

Introduction: IP and the Asia-Pacific ‘Spaghetti Bowl’ of Free Trade Agreements

Christoph Antons and Reto M. Hilty

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Abstract The contributions to this book show the strategies and policies of countries in the Asia-Pacific region that have to grapple with international standard setting in what has been called the ‘spaghetti bowl’ of criss-crossing free trade agreements. The chapters show how intellectual property is just one among many political and economic factors that are used in trade off discussions. It leads to an often considerable further raising of IP standards in those countries that agree to higher protection levels, often for reasons that have little to do with the provision of

C. Antons: Referendar jur. (Rhineland Palatinate), Assessor jur. (Bavaria), PhD in Law (University of Amsterdam); Chair in Law; Chief Investigator, ARC Centre of Excellence for Creative Industries and Innovation; Affiliated Research Fellow, Max Planck Institute for Innovation and Competition, Munich; Senior Fellow, Center for Development Research, University of Bonn.

R.M. Hilty: Professor Dr., Director. Full Professor ad personam at the University of Zurich. Honorary Professor at the University of Munich.

C. Antons

School of Law, Faculty of Business and Law, Deakin University, Melbourne, Australia

e-mail: christoph.antons@deakin.edu.au

R.M. Hilty

Max Planck Institute for Innovation and Competition, Munich, Germany

e-mail: hilty@ip.mpg.de

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C. Antons, R.M. Hilty (eds.), *Intellectual Property and Free Trade*

Agreements in the Asia-Pacific Region, MPI Studies on Intellectual Property and Competition Law 24, DOI 10.1007/978-3-642-30888-8_1

incentives for technological progress. A more nuanced picture of IP protection in Asia shows the different interests of high protection countries, ‘first’ and ‘second tier’ newly industrialized and industrializing countries and the rather peculiar position of Australia and New Zealand. The chapter introduces the contributions to this volume according to these various groups of countries and of international law and the political economy of the region.

Keywords Bilateral and Regional Trade Agreements (RTAs) • Forum shifting • Regional Comprehensive Economic Partnership (RCEP) • Trans-Pacific Partnership (TPP) • TRIPS-plus

1 Forum Shifting in Intellectual Property Negotiations: From Bi-lateral Negotiations to TRIPS and Back?

The development of intellectual property systems in Asian and Pacific countries over the last few decades has been breathtaking. Of course, the rapid pace of technological transformation has brought fundamental change everywhere. Changes in the Asia-Pacific region¹ are particularly remarkable, however, because many countries in this part of the world until a few decades ago had no intellectual property protection at all or had laws from the colonial period that had hardly been revised since independence and that had fallen into disuse.²

Attention began to shift to Asia and to the Asian model(s) of development and their legal features³ during the 1970s and 1980s. The shift in Asia from import substitution to export-led development and the strong focus on the attraction of foreign investment brought the region’s antiquated intellectual property systems into view.⁴ Investors concerned about their intellectual property (IP), began to lobby their governments to do something about this lack of protection. Section 301 of the US Tariff and Trade Act and its local consultation process became a preferred avenue for US American businesses to voice their concerns.

¹ The ‘Asia-Pacific’ region can be interpreted in many different ways, see Antons (2009a), pp. 5–7 and see the chapter by C. Antons and D. Thampapillai, this volume. It is used in this book as convenient shorthand for Asian countries (with a focus on East and Southeast Asia), the countries of Australasia (with a focus on Australia and New Zealand) and the United States across the Pacific.

² For useful surveys of the development of intellectual property law in the region, see the contributions in Heath (2003) and Goldstein and Straus (2009). For Southeast Asia, see Antons (1991, 2009b).

³ On Asian law in the context of development see Pistor and Wellons (1999) and Rose (1998); and the contributions in Jayasuriya (1999), Antons (2003), Antons and Gessner (2007), and Gillespie and Peerenboom (2009).

⁴ Gadbow and Richards (1988).

European businesses and governments also initiated similar investigations and countries regarded as problematic were threatened with trade sanctions.

