



# The IP Dimension of Bilateral and Regional Agreements in Asia: Implications for Trade and Development Policy

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# Why FTA?

- (1) Fostering closer international economic partnership
- (2) Regulatory cooperation
- (3) Regional supply chain
- (4) Stalemate of WTO Doha Round
- (5) vs the backdrop of Asian Financial Crisis
- (6) True motivation? Ravenhill \* – political and diplomatic motivations
- However – differing levels of economic development & interest in IP protection
- Race to the bottom or to ceiling?

\* John Ravenhill, The Political Economy of an “Asian” Mega-FTA, The Regional Comprehensive Economic Partnership, available online at <http://as.ucpress.edu/content/ucpas/56/6/1077.full.pdf>

# REGIONAL TRADE AGREEMENTS IN ASIA

NO	NAME OF RTA	DATE OF NOTIFICATION	DATE OF ENTRY INTO FORCE
1	CHINA – COSTA RICA	27 FEB 2012	01 AUG 2011
2	EU – REPUBLIC OF KOREA	07 JULY 2011	01 JULY 2011
3	HONG KONG, CHINA – NEW ZEALAND	10 OCT 2014	01 JUL 2014
4	HONG KONG – CHINA -CHILE	15 OCT 2014	09 OCT 2014
5	JAPAN - MALAYSIA	12 JUL 2006	13 JUL 2006
6	JAPAN - MEXICO	31 MAR 2005	01 APR 2005
7	JAPAN – PHILLIPPINES	11 DEC 2008	11 DEC 2008
8	JAPAN - THAILAND	25 OCT 2007	01 NOV 2007
9	KOREA, REPUBLIC OF - AUSTRALIA	22 DEC 2014	12 DEC 2014
10	KOREA, REPUBLIC OF - INDIA		01 JAN 2010
11	KOREA, REPUBLIC OF - VIETNAM	02 MAR 2016	20 DEC 2015
12	MALAYSIA - AUSTRALIA	13 MAY 2013	01 JAN 2013
13.	UNITED STATES - AUSTRALIA	22 DE 2004	01 JAN 2004
14.	UNITED STATES - SINGAPORE	17 DEC 2003	01 JAN 2000

[https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm)

# REGIONAL TRADE AGREEMENTS IN ASIA

	RTA NAME	DATE OF NOTIFICAION	DATE OF ENTRY INTO FORCE
1	ASEAN – AUSTRALIA – NEW ZEALAND	08 APR 2010	01 JAN 2010
2	ASEAN - CHINA	21 SEP 2005	01 JAN 2005 (G) 01 JUL 2007 (S)
3	ASEAN - INDIA	19 AUG 2010	01 JAN 2010 (G) 01 JUL 2015 (S)
4	ASEAN – KOREA, THE REPUBLIC OF		01 JAN 2010 (G) 14 oct 2010 (S)
5	EFTA – KOREA, THE REPUBLIC OF	23 AUG 2006	01 SEP 2006
6	EFTA - SINGAPORE	14 JAN 2003	01 JAN 2003

**Asian trade**

# The noodle bowl

**Why trade agreements are all the rage in Asia**

Sep 3rd 2009



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THESE are worrying times for world trade. Despite a recent levelling out after the first quarter's collapse, the World Trade Organisation reckons global trade volumes will be around 10% lower this year than in 2008. Trade ministers convened in New Delhi this week to talk about resurrecting the Doha trade talks—but those talks remain moribund. Yet amid the general gloom, activity on one sort of trade—bilateral free-trade agreements (FTAs)—continues at a feverish pace in Asia. This month, another deal was signed, this time between India and South Korea.

The agreement is the first between two of Asia's four biggest economies (India, China, Japan and South Korea). But the stream of FTAs, typically between one large economy and a smaller partner, has become a flood in the past decade. From just six in 1991, their number had increased to 42 by 1999. But almost three times as many have been signed

# MINIMALIST TREATMENT ON IP

- Intellectual Property included in the definition of ‘investment’
- Reinforcement of existing treaty obligations under TRIPs
- Mutual cooperation on matters pertaining to IP such as enforcement etc

## Iceland –China FTA

Reaffirms the importance of IPRS in promoting economic and social development

Establish and maintain transparent IPR regimes

Reaffirms obligations under the TRIPS Agreement, and other treaties to which both members are party

Strengthen cooperation in IPR; exchange of info etc

Request for dialogue; mutually satisfactory resolution of any IP issue

# Mid level agreement

- Modestly TRIPS PLUS

E.g. Japanese Economic Partnership Agreements with various ASEAN countries

Requires accession to agreements not yet referred to in TRIPS

Border measures

Well known TM

WIPO Internet Treaties

UPOV standards

# MAXIMALIST TREATMENT ON IP

- FULL SUBSTANTIVE CHAPTER ON IP
- COVERS SUBJECT MATTERS NOT COVERED UNDER TRIPS
- INTRODUCE NEW EXCLUSIVE RIGHTS
- TRIPS PLUS OR TRIPS MINUS PROVISION
- IDEA IS TO INCREASE IPR PROTECTION AMONG MEMBER COUNTRIES TO A HIGHER LEVEL



# MAXIMALIST TREATMENT

- US FTA models
  - Complex and lengthy provisions on commercial regulatory areas
  - Platinum standard or high quality agreements that extend beyond current WTO accords on international trade and investment regulation
- AND
- Two major grand regional FTA
  - Trans-Pacific Partnership Agreement
  - Regional Comprehensive Economic Partnership

# Transplanting of international obligations –e.g. US Singapore FTA – between hard obligations and soft obligations

New obligations	
<p>Membership to International Treatise</p> <p>Shall at a minimum</p>	<p>Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974)</p> <p>International Convention for the Protection of New Varieties of Plants (1991) (AUPOV Convention@);</p> <p>the WIPO Copyright Treaty (1996);</p> <p>WIPO Performances and Phonograms Treaty (1996)</p> <p>the Patent Cooperation Treaty (1984).</p>
<p>Shall give effect to</p>	<p>Articles 1 through 6 of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999), adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization (WIPO)</p> <p>Trade Mark Law Treaty</p>
<p>Shall make best efforts to ratify or accede</p>	<p>the Hague Agreement Concerning the International Registration of Industrial Designs (1999); and</p>

# Background of TPPA

- TPPA had its origins in the **(P4) free trade agreement** signed by **New Zealand, Singapore, Chile and Brunei**.
- TPPA negotiations began with inclusion of the **United States, Australia, Peru and Vietnam** in March 2010. Scope expanded with inclusion of new issues
- First TPPA round - March 2010. **Malaysia** became the 9th TPP member in **October 2010**
- **Canada and Mexico** joined in December 2012 (15th Round) and **Japan** in July 2013 (18th Round)
- Membership in TPPA is **voluntary but open only to APEC member economies**.

## What is the TPPA

The Trans-Pacific Partnership Agreement (TPPA) builds on the FTA signed by the Pacific 4 (P4) countries, New Zealand, Singapore, Chile and Brunei Darussalam. The P4 FTA was signed in 2005 and came fully into force in 2009.

The P4 was then expanded and the TPPA negotiations began with the entry of the United States, Australia, Peru, and Vietnam in March 2010. The scope has been expanded to include new issues with the goal to develop a comprehensive and high standard agreement.

The TPPA is an initiative to establish an FTA among 12 countries with a market of 800 million people with a combined GDP of USD 27.5 trillion.

There are 21 working groups which have been established to undertake negotiations on:

1. Market Access;
2. Technical Barriers to Trade;
3. Sanitary and Phytosanitary Measures;
4. Rules of Origin;
5. Customs Cooperation;
6. Investment;
7. Services;
8. Financial Services;
9. Telecommunications;
10. E-Commerce;
11. Business Mobility;
12. Government Procurement;
13. Competition;
14. Intellectual Property;
15. Labour;
16. Environment;
17. Capacity building;
18. Non-conforming measures;
19. Trade Remedies;
20. Horizontal issues; and
21. Legal and Institutional.

# Transplanting of international obligations – e.g. TTPA

Membership to International Treatise	
Has ratified or acceded	the Patent Cooperation Treaty (1984) Paris Convention Berne Convention
Shall ratify or accede to.. .By the date of entry into force	the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989) Budapest Treaty Singapore Treaty UPOV 1991 WCT WPPT

# Binding commitments

- 1. TRIPS-plus standards
- 2. Obligations on areas not traditionally classified as IP rights under existing treaties, such as domain names, clinical data and Internet retransmission.
- 3. Obligations relating to the administration and management of IP which are of interest to all Contracting Parties, such as registration systems, adjudication of disputes or enforcement of rights.

# Expansion of IP subject matter

## TRIPS

- 1. Copyright and related rights
- 2. Trade Marks
- 3. Geographical Indications
- 4. Industrial Designs
- 5. Patents
- 6. Layout Designs of Integrated Circuits
- 7. Protection of Undisclosed Information
- 8. Control of anti competitive practices in contractual licences
- 9. Enforcement and border measures

## RTAs

- 1. technological protection measures, copyright duration, exceptions and limitations
- 2. famous marks, non traditional marks
- 3. conflict between GI and trade marks
- 4. part of an article
- 5. clinical data, new use & new forms, patent adjustment and extension term
- 6.
- 7. criminalisation of disclosure of trade secrets
- 9. commercial purpose, criminalisation of aiding and abetting, imports and in transit
- 10. satellite signals

IP Subject matter	List of concerns	Extended obligations
Trademarks	Criteria for protection	No requirement for visually perceptible nor deny sound marks
	Use of common name	Requirements concerning the relative size, placement or style of use of the trademark in relation to the common name do not impair the use or effectiveness of trademarks used in relation to such good or service
	Use of identical or similar signs	The exclusive right to prevent third parties not having the owner's consent from using in the course of trade identical or similar signs, including subsequent geographical indications
	Well-known trademarks	No Party may require as a condition for determining that a trademark is well known that the trademark has been registered in the Party or in another jurisdiction
	Trade mark licences	No Party may require recordal of trademark licenses
Domain name cyber squatting	Dispute resolution	Appropriate procedure for the settlement of disputes, based on the Uniform Domain-Name Dispute-Resolution Policy
Geographical indications	Grounds for opposition and cancellation	<ul style="list-style-type: none"> <li>Likely to cause confusion with a pre-existing trademark</li> <li>The geographical indication is a term customary in common language as the common name for such goods in that party's territory</li> </ul>
	Term customary in the common language as the common name	To take into account how consumers understand the term in that party's territory
	Multi-component terms	Shall not be protected if he component is a term customary in the common language as the common name for the associated good

Extended IPR obligations under TPPA

Patents	New use/new method/new process of a known product	May not deny a patent solely on the basis that the product did not result in enhanced efficacy / each party confirms patents are available
	Availability of patents	Patents should be available for plants and animals A party may exclude from patentability plants other than microorganisms Confirms that patents are available at least for plant derived inventions
	Sufficiency of disclosure	Shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date
	Industrial applicability	A claimed invention is considered to be of industrial application if it has a specific substantial and credible utility
	Publication of patent applications and issued patents	Search and examination results, including details of, or information related to, relevant prior art searches; (b) non-confidential communications from applicants, and (c) patent- and non-patent-related literature citations submitted by applicants, and relevant third parties
	Patent adjustment term	Adjust the term of a patent to compensate for unreasonable delays in the granting of the patent of more than five years from the date of filing of the application, or 3 year after a request for examination
	Test data	<ul style="list-style-type: none"> <li>• Agricultural chemical products/ pharmaceutical products – 10 years from the date of the marketing approval of the product in the territory</li> <li>• Pharmaceutical product – 5 yrs from the date of marketing approval</li> <li>• Biologics –at least 8 years from the date of the marketing approval of the product in the territory or five years plus other measures</li> </ul>
	Patent linkage	No third party may use the information to get marketing approval in another territory A system to notify the patent holder that other person is seeking the market that product
Traditional knowledge	Exercise sovereignty, prior informed consent, fair and equitable sharing of benefits	



Industrial design	Subject matter of protection	<p>Availability of protection over part of an article; or alternatively</p> <p>Having a particular regard, where appropriate, to a part of an article in the context of the article as a whole</p>
Copyright and related rights	Exclusive rights	<p>Right to authorize or prohibit reproductions of work, including in electronic form</p> <p>Authors – communication to the public right</p> <p>Authors, performers and producers of phonograms – right of distribution</p> <p>No hierarchy between performer, producer</p> <p>Performer’s right – broadcast and communication to the public, fixation</p>
	Copyright term	<p>Up to 100 years from author’s death or not less than 95 years from publication or 120 years from the date of creation</p> <p>Not less than 70 years (p.m.a) or post publication</p>
	TPM/RMI	Criminal procedures and penalties if engaged willfully and for the purposes of commercial advantage or financial gain
Internet retransmission	Compulsory licensing	May permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal

Extended IPR Obligations under TPPA

Enforcement		
	Presumption of subsistence of copyright	Member States to provide for a presumption that copyright subsists in a work unless proved to the contrary.
	Determination of amount of damages	allows the court, when determining the amount of damages, to consider any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price or the suggested retail price.
	Civil and administrative procedures and remedies	seizure or other taking into custody of devices and products suspected of being involved in the prohibited activity and destruction of materials and implements
	Border measures	Mandates ex officio initiation of border measures in respect of importation, destined for export and goods in transit.
Criminal procedures	Acts not for commercial advantage	Criminalization of acts not for commercial advantage or financial gain and significant acts, not carried out for commercial advantage or financial gain that have a substantial prejudicial impact on the interests of the copyright owner.
	Camcording in cinema	To adopt and maintain appropriate criminal procedures and penalties
	Aiding and abetting	Ensure the availability of criminal liability for aiding and abetting
	Penalties	that include sentences of imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistent with the level of penalties applied for crimes of a corresponding gravity
	Disposal of counterfeit goods	those goods are disposed of outside the channels of commerce in such a manner as to avoid causing any harm to the right holder. Authority to release it to the right holder for civil suits
	Fine	As an alternative, a fine, the value of which corresponds to the assets derived from, or obtained directly or indirectly through, the infringing activity.

Trade secrets	Criminal procedures	<p>Provide for criminal procedures for:</p> <p>(a) the unauthorised and willful access to a trade secret held in a computer system;</p> <p>(b) the unauthorised and willful misappropriation<sup>138</sup> of a trade secret, including by means of a computer system; or</p> <p>(c) the fraudulent disclosure, or alternatively, the unauthorised and willful disclosure, of a trade secret, including by means of a computer system.</p>
Protection of Encrypted Program-Carrying Satellite and Cable Signals	Criminal offence	Manufacture and other dealings of device and system to decode an encrypted program-carrying satellite
Government Use of Software		That central government agencies use only non infringing computer software
Internet Service Providers	Notice and take down procedure	<p>mandates ISPs to expeditiously remove or disable access to alleged infringing material upon acquiring actual or constructive knowledge of the infringement.</p> <p>mandates each party to provide procedures, judicial or administrative, to allow copyright owners who have made ‘legally sufficient claim’ of copyright infringement to get from ISPs information in the ISP’s possession which identifies the alleged infringer.</p>

# Regional Comprehensive Economic Partnership

- Given the significance of strengthening East Asian economic integration, the Leaders of ASEAN and the 6 countries endorsed the Framework for RCEP and its Work Plan at the 19th ASEAN Summit in Bali in November 2011.
- The RCEP negotiation was later launched during the 21st ASEAN Summit in Phnom Penh, Cambodia in November 2012. The Leaders agreed that RCEP shall involve broader and deeper engagement with significant improvements over existing ASEAN FTAs/CEP with these countries.
- The stated objective of the RCEP is to achieve a modern The RCEP is participated by ASEAN, China, Korea, Japan, India, Australia and New Zealand. The RCEP is ASEAN led. Besides the RCEP, negotiations are on-going for two other major trade initiatives – TPP and Transatlantic Trade and Investment, comprehensive, high-quality and mutually beneficial economic partnership agreement among RCEP members.
- Based on current data, RCEP will create an alliance of a region populated by more than three billion people, with a combined GDP of more than US\$17 trillion and over 40% of the world trade.

The RCEP will cover: 1. Trade in Goods; 2. Trade in Services; 3. Investment; 4. Economic and Technical Cooperation; 5. Intellectual Property; 6. Competition; 7. Dispute Settlement; and 8. Other issues agreed by RCEP parties.

# IP provisions in RCEP (leaked document 15 Oct 2015)

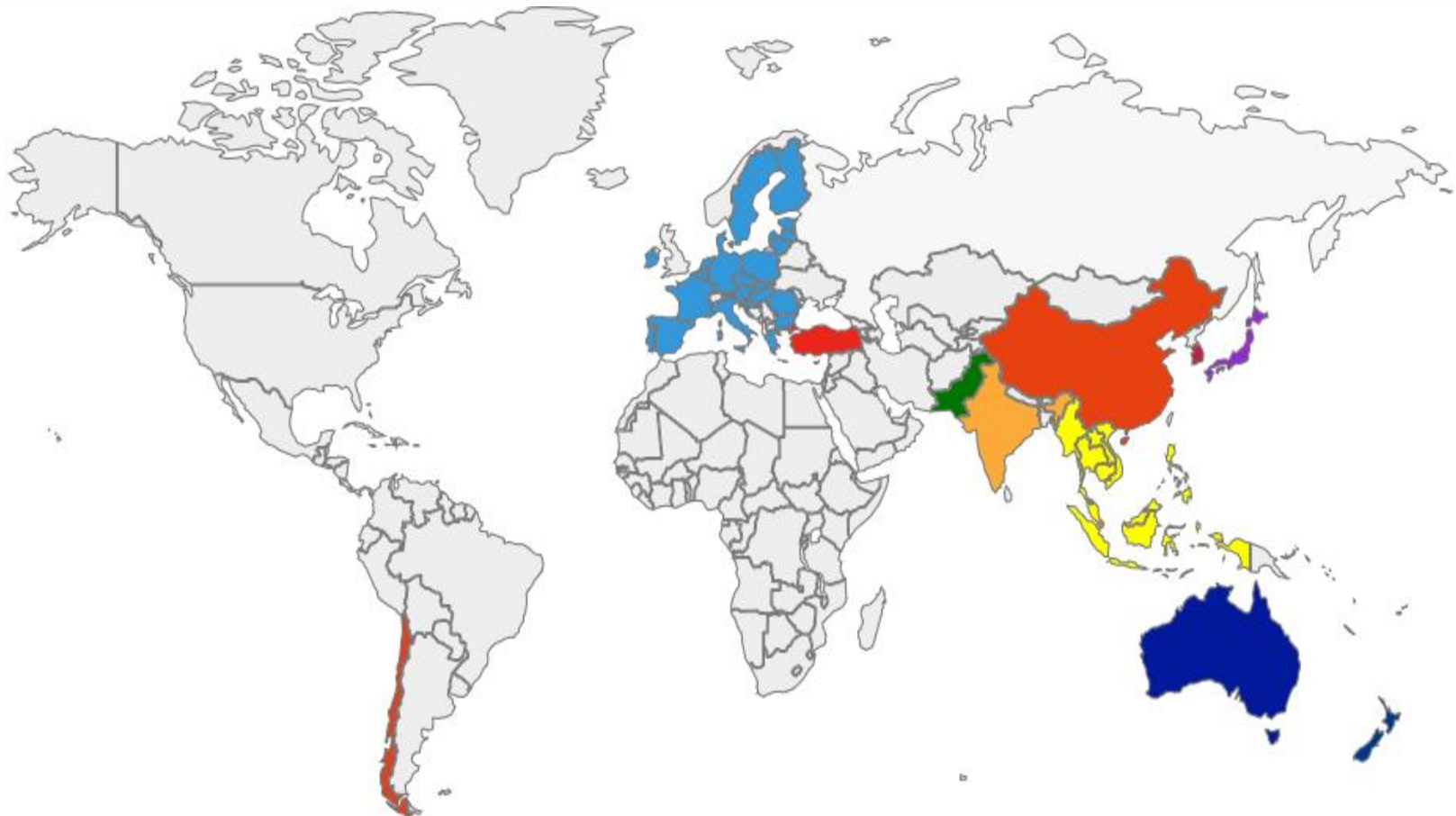
Copyright	
Exclusive right	Communication to the public right, including for sound recordings and performances
Collective management organisations	Establish CMOs, to be run in efficient, transparent manner
Technological Protection Measures/ RMI	Adequate legal protection and effective legal remedies – to owners/authors including the manufacture and commercial dealing of devices/services used to circumvent TPM
Government use of software	Usage of the software in the manner authorised by law
Limitations and exceptions	Confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder
Broadcast	No retransmission of tv signals on the Internet without the authorization of the right holders
Protection of encrypted program carrying satellite signals	No manufacture and dealing with devices capable of decoding an encrypted program-carrying satellite signals

