Briefing Paper

Trans-Pacific Partnership (TPP): Trade, ICT and the Internet

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Trans-Pacific Partnership (TPP): Trade, ICT and the Internet

The interest of manufacturers and merchants

...in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public...The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. (Adam Smith *The Wealth of Nations*, 1779)

**Introduction**

Trade negotiations are complex affairs, and politicians and negotiators alike have to rely upon those directly involved with the day-to-day operations of commercial sectors. This inevitably opens the door to influential corporate lobbies. Corporate affairs are traditionally handled in private. Secrecy is the *sine qua non*, or inevitable condition of, such a process. Trade negotiations are also often, but not of necessity, held in secret because politicians too have a motivation not to be seen to be compromising too much too often. The TPP negotiations are caught between these two influences. In 2011 three US law academics took Adam Smith’s warning seriously after analyzing a ‘leaked’ TPP US IP chapter. They raised the following alarm.¹

The US proposals, if adopted, would upset the current international framework balancing the minimum standards for exclusive rights for media and technology owners, on the one hand, and the access rights of the public, competitors, innovators and creators, on the other. The proposed US IP chapter greatly exceeds the imperfect, but more balanced provisions codified in the 1994 WTO Trade-Related Aspects of intellectual Property Rights Agreement [hereinafter TRIPS] proposals are primarily based on, and frequently go beyond, the maximalist and controversial standards of the Korea-US Free Trade Agreement (KORUS) and the Anti-Counterfeiting Trade Agreement (ACTA), neither of which was subject to an open and transparent negotiation process. The provisions of the TPP proposals are inconsistent with the current laws in every TPP member country for which public analysis is available, including the U.S. itself. The proposal is also a new step for U.S. international policy, abandoning the development-oriented flexibilities on access to medicines expressed in the 2007 New Trade Deal between Congress and the Bush Administration.

¹Sean Flynn, Margot E. Kaminski and Brook K. Baker (2011) Public interest Analysis of the US TPP Proposal for IP Chapter, PUIP Research Paper Series, Digital Commons@American University Washington College of Law http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1023&context=research
What is the TPP?

The proposal for a Trans-Pacific Partnership (TPP) arose out of the 2006 Trans-Pacific Strategic Economic Partnership (TPSEP)\(^2\) or ‘P4’, between Singapore, Brunei, Chile and New Zealand when, in “September 2008, the US indicated its interest to negotiate an FTA with the TPSEP member countries.”\(^3\) Currently Australia, Canada, Japan, Malaysia, Mexico, Peru and Vietnam have also joined the negotiations, all members of APEC. It is expected that South Korea may join soon.\(^4\) President Obama has signaled that he would like to see agreement by end-2013, but to achieve this he also needs Trade Promotion Authority (TPA) from Congress to fast-track endorsement of trade agreements.\(^5\)

The aims of the TPP are, like most trade treaties, designed to promote cross-border trade and investment through a series of enabling policy and administrative measures, such as tariff reductions, removal of NTBTs, but also through cross-cutting regulatory and administrative reforms.

![The TPP's Scope](http://a2knetwork.org/sites/default/files/tpp_competition_chapter.pdf)

Alice Pham for Consumer international has described the TPP as follows. “This is a very comprehensive agreement, with 26 chapters under negotiation, broadly covering the following issues:
1) Comprehensive market access, including the elimination of tariffs and other trade and investment barriers between TPP countries;
2) Trade facilitation and supply chain development amongst TPP members;
3) ‘Cross-cutting’ issues, such as ensuring regulatory coherence between TPP countries and ensuring a competitive business environment;
4) Emerging challenges especially from new technologies; and
5) Provisions which enable TPP members to update the agreement to address new issues as they arise.