The conclusion of the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS) in 1994 was regarded as a breakthrough in this discussion. It brought IP *demandeurs* from industrialized economies considerably higher protection standards and, for the first time in an IP law agreement, a chapter on enforcement.⁵ However, while developing countries were hoping that they had agreed to standards that would provide the maximum level of protection for some time, governments from industrialized economies saw gaps and much unfinished business in TRIPS. When it became clear that the current Doha round of WTO negotiations would not help in this regard, the governments of developed nations began to shift the discussion back to the bilateral level and to include provisions and entire chapters related to IP law into bilateral free trade and partnership agreements.⁶

As Hilty and Jaeger show in this volume,⁷ a combination of the ‘most favoured nation’ clause and the principle of national treatment enshrined in TRIPS, means that protection standards in those FTAs that go beyond TRIPS (so-called TRIPS-plus provisions) will have to be made available to all WTO partners of the respective parties. They lead, therefore, to a further ‘ratcheting up’ of international IP protection outside of the multilateral context of the WTO negotiations.

2 Intellectual Property in the ‘Spaghetti Bowl’ of FTAs in the Region

The contributions to this book show the strategies and policies of countries in the region that have to grapple with this international standard setting in what has been called the ‘spaghetti bowl’⁸ of criss-crossing free trade and partnership agreements. The chapters show how intellectual property is just one among many political and economic factors that are used in trade off discussions. It leads to an often considerable further raising of IP standards in those countries that agree to higher protection levels, often for reasons that have little to do with the official justification for such protection, namely the provision of incentives for technological progress. There is understandable concern about the economic consequences that this further ‘raising of the bar’ is likely to have for developing countries that are still struggling to cope with the many novelties brought by TRIPS.⁹

⁵ On TRIPS and its negotiating history see UNCTAD-ICTSD (2005), Correa (2007), and Gervais (2008).

⁶ See Drahos (2001) and Sell (2011) and see the chapters by R. Lutz; T. Jaeger; and N. Ono, this volume.

⁷ See the chapter by R.M. Hilty and T. Jaeger, this volume.

⁸ Bhagwati (2008).

⁹ See the chapter by R.M. Hilty and T. Jaeger, this volume.

It is furthermore likely that the trend to include different levels of IP protection in these agreements will lead to a further differentiation of the international IP landscape beyond the rather crude and no longer adequate distinction in international development policies and in the TRIPS agreement between ‘developed’, ‘developing’ and ‘least developed’ countries.¹⁰ The relatively low level of IP content in many of the agreements, discussed by Antons and Thampapillai,¹¹ shows the strategic importance of many of them that often trumps economic considerations, as Ravenhill points out.¹² Although, foreign investment remains important for developing Asian countries, the bargaining power of industrialized economies interested in high technology protection is different now from during the early days of export-led development. In the post-Global Financial Crisis (GFC) environment, the major industrialized economies in Europe and North America have become more inward looking, while a surge in prices for raw materials—triggered in particular by the industrial transformation in India and China—has created a steady flow of investment and export earnings outside those sectors of the economies that are primarily driven by technological change. Although there has been a recent souring of investor sentiment towards emerging markets,¹³ alternative visions of IP development have become visible during these post-GFC years, for example in the ‘soft diplomacy’ of China,¹⁴ the ‘brick by brick’ building of IP protection in a string of ASEAN agreements,¹⁵ or in the focus on ‘new types’ of intellectual property rights such as for traditional knowledge in the agreements concluded by developing countries, but also by a developed country like New Zealand.¹⁶

A more nuanced picture of IP protection in Asia over the next few years will include as major players high protection countries with considerable technological capacity, such as Japan, followed by ‘first tier’ newly industrialized economies¹⁷ like Singapore and Korea. As the chapters by Lee and Ng-Loy show, the conversion of these economies to higher standards of IP protection has led to agreements with the US and EU with high standards, but these have not been imposed on their regional neighbours in other agreements. A similar mid-level position, albeit for

¹⁰ It is interesting to note in this context that the WTO, quite understandably in view of the difficulties and different terminologies, provides no definition of “developing country”, but accepts the self-description of member states. This is surprising in view of the legal consequences of “developing country” status and has led to affiliations of some countries that differ from the lists maintained by, for example, the OECD or the IMF, see WTO (2013) and Bosco (2011).

¹¹ See the chapter by C. Antons and D. Thampapillai, this volume.

¹² See the chapter by J. Ravenhill, this volume.

¹³ Wassener (2013).

¹⁴ Discussed in the chapter by P. Yu, this volume.

¹⁵ Discussed in the chapter by T. