TRIPS-PLUS NORM-SETTING BY RCEP AND POSSIBLE IMPACT ON INDIA

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ABSTRACT

TRIPS lays down the minimum standards for protection with respect to intellectual property. However, post TRIPS, there has been an increasing trend to introduce higher levels of protection via bilateral and regional free trade agreements. Since 2012, India participated in the negotiations of a regional agreement, RCEP, which would, inter alia, set IP standards in Asia as it was slated to be the first such agreement involving mostly Asian economies. Though India withdrew from this Agreement, it has implications for India given RCEP standards will bind countries from its immediate neighbourhood and with whom India has considerable trade tries. This also becomes relevant because of India's Act-East policy and renewed focus on Asia-Pacific. Hence, the agreement must be analysed to foresee the possible changes in IPR laws in Asia, particularly South East Asia as ASEAN economies are members of RCEP. This paper analyses Chapter 11 of RCEP containing the IP provisions and contrasts it with the position under TRIPS and Indian law wherever required.

1. INTRODUCTION

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets minimum standards for intellectual property protection. [1] However, there is a prolonged trend of negotiating bilateral and regional trade agreements that incorporate TRIPS-plus provisions with substantially higher levels of protection.[2] This is an alternative way of global Intellectual Property norm-setting.[3] These are usually skewed in favour of holders of IP at the cost of larger public interest. The US and European Union have been front-runners in signing such agreements in the garb of extending better trade concessions. However, many developing countries have resisted such "*IP-plus-more-IP agenda.*"[4] In fact, India also took this up before the TRIPS Council.[5] It is important to consider such agreements as their impact extends much beyond the members.[6]

Negotiations of the Regional Comprehensive Economic Partnership (RCEP) were not public. [7] The 2015 draft IP chapter that was leaked raised concerns over the extensive nature of IP protections under consideration.[8] Many provisions resembled those of Trans-Pacific Partnership ("TPP") which was also being negotiated back then. When RCEP negotiations concluded in November 2019, India withdrew. The final agreement was signed in November 2020.

Even though India chose to opt out, RCEP becomes important to analyse because it is a major trade block comprising of the ten ASEAN economies along with China, New Zealand, South Korea, Japan and Australia. These are important countries from the point of view of India's Act East Policy and renewed focus on the India Ocean Region. Further, RCEP is the

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[1] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1c, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter *TRIPS*].

[2] Susan K. Sell, *TRIPS-Plus Free Trade Agreements and Access to Medicines*, 28 LIVERPOOL L. REV. 41, 58-59 (2007).

[3] Susy Frankel, *Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 2(4) J. INT'L ECO. L. 1023, 1037 (2009).

[4] Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TTP*, 18 J. INTELL. PROP. L. 447, 477 (2011).

[5] Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of the Council for TRIPS Meeting*, *Agenda Item O (Enforcement Trends)*, IP/C/M/67, ¶ 509-518 (Oct. 24-25, Nov. 17, 2011).

[6] Ishan Seth, *Of Free Trade and Intellectual Property Restrictions*, 6 INDIAN J. INTELL. PROP. L. 112, 131 (2013).

[7] Regional Comprehensive Economic Partnership, Nov.15, 2020, https://rcepsec.org/legal-text/ [hereinafter *RCEP*].

[8] *2015 Oct 15 Version: RCEP IP Chapter*, KNOWLEDGE ECOLOGY INTERNATIONAL (Apr. 19, 2016), https://www.keionline.org/23060.

first such agreement with an Asian-focus and will have important implications for IP norm-setting in Asia-Pacific.[9] There are larger ramifications as individual members are bound by these standards even when dealing with non-members. Even non-members sometimes end up adopting such norms either to harmonise their laws or out of external pressure.[10] The door for India to join the agreement has been left open. Thus, it becomes important to analyse the scope of these IP provisions.

2. ANALYSING THE IP PROVISIONS OF RCEP

Chapter 11 addresses IPRs in a detailed fashion. There are fourteen sections covering various dimensions ranging from availability to acquisition, maintenance and enforcement. These have been analysed below.

2.1 General Provisions and Basic Principles

These seem to be a mix of provisions found in the Preamble and Article 7 of TRIPS along with some additional elements. Firstly, under Article 11.1.1, the objective of Chapter 11 has been defined as "*to reduce distortion and impediments to trade and investment.*" The additional reference to "*investment*" is because IPRs and goodwill have been included in the definition of investment.[11] Secondly, the different stages of economic development and capacity of members has been recognised along with the need to maintain an "*appropriate balance*" between rights of holders and legitimate interest of users and the public. This reaffirms the basic understanding that IP rights are not an end in themselves and there must be a balance between protection of private rights (interestingly reference to IP rights being private rights is absent) and promotion of social and economic welfare.[12] The use of this particular language is perhaps owing to the fact that this agreement recognises "*ASEAN Centrality*".[13]

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[9] Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT'L L. 673, 740 (2017).

[10] Peter K. Yu, *TPP, RCEP and the Future of Copyright Norm-setting in the Asian Pacific*, *in* MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC: JUXTAPOSING HARMONISATION WITH FLEXIBILITY 19, 45 (Susan Corbett & Jessica C Lai eds., ANU Press 2018).

[11] *RCEP*, *supra* note 7, art. 10.1(c)(iv).

[12] UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 125-126 (ICTSD-UNCTAD Capacity Building Project on IPRs and Sustainable Development ed., Cambridge Univ. Press 2005) [hereinafter *Resource Book on TRIPS*].

[13] Regional Comprehensive Economic Partnership, Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, ¶ 2, https://rcepsec.org/official-documents/.

Further, Article 11.3 states that in case of inconsistency between the provisions of RCEP and TRIPS, TRIPS would prevail. However, it is important to take note of the footnote 1 attached which says that merely because a more extensive protection is called for by RCEP, that does not make it inconsistent with TRIPS. This footnote itself admits the TRIPS-plus character of RCEP.

Article 11.4 states further principles. Its language is similar to Article 8 of TRIPS. However, there are two interesting additions. Firstly, Article 11.4.3 reads: "*Further to paragraph 2, the Parties recognise the need to foster competition*"[14]. Secondly, footnote 2 recognises that IPRs by themselves do to necessarily confer market dominance. This reiterates the preambular provision of TRIPS that IPRs should not become barriers to legitimate trade. The principles set out in Articles 11.1 and 11.4 are contained within the main text hence form operative provisions. Just like Articles 7 and 8 of TRIPS, these should play a greater role in interpretation and application.[15] Article 11.8 further reflects the balance of rights by reaffirming the commitment to the Doha Declaration of 2001. The primacy given to public health can be deciphered from Article 11.8.1(b) & (c) as well. A conjoint reading of these initial provisions indicates a better balance between IPRs and public interest is sought to be achieved when contrasted against other RTAs like The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP").

The wording of Article 11.6 is also noteworthy. It explicitly allows parties to choose the exhaustion regime they want. Article 6 of TRIPS just says the issue of exhaustion cannot be subjected to the dispute settlement mechanism. There were differences of opinion regarding its interpretation. The proponents of "procedural opinion" argued that Article 6 only precludes issues of exhaustion being dealt with within the WTO dispute settlement and it may nonetheless be addressed in the context of substantive provisions. While the supporters of "substantive opinion" contended that since there was no agreement on this, the choice of exhaustion policy is left up to individual members.[16] The Doha Declaration brought clarity that international exhaustion is consistent with TRIPS.[17] RCEP negotiating parties like Australia and New

[14] *RCEP*, *supra* note 7, art. 11.4(3).
[15] *See* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1003-04 (2009) (discussing how Article 7 and 8 should be interpreted and applied while referring to the writings of Prof. Daniel Gervais & Prof. Carlos M. Correa).
[16] FLORIAN KEßLER, WTO—TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 172-174 (Peter-Tobias Stoll et al. eds., 2009).
[17] World Trade Organization, Ministerial Declaration of 20 November 2001, ¶ 5(d), WT/MIN(01)IDEC/2 (2001).

Zealand had supported inclusion international exhaustion in TRIPS during the Uruguay round[18] and so have India[19] and Japan.[20] The ASEAN economies also adopt international exhaustion to varying degrees.[21] This is probably the reason behind this specific inclusion.

Article 11.9 is also TRIPS-plus. Article 11.9.1(a) mandates parties to ratify or accede to seven WIPO treaties, namely: Paris Convention,[22] Berne Convention,[23] Patent Cooperation Treaty,[24] Protocol relating to Madrid Agreement,[25] WIPO Copyright Treaty,[26] WIPO Performances and Phonograms Treaty [27] and Marrakesh Treaty.[28] However, Budapest Treaty[29], UPOV[30], Geneva Act of the Hague Agreement[31], Rome Convention[32] or Singapore Treaty[33] are only optional. India is already a party to the mandatory agreements. There were concerns regarding imposition of UPOV as there was a push on part of Australia, Japan and South Korea to make accession to UPOV mandatory. It must be noted that nine out of sixteen negotiating parties, including India, and most of ASEAN are not UPOV members. Majority of the members including ASEAN, India, China and for most part New Zealand (the last two themselves being members

[18] Enrico Bonadio, *Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?*, EUR. INTELL. PROP. REV. 153, 158 (2011).
[19] *Resource Book on TRIPS*, *supra* note 12, at 98.
[20] *Resource Book on TRIPS*, *supra* note 12, at 11.
[21] *See generally* Irene Calboli, *The ASEAN Way or No Way? A Closer Look at the Absence of a Common Rule on Intellectual Property Exhaustion in ASEAN and the Impact on the ASEAN Market*, 14 U. PA. ASIAN L. REV. 363, 371-384 (2019) (detailing the exhaustion principles adopted by ASEAN economies for different intellectual properties).
[22] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, last revised at Stockholm, July 14, 1967,
21 U.S.T. 1583, 828 U.N.T.S. 305.
[23] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Stockholm, July 14, 1967, 828 U.N.T.S. 22.

[24] Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.
[25] Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989, WIPO Pub. No. 204(E).
[26] WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 2186 U.N.T.S. 121.
[27] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 2186 U.N.T.S. 203.
[28] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, WIPO Lex No. TRT/MARRAKESH/001.
[29] Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Sept. 26, 1980, as amended on Sept. 26, 1980, WIPO Lex No. TRT/BUDAPEST/001.
[30] International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, S. Treaty Doc. No. 104-17 (1991).
[31] Geneva Act of Hague Agreement Concerning the International Registration of Industrial Designs, July 2, 1999, WIPO Lex No. TRT/HAGUE/006.
[32] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.
[33] Singapore Treaty on the Law of Trademarks, Mar. 27, 2006, WIPO Lex No. TRT/SINGAPORE/001.

of UPOV)[34] opposed it and civil society concerns were also raised,[35] pursuant to which UPOV was made optional.

Thus, as per the analysis above, the initial provisions of RCEP seem largely in line with the policy stance of India.

2.2 Copyright and Related Rights

This section includes important additions. To begin with, members have to accede to WCT and WPPT which itself is TRIPS-plus. Article 11.10.2 provides: "*Each Party shall provide to performers and producers of phonograms the exclusive right to authorise the making available to the public of their performances fixed in phonograms and phonograms, respectively, by* ***wire*** *or wireless means, in such a way that members of the* ***public may access them from a place and at a time individually chosen by them***." Hence, quite clearly both producers and performers are treated on an equal footing. This is not the case when it comes to TRIPS which treats performers' rights as related rights and provides differential set of standards under Article 14. Further, not only live performances but those available to be accessed by public later are also covered. This is basically trying to address the issue of infringement over the internet especially considering the popularity of Over The Top (OTT) platforms. This is perhaps to facilitate better protection of copyrights in the digital environment. Footnote 5 allows the parties to interpret "producer of phonogram" to mean "author of sound recordings".