As such, this agreement goes much beyond “conventional” trade issues (only 2 out of 26 current chapters deal with “trade” directly) to include behind-the-border (‘cross-cutting’, ‘emerging’, ‘new’) trade-related matters, competition being one such area. The TPP is also name-tagged as “the most secretive and least transparent trade negotiations in history”.\(^6\)

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\(^2\) The TPSEP will reduce tariffs on traded goods to zero. For a summary of the Agreement, see [http://www.fta.gov.sg/fta_tpfta.asp?hl=12](http://www.fta.gov.sg/fta_tpfta.asp?hl=12)


\(^5\) Resistance from Congress may come from Democrats pushing for more labour protection measures and environmental controls and from Republicans who may equally oppose such measures.

China
The notably absentee is China, and cynics have described the TPP as the “anyone but China” negotiations. However, according to the US Undersecretary of Commerce for International Trade Francisco Sanchez the US would welcome China joining the TPP and “sources in the Ministry of Commerce told China Daily that China is becoming "positive" toward the US-led Trans-Pacific free trade agreement.” Noteworthy also is an article appearing under the name of China’s premier, Li Keqing in which it is stressed that China will “continue to support the Doha round of the WTO talks, work on the signing of bilateral free trade agreements, upgrade the China-ASEAN FTA, and provide a level playing field and better legal environment for foreign investors.” (‘China will stay the course on sustainable growth’ Financial Times, 9 September 2013).

How Transparent is the TPP Process?
TPP has been criticized for a lack of transparency surrounding the negotiations which makes it difficult to know precisely what is and what is not on the table at any one time. “The entire process has shut out multi-stakeholder participation and is shrouded in secrecy” according to the Electronic Frontier Foundation’s What’s Wrong with the TPP? However, the USTR has on occasion consulted its stakeholders, making the point that “We’re at a stage in TPP where we’re going to have to make difficult decisions. I imagine that not everyone will be 100% pleased with every decision, but we can guarantee that we will seek your input, we will consult with you. We won’t make these decisions in isolation. And we will be proactive about getting your participation in this process.” Not all APEC governments reach out in this way. However, after the Brunei round of talks held in August 2013, the meeting temporarily adjourned “so that negotiators could meet with 150 stakeholders on site from across the TPP region. Stakeholders made presentations to negotiators on a wide range of issues, and Chief Negotiators met informally with stakeholders to discuss in detail on specific issues of interest to them.”

How Controversial is the TPP?
Controversy inevitably surrounds the content of the talks at three levels: the international level in terms of multilateralism versus regionalism and bilateralism; the national level in terms of national interests; the local level in terms of interests groups.

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8 EFF ‘What’s Wrong with the TPP?’ https://www.eff.org/issues/tpp
9 U.S. Trade Representative Michael Froman, 9th September 2013, see http://www.ustr.gov/about-us/press-office/press-releases/2013/august/Readout-TPP-Call-US-Stakeholders. One point that emerged was that in supporting US tobacco farmers and cigarette manufacturers, the US proposal “for the first time in a trade agreement acknowledge the impact of tobacco on public health and include measures to address the issue.” But for health advocates this will still seem like providing safety matches to an arsonist. See http://www.ustr.gov/about-us/press-office/fact-sheets/2013/august/fact-sheet-tobacco-and-tpp
10 http://www.ustr.gov/19th-TPP-Round-Summary
**Multilateralism versus Regionalism versus Bilateralism**

The outgoing D-G of the WTO, Pascal Lamy was “quietly critical of the EU-US and TPP efforts” (‘WTO chief takes swipe at regional and bilateral talks’, *Financial Times*, 19th July 2013) and “unclear whether officials in Washington, Brussels or Tokyo had thought through how the transatlantic and trans-Pacific agreements would fit together if they were successfully concluded.” By contrast, his successor from Brazil, Roberto Azevedo, who hopes to reach a ‘Doha Lite’ agreement on food security and reduced bureaucracy at borders at the biennial ministers’ meeting in Bali in December 2013, does “not see them as a threat to the WTO” and has noted that the world will not “wait for the WTO indefinitely” (‘WTO chief demands Bali settlement’ *Financial Times*, 10 September 2103).

The debate as to whether FTAs on a bilateral or regional basis provide an under-carriage to multilateralism or an escape route is ever ongoing. One way to bridge the gap would be to take a leaf out of the IT standards book and make a Most Favoured Nation clause interoperable between trade treaties, but this is an idea whose time had yet to come.

**Countries**

At the national interest level, negotiations remain difficult on a number of fronts. According to the International Centre for Trade and Sustainable Development (ICTSD) the latest round of talks in Brunei\(^{11}\) reportedly saw progress in the areas of competition, environment, financial services, investment, intellectual property, market access, and rules of origin. However, groups dealing with other topics - such as those involving technical barriers to trade, e-commerce, and legal issues - did not meet during the nine-day talks, though they are expected to hold discussions in the weeks ahead. - See more at: [http://ictsd.org/i/news/bridgesweekly/175521/#sthash.lzE9ACzP.dpuf](http://ictsd.org/i/news/bridgesweekly/175521/#sthash.lzE9ACzP.dpuf)

The outstanding issues will be dealt with through a series of inter-sessional closed-door meetings, all to be held in North America up to December 2013. (See below ‘Next Steps for the TPP’)

**Interest Groups**

Interest group issues become national issues when the interest groups are sufficiently powerful, either economically or politically. In Japan as in the US, the agricultural lobby, alongside the IT sector, is powerful for both reasons, but especially political.\(^{12}\)

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access is generally an issue for lobby groups, for example to access public projects.\textsuperscript{13} These would presumably include public sector cloud computing networks. On the social front, environmental and other policy protections are seen to be at risk. For example: “How will the TPPA restrict and regulate trade? If the participating nations practice policies intended to protect its economy or have laws to govern its wellbeing and should these be in the way of businesses owned and operated by companies of the other members of the TPPA, then the agreement will supersede national laws and policies.” (Mahathir Mohamad, ex-PM of Malaysia).\textsuperscript{14} A similar view was expressed about the US-EU trade talks by France’s trade minister, Nicole Bricq when she warned that the European Commission’s negotiating mandate “would allow foreign companies to challenge environmental and social laws that have been passed by elected governments.” (‘Paris raises legal fears over US trade talks’ \textit{Financial Times}, 11 September 2013).

\textbf{IPRs and non-IPRs}

There is particular concern expressed with the way the TPP may be used by powerful lobby groups to use IPRs to monopolize content over the internet, including enforcement measures (implying some degree of intermediary liability) that would severely restrict the commercial operations of Internet businesses, especially those challenging established and entrenched business models. A closely related concern is the damage this could inflict upon freedom of access to and usage of the Internet, including the right to access and exchange information, especially in emerging economies. For example, the human rights group Article 19\textsuperscript{15} argues that in countries where information about health issues is either not available or is deliberately withheld because there is no freedom of information, the position of the underprivileged can be worsened by trade agreements that have the effect of undermining the local digital economy.

The non-transparent manner in which global and regional trade agreements are negotiated appears to erode access to information and participation in public affairs of marginalized groups – as well as their right to health. For example, the secrecy surrounding the agreement of the new regional trade agreement in the Pacific region – the Trans-Pacific Partnership (TPP) Agreement – effectively works against the interests of women and children, and those living in extreme poverty.

The issue here is not that trade agreements will necessarily have these detrimental effects, but lack of transparency offers powerful lobby groups an influence that could impact badly

\textsuperscript{13} For example, Japan has asked emerging economies such as Malaysia and Vietnam to open up their public sector projects to foreign companies – see http://www.globalpost.com/dispatch/news/kyodo-news-international/130828/japan-asks-tpp-states-open-public-works-projects-forei

\textsuperscript{14} www.malaysia-chronicle.com/index.php?option=com_k2&view=item&id=139541:tppa-may-force-us-to-abandon-policies-aimed-to-correct-social-ills-dr-m&Itemid=2#axzz2b300Se00

\textsuperscript{15} http://www.article19.org/resources.php/resource/1751/en/world-health-day-right-to-information-%26-freedom-of-expression---a-lifeline-for-right-to-health
on local entrepreneurs and NGOs who want to offer digital access. The most outspoken advocate of openness for the ICT and Internet sectors is the EFF. The text below is taken directly from their website – which cites from the leaked February 2011 draft US TPP IP Rights Chapter [PDF] – and given their interests, refers primarily to electronic and Internet issues:

## Electronic Frontier Foundation

The leaked US IP chapter includes many detailed requirements that are more restrictive than current international standards, and would require significant changes to other countries’ copyright laws. These include obligations for countries to:

- **Place Greater Liability on Internet Intermediaries**: The TPP would force the adoption of the US DMCA Internet intermediaries copyright safe harbor regime in its entirety. For example, this would require Chile to rewrite its forward-looking 2010 copyright law that currently establishes a judicial notice-and-takedown regime, which provides greater protection to Internet users’ expression and privacy than the DMCA.

- **Regulate Temporary Copies**: Treat temporary reproductions of copyrighted works without copyright holders' authorization as copyright infringement. The language reveals a profound disconnect with the reality of the modern computer, as all routine computer functions rely upon the regular creation of temporary copies of programs and files. As drafted, the related provision creates chilling effects not just on how we behave online, but also on the basic ability of people and companies to use and create on the Web.

- **Expand Copyright Terms**: Create copyright terms well beyond the internationally agreed period in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TPP could extend copyright term protections from life of the author + 50 years, to Life + 70 years for works created by individuals, and either 95 years after publication or 120 years after creation for corporate owned works (such as Mickey Mouse).

- **Enact a "Three-Step Test" Language That Puts Restrictions on Fair Use**: The United States Trade Representative (USTR) is putting fair use at risk with restrictive language in the TPP's IP chapter. US and Australia have proposed very restrictive text, while other countries such as Chile, New Zealand, and Malaysia, have proposed more flexible, user-friendly terms.

- **Escalate Protections for Digital Locks**: It will compel signatory nations to enact laws banning circumvention of digital locks (technological protection measures or TPMs) [PDF] that mirror the DMCA and treat violation of the TPM provisions as a separate offense even when no copyright infringement is involved. This would require countries like New Zealand to completely rewrite its innovative 2008 copyright law, as well as override Australia’s carefully-crafted 2007 TPM regime exclusions for region-coding on movies on DVDs, videogames, and players, and for embedded software in devices that restrict
access to goods and services for the device—a thoughtful effort by Australian policy makers to avoid the pitfalls experienced with the US digital locks provisions. In the US, business competitors have used the DMCA to try to block printer cartridge refill services, competing garage door openers, and to lock mobile phones to particular network providers.

- **Ban Parallel Importation**: Ban parallel importation of genuine goods acquired from other countries without the authorization of copyright owners.
- **Adopt Criminal Sanctions**: Adopt criminal sanctions for copyright infringement that is done without a commercial motivation, based on the provisions of the 1997 US No Electronic Theft Act.

In short, countries would have to abandon any efforts to learn from the mistakes of the US and its experience with the DMCA over the last 12 years, and adopt many of the most controversial aspects of US copyright law in their entirety. At the same time, the US IP chapter does not export the limitations and exceptions in the US copyright regime like fair use, which have enabled freedom of expression and technological innovation to flourish in the US. It includes only a placeholder for exceptions and limitations. This raises serious concerns about other countries’ sovereignty and the ability of national governments to set laws and policies to meet their domestic priorities.

Source: [https://www.eff.org/issues/tpp](https://www.eff.org/issues/tpp)

### TPP, ICTs and the Internet

Given the lobbying power of groups like the BSA it is useful to outline their list of key barriers to trade in IT products and services in emerging markets.