# TM & Patents

Trade Marks	Cannot deny registrability on the basis of visual appearance or simply sound or scent marks
Registration and Applications of Trade Marks	Including an electronic system for registration and maintenance of TM
Madrid Protocol	Parties shall endeavour to accede to the Protocol
Well known trade marks	Cancellation of trademark which is identical or similar to a well known trade mark, including goods and services which are not identical or similar
Geographical Indications	May be protected through a TM system, sui generis or other means Grounds for refusal of GI
Patent	Available for any inventions, whether product of processes, accession to PCT, worldwide novelty patent term restoration, pre grant opposition, clinical data, accelerated examinations
Excluded subject matter	To protect ordre public or morality, animal or plant life or health or to avoid serious prejudice to the environment
Experimental use of a patent	Including the imparting of instruction to pupils
Patent amendments	Shall provide patent applicants with at least one opportunity to make amendments, corrections
Electronic Patent Application System	Encourage the adoption of electronic patent system

<b>Industrial Design</b>	<b>New if not significantly different from known designs or combinations of known design features</b>
	Requirements or securing protection do not unreasonably impair the opportunity to seek and obtain such protection
	Accession to Hague Agreement
	Worldwide novelty
Genetic Resources, Traditional Knowledge and Folklore	Adequate and effective implementation of CBD, to take legislative, administrative or policy measures relating to access to genetic resources & associated TK, recognise the use of databases
Unfair competition	Any use in the course of trade.. . That misleads, or is likely to mislead, the public as to the origin of the goods
Protection of undisclosed information	There should not be any measures to force disclosure of undisclosed information
enforcement	Presumption of authorship/ownership
Civil and administrative procedures and remedies	Loss of profits, pre established damages, seizure of goods, destroy infringing goods, materials and implements, provisional measures, border measures, destruction order,
Criminal remedies	Wilful trade mark counterfeiting or copyright, wilful importation, forfeiture and destruction of goods, digital environments
Enforcement in the digital environments	Curtail repetitive infringement of copyright and related rights