Article 11.14 obliges parties to provide remedies against circumvention of effective technological measures and Article 11.15 provides for protection of electronic rights management information. These are a reproduction of Articles 11 and 12 of WCT and Articles 18 and 19 of WPPT. In addition, parties may provide for appropriate limitations and exceptions.

Article 11.17 address governmental use of software and obliges parties to take measures for use of only non-infringing computer software by their central governments and encourage regional and local governments to adopt similar measures.

Based on the 2015 draft, there were concerns that the scope of limitations and exceptions might be curtailed. Article 11.18.1 says that limitations should be confined to certain special cases,

[34] Grain Staff, *New leaked chapter of Asia trade deal shows RCEP will undercut farmers' control over seeds*, DOWN TO EARTH (Jun. 8, 2016) https://www.downtoearth.org.in/news/agriculture/new-leaked-chapter-of-asia-trade-deal-shows-rcep-will-undercut-farmers-control-over-seeds-54275.

[35] Grain Staff, *Asia under threat of UPOV 91*, GRAIN (Dec. 3, 2019), https://grain.org/e/6372.

not conflicting with normal exploitation and should not unreasonable prejudicing legitimate interests of the right holder. Further, Paragraph 3 stresses on balance between copyright and limitations for legitimate purposes including "*education, research, criticism, comment, news reporting, and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled*."[36] However, it reiterates that such exception should be consistent with paragraph 1. Further paragraph 4 clarifies that parties may adopt an exception for fair use so long as it is confined in accordance with paragraph 1. These provisions thus retain the application of the three-step test as present under Article 13 of TRIPS and Article 9 of Berne Convention, though some measure of clarity with respect of what legitimate purpose could mean is provided. "Normal exploitation" and "legitimate interest" are nonetheless open to varied interpretation.

Article 11.74.4 addresses illegal cam-coding of cinematographic films in theatres. It mandates parties to provide measures against it and at a minimum criminal procedures and penalties. This is to target piracy of films. India has a huge film industry with a global following. Not all movies are made legitimately available on the internet upon their release. Yet new releases can be found on the internet which are often cam-coded versions. This provision seeks to control the very act that makes such infringing copy available and hence is definitely aligned to the interests of India.

Another TRIPS-plus aspect is contained in Article 11.58 which says that in civil, criminal and administrative proceedings involving copyright of authors, there will be a rebuttable presumption that the person whose name is indicated as the author of the work is the author of the work.

In light of the above analysis, it seems that while the copyright provisions will help in better protection of rights, they could however prove quite burdensome for the parties when it comes to implementation.

2.3 Trademarks

This section contains all the usual provisions. Unlike Article 15 of TRIPS, RCEP under Article 11.19, bars visual perceptibility as a mandatory condition of registration. This would facilitate protection of taste and smell marks. It adds that registration cannot be denied solely on the

[36] *RCEP*, *supra* note 7, art. 11.18.3.

grounds that the sign of which it is composed is a sound. Thus, protection has been extended to sound marks as well. This TRIP-plus provision increases the scope of protection though it is in line with the recent developments globally.[37] Such marks have been recognised across various jurisdictions including India.[38] This seems to be an enabling provision to effectively protect new forms of trademarks.

Another TRIPS-plus addition seems to be Article 11.20.2 that obliges parties to provide possibility of trademark protection for signs that may serve as Geographical Indicators ("GI"). Under Article 25.5 of TRIPS, if a trademark is registered or applied for or rights have been acquired through use in good faith either before GI protection was adopted in the country or before application of TRIPS, the same shall not be prejudiced. RCEP seems to extend trademarks protection into what would ordinarily be protected as GI post-TRIPS. In the Indian context,[39] this may potentially conflict with our law which says if trademarks "*consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service*",[40] it is an absolute ground of refusal of registration.