#### Business Software Alliance (BSA)

BSA’s study catalogues them in five groups, providing case studies for each one. The five categories include:

- Stacking procurement by government or state-influenced enterprises in favor of domestic products or IP, or biasing particular technologies or business models.
- Manipulating technology standards to bolster domestic firms and insulate them from foreign competition.
- Invoking security concerns to block or tie up foreign IT products in red tape while giving advantage to local alternatives.
- Inhibiting multinational cloud service providers with data-location requirements or restrictions on cross-border transactions.
- In addition to pernicious new forms of protectionism, there are tariff barriers that persist because the WTO’s Information Technology Agreement doesn’t cover many new technologies or key markets.
Breaking down these new IT barriers will require a concerted bilateral, multilateral, and regional trade program. Among other steps, BSA calls on the US and other leading IT economies to champion transparent, nondiscriminatory procurement policies; promote market-led technology standards; set clear rules allowing data to flow across borders; lead an effort to modernize and expand the World Trade Organization’s Information Technology Agreement; and intensify engagement with emerging markets to promote best practices for spurring innovation.

‘Lockout: How a New Wave of trade Protectionism Is Spreading through the World’s Fastest-Growing’

An equally campaigning lobby is the MPA, or to give its full title, the Motion Picture Alliance for the Preservation of American Ideals (MPAPAI). To drive home the importance to the US economy of copyright and digital rights management (DRM) the MPA point out that “Today only 16% of movie revenues come from the cinema. The remaining whopping 84% stems from the home environment – via DVD and VCD, pay-TV and free-to-air TV.”

It should be noted also that the US is separately promoting talks around a Trade in Services Agreement (TISA) with an initial group of 20 trading partners. As of September 2013, participants in the TISA include Australia, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Republic of Korea, Switzerland, Turkey, and the United States.

Cloud Computing

The case for opening national markets to cloud computing by removing requirements to establish local data centres and by allowing an unrestricted cross-border flow of information is widely supported by most IT companies for obvious reasons. The Business Software Alliance’s TechPost gave the following advice to negotiators. “for the countries participating in the TPP to capture the full benefit of cloud computing, negotiators will need to do three big things right:

1. Ensure that data can flow easily across borders.
2. Strengthen intellectual property protections.
3. Promote a competitive marketplace by eliminating preferences for particular technologies or providers.”

18 http://www.regulations.gov/#/documentDetail;D=USTR_FRDOC_0001-0270
19 https://servicescoalition.org/negotiations/trade-in-services-agreement
In their market access report,\footnote{Lockout: How a New Wave of trade Protectionism Is Spreading through the World’s Fastest-Growing IT Markets — and What to Do about It (p.15) \url{http://www.bsa.org/~/media/Files/Policy/Trade/BSA_MarketAccess_Report_FINAL_WEB_062012.pdf}} the BSA added that “Strong provisions on government procurement also should be addressed in regional forums such as APEC and incorporated into new trade agreements such as the TPP.” This was a message echoed by the US Ambassador to Australia. “The biggest obstacle ... is a growing ‘cloud protectionism’... One way to stop cloud protectionism is through the Trans-Pacific Partnership, or TPP.”\footnote{The Age \url{http://www.theage.com.au/it-pro/government-it/cloud-agreement-can-bring-blue-skies-20121210-2b77f.html}}

But Australia is a particularly hard place to convince, concerned as they are that personal and private data, and data related to national security, may end up in offshore clouds, which under the TPP they may not be able to stop. One robust response to the Ambassador’s remarks suggested that: “While the US government might be eager to ensure it can maximise its access to the world’s confidential data, it is more likely that the Ambassador was engaged in the far more traditional tactic of trying to maximise sales opportunities for US firms. The US, with Japan, is the world leader in cloud computing services. According to a Gartner report, US cloud computing exports of varying kinds — and remember the term “cloud computing” covers a broad range of quite different services — were already worth US$1.5 billion in 2011, with additional sales of nearly US$1.4 billion by US-owned local affiliates.”

E-Commerce

The FTA with Singapore in 2003 was the first the US signed in Asia, and included as principles covering the development of e-commerce, first, the private sector should take the lead in developing electronic commerce and establishing electronic business practices, and second, governments should avoid imposing unnecessary regulations and restrictions on electronic commerce. That includes not restricting the free flow of commercial information. The problem is that personal data has also become of an issue of commercial interest, and ever more so as the Internet and social networking in particular has spread.

