligations, including obligations stemming from an FTA, may require implementation into national laws, but such implementation may distort the equilibrium of a national IP system.

Equilibrium in a national IP system should be maintained and restored with each significant change; the equilibrium requires a recalibration that considers not only particular IP law components that are being amended to comply with an FTA but also other elements of the national legal system.[447] Frankel suggests that TRIPS-plus requirements might create a strong impetus to calibrate national IP systems, particularly when the requirements are for stronger IP protection; according to Frankel, "[a]s stronger intellectual property norms proliferate[,] the incentive for domestic calibration becomes even greater."[448]

In some countries, an FTA might precipitate useful openings in the national legislative process. National negotiators could hope that a new FTA would not require changes to their national laws and therefore not create a danger of undesirable changes to the laws. But a disadvantage to one is an opportunity to others, and sometimes an FTA forces a valuable opening in a national law, inviting positive reassessment and positive changes to the law.[449]

Ideally, the process of calibration would start much earlier. Anderson and Razavi note that "developing countries owe themselves and the system the benefit of a hard look, including a cost-benefit analysis *before* any agreement is reached or negotiated."[450] Indeed, the perspectives of the developing and least-developed countries have often been missing from international negotiations, impoverishing the negotiations of a plenitude of policy considerations from which all countries could benefit.

Ex ante analyses contribute to the shaping of all countries' negotiation positions that best comply with their calibration plans. The process and outcome of negotiations will often require changes to plans, but all changes may benefit from analyses that were conducted in preparation for negotiations. Ex ante analyses and sufficient

447. *See, e.g.*, Trimble, *supra* note 118, at 502–04.
448. Frankel, *supra* note 71, at 104.
449. *See supra* Section III.A.
450. Anderson & Razavi, *supra* note 74, at 291 (emphasis added).

planning can alleviate some of the concerns over democratic deficit and transparency in FTA negotiations.[451]

CONCLUSIONS

Bilateral and regional treaties, including FTAs, can move international law forward and can do so in a productive and beneficial manner. When countries reach a point in multilateral negotiations where they cannot, or do not want to, compromise, their negotiators may exclude a matter from a proposed instrument, they may treat a matter at a higher, acceptable level, or they may consciously introduce some degree of ambiguity into the treatment of the matter to ease the implementation of the instrument in the negotiating countries. Because of the smaller number of participating countries, bilateral and regional negotiations enable negotiators to explore controversial points and attempt greater agreement on difficult points. Negotiators may include previously excluded matters, reach deeper into details that multilateral instruments have omitted, and clarify ambiguities that multilateral instruments have left unresolved.

When TRIPS was concluded, it was a benchmark of countries' agreement on international IP law in the multilateral setting. With one exception,[452] TRIPS has remained a static instrument that does not, and cannot, reflect the evolution of national IP laws and current thinking about IP law. Nor does TRIPS reflect that there are parties to TRIPS that can agree on more points than any multilateral setting permits. FTAs give countries the possibility of success at a smaller-than-multilateral scale, which may benefit a variety of stakeholders—not only IP rights holders.

Existing FTAs should not be idealized; they are a compromise that favors stronger parties over weaker ones. IP law provisions, negotiated as a lesser part of a larger treaty, can be an area where weaker parties accept significant compromises in order to achieve their trade objectives. Nor should there be unreasonable expectations of a stronger country; as much as one might wish otherwise, no country should be expected to place the universal global good before its own good. If a country has IP laws that were adopted by a democratically elected legislature, the country's negotiators cannot be expected to do less than promote the country's own IP law on the international stage.

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451. For concerns over democratic deficit and transparency see *supra* notes 78, 91, 92 and accompanying text.

452. TRIPS, *supra* note 4, Article 31*bis*.

Any deviations from the national law in the negotiators' positions, unless pre-approved by the national legislature, are an attempt at changing national law through undemocratic means—by forcing a change onto the legislature as a *fait accompli*. The replication of a country's own national law in an FTA is also desirable because the principle of reciprocity is absent from most international IP law, and therefore only the exportation of a country's own law into other countries ensures that the country's nationals will benefit from the same national law in the other countries.

Proponents, and even some critics of FTAs, have observed the beneficial aspects of TRIPS-plus provisions.[453] Whether there is a benefit, and how much benefit countries have gained or may gain from TRIPS-plus depends on perspective, and no uniform perspective, or even a single perspective for one country, exists. Issues and positions have advantages and disadvantages, and international negotiations are as much about convincing one's counterparties to abandon certain positions as they are about pursuing domestic desiderata.

The review of FTA provisions and features in this Article highlights the aspects of FTAs that can be useful elements in future negotiations. Some FTA provisions that seem to be mere treaty "fillers" to some countries may be significant negotiating points to other countries; regardless of a country's perspective, negotiations on even the most banal provisions can contribute to a building of mutual trust and respect in international IP law and form the basis for more advanced future negotiations.

453. Yu, *supra* note 56, at 113 ("As much as policymakers and commentators are eager to criticize the deleterious effects of the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral agreements, we cannot lose sight of the Agreements' positive benefits.").