Article 11.21 mandates adoption of Trademark classification system consistent with the Nice Agreement. Though TRIPS-plus this provision would enable members to uniformly classify Trademarks and would help expedite search process before granting a new Trademark. India also follows Nice Classification.[41]

Another addition is Article 11.22 which lays down certain obligations pertaining to registration and applications. Under TRIPS, parties are free to determine conditions for filing and registration as Article 6 of the Paris Convention has been incorporated. As per the leaked 2015 draft, India objected to the inclusion of Article 11.22.1(b) which mandates providing opportunity to the applicant to respond to initial refusal by the Trademark authority, to contest such initial refusal and also provide for judicial appeal against final refusal. Sections 18 and 91

[37] *See generally* Lisa P. Lukose, *Non-Traditional Trademarks: A Critique*, 57 J. INDIAN L. INST. 197 (2015), http://14.139.60.114:8080/jspui/handle/123456789/34744.
[38] *See generally* Rachna Bakhru & Manav Kumar, *India's Approach to Non-Conventional Trademarks*, 32 WORLD TRADEMARK REV. 108 (2011).
[39] Suresh C Srivastava, *Geographical Indications under TRIPS Agreement and Legal Framework in India: Part I*, 9 J. INTELL. PROP. RIGHTS 9, 20 (2004).
[40] Trade Marks Act, 1999, § 9(1)(b), No. 47, Acts of Parliament, 1999.
[41] Trade Marks Rules, 2017, rule 20, 58 Gen. S. R. & O. 199(E).

of the Trade Marks Act read with Rules 33, 115 and 125 provide for these opportunities. It is hence difficult to determine why India objected initially.

Other provisions dealing with well-known trademarks, bad faith trademarks, rights conferred under this section, exceptions etc. usually found in FTAs are also present.

2.4 Geographical Indications

Under article 11.29, the parties are free to choose any legal means to protect GIs, be it trademarks law or a *sui generis* system. The chapter does contain TRIPS-plus aspects particularly obligating parties to adopt or maintain due process and transparency obligations in respect of whatever protection regime they adopt and the GI provisions do resemble those present in CPTPP. While TRIPS-plus, these provisions provide better scope and coordination for protection.

2.5 Patents

The provisions relating to patentable subject matter, rights conferred, exceptions to rights are similar to TRIPS. Under Article 30 of TRIPS, a *Bolar Exception* is permissible, though not mandatory. RCEP under Article 11.40 mandates that parties "*shall*" allow use of patented subject matter by third party for "*experimental purposes*". Footnote 34 provides parties may determine what falls within the scope of "*experimental purposes*". There is a possibility to interpret this as allowing even a *naked Bolar exception* which is not permissible under TRIPS and in that case it would in fact be TRIPS-minus. Indian law also has a *Bolar-exception*. Though a feature of most jurisdictions, this definitely brings in more legal certainty.

Article 11.44 mandates a publication of application after expiry of 18 months from filing or earliest priority date, if priority is claimed. Next, Article 11.45 states that information made public on internet may constitute prior art. Given the growing importance of internet this is just clarificatory. Article 11.47 makes patent classification system under Strasbourg Agreement optional. Certain other procedural requirements enabling e-filing, provision of grace period and expedited examination have also been provided. The Indian law already provides for these. Certain provisions like data exclusivity which were considered during the negotiations and had caused great concern have not found their way into the final text.

The position regarding protection of new plant varieties is interesting. Article 11.36.3(b) states plant varieties shall be protected either by patents or by an effective *sui generis* system or by any combination. However, Article 11.48 obligates parties to provide protection via a "*effective sui generis plant variety protection system*." Footnote 38 says that Article 11.36.3(b) is subject to Article 11.48. Hence, Parties have to provide for sui genesis plant patent protection separate from its usual patent law if they choose patent as a means of protection.