As the NGO Consumers international has pointed out in recent trade agreements “the topic of information flow has appeared within e-commerce chapters, but not in others. For instance, in the trade agreement between the US and South Korea (KORUS), the clause reads: ‘Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties shall endeavour to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders’ ... While TPPA negotiating text is still secret, it is reasonable to presume that the language incorporated will be replicated in the TPPA, since the USTR has expressed its intention to build on the top of previous trade agreements.”\footnote{Alberto Cerda and Carolina Rossini (2013) Information Flow and Trade Agreements:}
Consumer International further notes that “There is no record of ‘free flow of information’ discourse being used by TPPA-member countries other than the U.S.” and the “USTR uses the language when pushing for more flexible approach on consumer privacy... This has been, for instance, the case of Canadian online services that cannot process data in the U.S. due to its low corporate privacy standards. But it may be also a challenge for other TPPA countries that currently provide higher protection to privacy than the U.S., such as Australia and New Zealand, and more recently Mexico and Peru.” It is reported that Australia has made a counter-proposal that “would restrict inbound and outbound traffic, as long as these can be justified for a non-trade-related purpose such as privacy protection.”

Other issues that would concern e-commerce if they appear in the TPP relate to controls on cross-border online payments and possibly to taxation on cross-border transactions following the precedent set in the US when the Senate passed the Marketplace Fairness Act in May 2013 (although the imposition of taxes on e-transactions originating in-country is likely to remain a local issue and the issue then becomes at what level of turnover for SMEs would trigger the tax), possibly to trade mark disputes procedures, to local requirements on foreign companies to set up locally data centres or offices or to appoint a natural person as a local representative and related issues of liability, dispute resolution procedures and questions of legal jurisdiction, etc. Unless the e-commerce chapter is leaked its scope remains unknown.

**Data protection**

There are two approaches to data protection. The EU has adopted a geographical determination, so if a country does not meet the standards of data protection required by the EU it is not legal to transfer data from the EU to that jurisdiction. This has not stopped the EU from circumventing this prohibition with respect to outsourcing to China and India, and a compromise was reached with the US where a ‘safe harbour’ was granted to companies compiling to high standards. Indeed, it is reported that under the US proposal for the TPP “companies will basically be tasked with coming up with their own privacy protection which would then be binding upon them.”

The second approach is the one adopted by APEC and Canada among others based upon accountability. For example, Singapore’s *Personal Data Protection Act* of 2012 places accountability on the shoulders of the ‘data controller’ which is the company that authorizes the collection of the data even when the actual collection or handling of the data and the storage and retrieval of the data is undertaken by a subcontracted ‘data processor’.

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24 History and Implications for Consumers’ Privacy, Consumers International
http://a2knetwork.org/sites/default/files/tpp_and_free_flow.pdf

25 The Fair Trade Commission (FTC) is responsible for monitoring certificates under the SHPs

26 http://www.slaw.ca/2012/09/20/tpp-to-undermine-privacy/
The issue at stake for many commentators is how far will the TPP attempt to remove restrictions on the ‘free flow of information’ to the detriment of national controls. Not that all national controls are to be welcomed. Those that restrict the freedom of speech and of access to independent sources of information are unwelcome in democratic societies, but those that protect the individual are to be welcomed. For example, restricted access to medical records is generally thought to be important, but when data is stored in the cloud, including from smartphones, what are the chances of insurance companies somewhere in the world obtaining records of users who download health apps such as heart monitors and blood pressure gauges? Technically, absolutely possible.  

Alberto Cerda and Carolina Rossini (Consumers International) ask what can be expected of the TPP with regard to the issues of data protection and consumer privacy.  

While the free flow of information seems being incorporated into the chapter on e-commerce of the PPA, its actual effects depend on additional chapters of the treaty. It is unclear, for instance, whether TPPA will include a whole chapter on regime of exceptions that may safeguard consumer privacy, whether it will make enforceable the provisions of the e-commerce chapter under the chapter on settlement dispute resolution, whether analogous provisions on free flow of information will be included in the chapter on services for non-digital services, and whether this freedom language will be reflected in the intellectual property chapter. In sum, it will be vital to assess free flow of information in the entire context of the TPPA as soon as a public release of the text is available.  