# Malaysia's FTA



<http://fta.miti.gov.my/?mid=49>



# Malaysia's noodle bowl: between hub and spoke

	Concluded/enforced	IP provision
Malaysia-Japan Economic Partnership Agreement	13 Dec 2005/ 13 July 2006	<p>.effective and non-discriminatory protection of IP, promotion of efficiency and transparency in administration of IP system and provision of measures for the enforcement of IP rights</p> <p>.Reaffirmation of commitment of international agreement S 27 TRIPS Agreement</p> <p>Patent shall not be rejected solely because of microorganism</p> <p>Expedited examination</p> <p>Publication of patents</p> <p>International novelty for industrial designs</p> <p>Well known trade marks – if it is for unfair intention, inter alia, intention to gain an unfair profit or intention to cause damage to the owner of the well known trade mark</p> <p>Copyright – making available to the public</p> <p>ISP's liability for copyright infringement – measures necessary</p> <p>Plant varieties are adequately protected</p> <p>Border measures – not allow the re-exportation of goods</p> <p>Civil and criminal remedies – willful trade mark counterfeiting and copyright piracy on a commercial scale</p> <p>.</p>

Malaysia-Pakistan Closer Economic Partnership Agreement (MPCEPA)	8 Nov 2007/1 January 2008	<p>Cooperation in customs procedures and cooperation</p> <p>No measures to expropriate or nationalisation of IP</p> <p>Importance of IP in promoting economic and social development</p> <p>The need to achieve a balance between the rights of the right holders and the legitimate interest of the users</p> <p>Compliance of TRIPS Agreement</p>
Malaysia – New Zealand Free Trade Agreement (MNZFTA)	30 May 2009/August 2010	<p>Reaffirmation of TRIPS obligation</p> <p>Cooperation and exchange of information</p>
Malaysia- Chile Free Trade Agreement	May 2010/25 Feb 2012	<p>-GI – CHILEAN PISCO</p> <p>Cooperation in IP activities</p>
Malaysia-Australia Free Trade Agreement (MAFTA)	30 March 2012/ 1 January 2013	<p>Patents and TM databases to be on the internet</p> <p>Affirmation of Berne, PCT, Paris Convention and NICE Agreements</p> <p>Agree to ratify asap – WCT, WPPT, Madrid Agreement and Protocol and Singapore Treaty</p> <p>Non traditional TM</p> <p>GI – can be protected either as TM or a sui generis system</p> <p>Patents – available to all technologies</p> <p>TPM – where circumvention is done knowingly or where a person had a reasonable grounds to know</p> <p>Criminal procedures include – commercial advantage or financial gain</p> <p>Criminal procedures not applicable to library, archive, educational institutions or public non commercial broadcasting entity</p> <p>Exemption of ISP's liability – if they do not control initiate or direct..</p>

ASEAN_India Free Trade Agreements (AIFTA)	13 Aug 2009/ 1 Jan 2010	Facilitation and promotion of effective and adequate protection of TRIPS
ASEAN-Japan Comprehensive Economic Partnership Agreement (AJCEPA)	8 Oct 2003/1 Feb 2009	Economic cooperation in relation to IP
ASEAN- Australia New Zealand FTA (AANZFTA)	27 Feb 2009/ 1 January 2010	<p>Copyright – right of communication to the public</p> <p>Criminal procedures for willful infringement for commercial advantage and financial gain</p> <p>CMOs</p> <p>Adequate protection for TPM</p> <p>Computer software for central govt agencies</p> <p>TM classification system</p> <p>GI – if protected by TM</p> <p>GI – specific measures to protect GR, TK and folklore</p>

# Implications for trade and development policy

- Forum shifting in IP Negotiations? From Bi-lateral Negotiations To TRIPS and Back
- Wither Development Agenda?
- Navigating different BTA and RTA binding commitments
- Whether TRIPS Plus Standards are really essential after all for regional integration and trade
- Trade and when in what matters would TRIPS Plus obligations would be necessary? - border enforcement measures, well known trade marks – what is necessary for inter Asian production line
- Legal effects of introducing additional FTAs into the bowl

# Implications for development policy?

- Cost of triggering upward spiral in IP protection
- Whether implementable in reality?
- Whether constraining the policy space currently enjoyed by countries under TRIPS Agreement?
- Whether external pressure needed to coerce domestic regulatory reform?

# conclusion

- Trade for IP or IP for trade
- Need for domestic reforms
  - Iron out inequities in the present system
  - Although copyright = natural right but easily given away by contract
  - Artiste's residual right; reversionary interest, droit de suite