2.6 Industrial Designs

This section incorporates Article 25 and Article 26.1 & 2 of TRIPS regarding the requirement for protection and kind of protection to be made available. Certain procedural requirements relating to system of grant and registration have been mandated under Article 11.51 such as provisions regarding communication of refusal of application, speaking or reasoned order of refusal or cancellation, opportunity to contest refusal etc. Unlike for patents, there is no mention of a grace period for designs. There seems to be no TRIPS-plus addition. Also, following Locarno Classification is only an endeavour not a mandate under RCEP. India has signed and adopted Locarno Classification in 2021.

2.7 Genetic Resources, Traditional Knowledge and Folklore

This section is unique in the sense that it introduces new areas conventionally left outside the ambit of IP. While Article 11. 53 does not impose mandatory obligations, it nonetheless authorises adoption of measures to protect genetic resources, traditional knowledge, and folklore or require disclosure of origin or source of genetic resources in their patent system and also taking into account publicly available documented information relating to traditional knowledge while determining prior art. There seems to be an effort to introduce certain elements of the Convention on Biological Diversity, 1992 and thus address the apparent conflict between the protection of IPRs and protection of biological resources and traditional knowledge pertaining to such resources.

Most agreements either do not address these issues or just provide for vague provisions relating to cooperation in this area.[42] In that sense, this is definitely an advance in the right direction. India has consistently sought better protection pertaining to these aspects and has been

[42] The Trans-Pacific Partnership Agreement, art. 18.6, Oct. 6, 2015, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents.

proactive in dealing with biopiracy.[43] This could shape into a model of how to harmoniously integrate IP protection with such non-traditional areas and lead the way in global norm-setting. This provision has huge potential. However, whether it achieves the intended goal or meets a fate akin to Article 31*bis* of TRIPS can be determined only once the agreement comes to force.

2.8 Unfair Competition and Undisclosed Information

Protection against unfair competition has to be in accordance with Article 10*bis* of the Paris Convention[44] and protection to undisclosed information in accordance with para 2 of Article 39 of TRIPS.[45] This section additionally deals with domain names. Parties are required to provide for domain name dispute resolution procedure modelled on principles established in the Uniform Domain-Name Dispute-Resolution Policy. Alternatively, it must be expeditious, at a reasonable cost, fair and equitable, not overly burdensome and should not preclude resort to judicial proceedings. Further, appropriate remedies, at least when a domain name identical or confusingly similar to a trademark is held in bad faith, have to be made available. This could help to specifically address the issue of cybersquatting that is widely prevalent in this age dominated by the internet.

2.9 Enforcement

Under this section most provisions are a reproduction of obligations under TRIPS pertaining to civil, criminal and administrative procedures and remedies along with provisional and border measures. However, enhanced obligations can be found under Article 11.62 which provides for destroying infringing goods, materials and implements, specifically in cases of trademarks and copyright infringement. Further under Article 11.63 judicial authorities have to be empowered to order penalties for violation of court orders relating to confidential information exchanged during civil proceedings. These provisions will enable better protection against further infringement. However, they will increase compliance costs for the Parties. Criminal remedies have also been expanded to cover wilful importation of counterfeit or pirated goods under Article 11.74.2. Another addition is Article 11.75 under which the parties have to extend the civil and criminal enforcement procedures to infringement of copyrights and trademarks in the

[43] *See generally* Dr. V K Gupta, *Protecting India's Traditional Knowledge*, 3 WIPO MAGAZINE 5 (2011), https://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2011/wipo_pub_121_2011_03.pdf.
[44] *RCEP*, *supra* note 7, art. 11.54.
[45] *RCEP*, *supra* note 7, art. 11.56.

digital environment. While these will certainly enable better protection, difficulties related to implementation and compliance will remain as these seem quite burdensome.

2.10 Other provisions

Other sections deal with technical assistance, party specific transition periods, cooperation and consultation. Article 11.77 contains a transparency obligation whereby parties are to publish or make publicly available, final judicial decisions and administrative rulings of general application that pertain to the "*availability, scope, acquisition, enforcement, and prevention of the abuse of intellectual property rights*".