**IPRs and the Internet**  

In a paper highly critical of the ‘leaked’ US IP Chapter proposal, Flynn et al. make the following summary (footnotes omitted), noting at the end the implications for the Internet.  

The U.S. proposal includes many dramatic expansions of the international minimum standards on the scope and length of copyright protection, including provisions not reflected in current U.S. law. To begin, TPP Art. 4.1 grants intellectual property rights holders the exclusive right to “prohibit all reproduction . . . in any manner or form, permanent or temporary (including temporary storage in electronic form).” This is a

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27 The joke currently circulating as this Briefing paper goes online asks “Want your finger print stolen? Buy an iPhone.”

28 Alberto Cerda and Carolina Rossini (2013) Information Flow and Trade Agreements: History and Implications for Consumers’ Privacy, Consumers International pp. 8-9

http://a2knetwork.org/sites/default/files/tpp_and_free_flow.pdf

29 Sean Flynn, Margot E. Kaminski and Brook K. Baker (2011) Public interest Analysis of the US TPP Proposal for IP Chapter, PIJIP Research Paper Series, Digital Commons@American University Washington College of Law

http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1023&context=research
poorly worded provision that does not track current U.S. law or international best practice.

Although the language of the U.S. proposed TPP Art. 4.1 was included in KORUS, it is not fully present in U.S. Copyright law. Section § 106(1) of the Copyright Act does not prohibit reproduction “in any form.” It rather prohibits reproduction of the “copyrighted works in copies or phonorecords.” Nor does U.S. law include an extension to “temporary storage in electronic form.” U.S. law requires that a copy be “fixed,” meaning “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” The DMCA recognizes a safe harbor for “system caching,” which is not included in the U.S. TPP proposal.

The distinctions are particularly important for enforcement of copyright on the internet. Lower courts in the U.S. have, for example, held that copyright does not extend to buffer copies on the internet. Similarly, although not a party to this agreement, the EU Copyright Directive (Directive 2001/29/EC, Article 5) contains an explicit exception for temporary reproductions addressing automated caching. The proposed TPP language could threaten these types of limitations and exceptions in TPP member countries.

In a section on ICANN they cite the opinion of a cyber-law expert, Wendy Seltzer commenting on the TPP Art. 3.1 requirements “that country-code top-level domain (ccTLD) provide dispute settlement based on principles established in the Uniform Domain-Name Dispute-Resolution Policy.” TPP Art. 3.2 requires that there be online public access to a reliable and accurate database of contact information concerning domain-name registrants. These requirements are in KORUS, but do not appear in TRIPS.

As the United States knows, both the UDRP and WHOIS are subjects of active policy debate in ICANN’s multi-stakeholder forum. It damages that process to freeze elements of it through trade agreements.

Country Code TLDs (ccTLDs, such as .uk, .br, .pe, .mx) are operated by groups in their countries, some governmental, some not. They are not under contract to ICANN (unlike the generic TLDs), and are free to develop their own policies, to reflect their own national laws and local needs. Extending U.S.-based law to them would deprive us of the experimentation and better speech-protections they can offer. (Domain names matter both for their expressive value as pointers to speech, and for the speech they convey directly.)

30 ccTLDs are also known as Internationalised Domain Names (IDNs) and are well explained in EURid-UNESCO (2012) World Report on IDNs deployment 2012 http://www.eurid.eu/files/publ/insights_2012_idnreport.pdf
The UDRP was one of the earliest-established ICANN policies for gTLDs. More than a decade ago, it was put in place as an arbitration-like procedure for domain/trademark disputes. Since then, several academic studies have cataloged its procedural and substantive problems, such as forum shopping and unfairness to domain registrants with criticism and parody domains,39 and many within ICANN's GNSO have called for the UDRP's review. Some ccTLDs have modified procedures based on the UDRP. For example, Nominet, the .uk registry, has a dispute policy based on the UDRP's framework but with greater free-speech protections, and specific reference to fair use defenses.

WHOIS, the public listing of contact info of domain registrants, is another hotly contested issue here at ICANN. The Article 29 Working Party of European data protection commissioners found likely conflicts with privacy laws,40 and these identification databases pose serious problems to speakers and critics in hostile regimes. Iranian activists in the green movement have been questioned in police detention about people identified in domains' WHOIS records.

The TPP seems to go well beyond TRIPS and the Anti-Counterfeiting Trade Agreement (ACTA). For a detailed comparison and analysis of the TPP with the provisions of the ACTA see http://infojustice.org/wp-content/uploads/2012/03/table-03222012.pdf.

**Asia Internet Coalition and the TPP** 31

Since 2010 the Asia Internet Coalition (AIC), an industry association of several major Internet companies, has been actively campaigning within the Asia Pacific region for open access and freedom to use the Internet and against overly restrictive IPR laws and regulations.32 AIC advocates the use of proportionality in law, for example, the use of civil rather than criminal proceedings wherever possible and taking into account the issue of intent rather than only effect, the use of take-down notices (TDNs) using sensible and practical timeframes rather than prosecutions, and against intermediary liability which has seen website owners being prosecuted for content posted without their knowledge and despite their best efforts to remove offensive material. AIC has campaigned against the over-regulation of the Internet and commissioned an EIU report that demonstrates how over-regulation retards the development of the local digital economy, helping to explain why so few internet companies from Asia have managed to achieve a global reach.33

AIC is just one of many Internet associations that are concerned with the possibly chilling effects of a widening of scope of IPRs, such as extended copyright laws, extended both in time (for example, from 70 years to 100 years after an author’s death which cannot

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31 Disclosure: the author of this Briefing Paper is Executive Director of the AIC
33 EUI (2013) Good to Grow? The Environment for Asia’s Internet Businesses http://asiainternetcoalition.org/advdoc/2c083eb6cd1ae38cee3826e1ad6a2a6e.pdf
conceivably be a reward to the author herself or himself for creativity) and in applications, for example to temporary copies of copyright material stored on a computer or to the use of copyright material for the purposes of parody, etc. AIC like many other organizations is also concerned with the liability that the TPP may impose on Internet companies to share confidential data, and advocate the use of a mutual legal assistance treaty (MLAT) agreement between countries to ensure a proper judicial process and oversight.

**Next Steps for the TPP?**

According to ‘Scoop’ Business,\(^\text{34}\) the TPP meeting in Brunei discussed only the most problematic ‘chapters’. “They included intellectual property (which discussed patents on medicines), state-owned enterprises, environment, investment and market access for goods, including agriculture. Most other chapters are ‘closed’. That means the technical work is complete and ready for political deals on the controversial matters that remain unresolved.” This will happen, if at all, during a series of closed-door inter-sessional meetings scheduled from 22-24\(^\text{th}\) September through to December with trade ministers meeting on the fringes of the APEC meeting in Bali, 6-7th October followed by an ASEAN ministers’ meeting in Brunei. “These appear to be labour (especially on enforcement) in Ottawa; intellectual property (including patents for medicines) Mexico City; e-commerce (including privacy and data protection) San Francisco; investment (mainly schedules of exclusions), location unknown; technical barriers to trade (labelling and technical standards) Mexico City; legal issues (including medical pricing and tobacco) Washington DC.”

‘Scoop’ Business suggests that while patents on medicines continues to be a thorny issue, “the biggest obstacle to a deal is the US-driven chapter on state-owned enterprises, where discussions on the text have barely begun. A new version that combines US and Australian proposals is beset with political, conceptual and technical problems. Almost no progress was made on it in Brunei… Yet the SOE chapter has been a centrepiece of their sales pitch to Congress on the TPPA. Without it, Congress may refuse to give the President “fast track” authority and retain their power to pick apart any final deal.”

The implication of this account is that most issues pertaining to IPRs are a done deal. But, as sagacious Lord Action apparently once warned, “Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.”\(^\text{35}\)