Though layout-designs (topographies) of integrated circuits has been recognized as an IP under Article 11.2, however, no specific section detailing provisions related to it has been included. Another notable omission is perhaps a provision corresponding to Article 40 of TRIPS dealing with anti-competitive practices in contractual licenses. There is an entire chapter, Chapter 13, dedicated to "competition" under RCEP, however, the provisions contained therein are fairly general. A specific elaboration such as that under Article 40.1 & 2 of TRIPS would have taken forward the goal set out in the principles mentioned under Articles 11.1 & 4 of RCEP which try to emphasize balance of rights and obligations of IP holders as against public interest, need for transfer of technology and its dissemination, and need to foster competition. In specific, Article 11.4.2 permits a party to take measures to deal with abuse of IPRs by holders or address practices employed by them that unreasonably restrain trade or adversely affect the international transfer of technology. A specific enumeration such as that under Article 40 of TRIPS would have given more force to the principles enshrined and a more certain clear framework to deal with such practices.

2.11 Relation with the Investment Chapters

Intellectual property has been included within the definition of investment provided under Chapter 10. Such inclusion itself is in a sense TRIPS-plus as overall IP protection is enhanced.[46] It is however difficult to ascertain the exact effect.[47] Such an inclusion would allow private parties to sue States for compromising the value of their IPRs. This is contentious and can have

[46]Susy Frankel, *The Legitimacy and Purpose of Intellectual Property Chapters in FTAs*, at 13, http://ssrn.com/abstract=1862686 (last visited Jan. 8, 2021).
[47] Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 795 (2001).

a detrimental impact on TRIPS flexibilities. [48] Also, private arbitration tribunals have questionable legitimacy to decide issues on IP standards.[49] There have been cases that heightened the condemnation against subjecting IP issues to Investor State Dispute Settlement ("ISDS"). [50] Given the strong resistance against ISDS by parties like Australia and New Zealand, the same is absent from the final text. Further, bar on expropriation of investment under Article 10.13.1 does not apply to "*issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights*"[51] Hence, many possible issues associated that could have arisen with inclusion of IP within the investment chapter have been conveniently sidestepped. Yet, the true impact of such inclusion remains to be seen.

3. OBSERVATIONS AND CONCLUDING REMARKS

India participated during greater part of the negotiations which began in 2012 and exited only in November 2019. So, it did play a role in shaping the agreement and this is quite evident in the final outcome of the negotiations. The IP chapter does contain TRIPS-plus provisions. However, it is shallower than expected and does not incorporate many contentious provisions that were being considered such as patent term extension, data exclusivity, accession to UPOV etc.[52] This could have been on account of two factors. Firstly, RCEP clearly adopted a regionally-focused approach. [53] Most parties are majorly developing countries and LDCs. Generally, US and EU have been on the forefront of forcing TRIPS-plus norms. Since, these two are not a part of RCEP, the nature of considerations were largely different. Secondly, RCEP negotiations began around two years after the TPP and was being negotiated in its shadows.

[48] Clara Ducimetiere, *Intellectual Property under the Scrutiny of Investor-State Tribunals: Legitimacy and New Challenges*, 9 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 266, 273 (2018).

[49] *Id.*

[50] Eli Lilly & Co. v. The Gov't of Can., UNCITRAL, ICSID Case No. UNCT/14/2; Philip Morris Asia Ltd. v. The Commonwealth of Austl., UNCITRAL, PCA Case No. 2012-12.

[51] *RCEP*, *supra* note 7, art. 11.13.4.

[52] CATHLEEN D. CIMINO-ISAACS & MICHAEL D. SUTHERLAND, CONG. RESEARCH SERV., IN11200, THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP: STATUS AND RECENT DEVELOPMENTS 3 (2020).

[53] Hugo Seymour & Jeffrey Wilson, *RCEP: An Economic Architecture for the Indo-Pacific?*, OBSERVER RESEARCH FOUNDATION (Jan. 8, 2021, 8:45 PM), https://www.orfonline.org/expert-speak/rcep-an-economic-architecture-for-the-indo-pacific-57242/.

Japan and South Korea tried to advance TPP-like provisions here.[54] However, post US withdrawal most of the contentious provisions, pushed by US, were suspended and CPTPP was concluded with a considerably watered-down IP chapter. Consequently, common members might have eased in their push for inclusion of such provisions in RCEP. [55]

RCEP in its current form, unlike other FTAs, does not force considerably higher and stricter standards. Indian law, for most part, is in line with it. Further, RCEP follows a balanced and inclusive approach.[56] While TRIPS and other instruments do provide for such balance, RCEP emphasises on it in a better manner by highlighting socio-economic welfare, transfer of technology and fair use. The section relating to protection of Genetic Resources, Traditional Knowledge and Folklore is also unique and a step in the right direction. This aspect is something that India has advanced before the international fora consistently. RCEP could have provided India a platform to further concretise and bring these aspects within the domain of IP protection in the future. This seems like a missed opportunity. Further, provisions streamlining electronic filing, providing technological protection measures and protection in the digital environment seem beneficial given the vitality of digital platforms and internet, magnified in the current pandemic.

Another interesting point to note is the possibility of including stricter provisions within this agreement as Article 20.8 provides for a "*General Review*" five years after entry into force and every five years subsequently. If US re-joins TPP then the seven common members may try to introduce TPP-like provisions in RCEP via this provision. This, however, will be possible only after five years of entry into force, which is yet to happen. So, it should not create any issues in the immediate future.

RCEP in its current form would not be problematic for India at all, were India to accede. The option for India to join as original member has been left open.[57] India's objections to RCEP are on grounds of other aspects of trade and primarily to safeguard its domestic markets.[58]

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[54] Belinda Townsend, Deborah Gleeson and Ruth Lopert, *The Regional Comprehensive Economic Partnership, Intellectual Property Protection, and Access to Medicines*, 28 ASIA PACIFIC J. PUB. HEALTH 682, 686 (2016).

[55] Australia, New Zealand, Singapore, Japan, Brunei Darussalam, Malaysia and Vietnam are common members to TPP/CPTPP and RCEP.

[56] The Association of South East Asian Nations, *Summary of The Regional Comprehensive Economic Partnership Agreement*,7 (Nov., 2020), https://asean.org/storage/2020/11/Summary-of-the-RCEP-Agreement.pdf.

[57] Regional Comprehensive Economic Partnership, Ministers' Declaration on India's Participation in the Regional Comprehensive Economic Partnership (RCEP) of 11th November 2020, https://rcepsec.org/wp-content/uploads/2020/11/RCEP-Summit-4-Joint-Leaders-Statement-Min-Dec-on-India-2.pdf.

[58] Suhasini Haidar & T.C.A. Sharad Raghavan, *India storms out of RCEP, says trade deal hurts Indian farmers*, THE HINDU (Nov. 4, 2019), https://www.thehindu.com/news/national/india-decides-against-joining-rcep-

However, if RECP adopts higher standards in the future it might prove problematic for India as it has decided to negotiate further bilateral agreements with many of the RCEP countries. If other countries are all subjected to higher standards via such FTAs, then they will try to include the same within their agreements with India and that might prove to be roadblock as we have seen in the case of EU-India FTA.

For now, the RCEP seems to acknowledge the varied developmental level of its parties and provides flexibilities. Had India joined, it would not have been required to bring substantial amendments to its domestic law. From a purely IP perspective, India stood to gain from the uniformity, cooperation and the general platform for future norm-setting made available. Nonetheless, it could have proved to be detrimental in the longer run given the concerns mentioned above and some parties like Japan, South Korea and even Australia vying for higher protections. For now, India does not seem to lose much on the IP front. However, an accurate assessment will be possible only once the agreement comes into force.

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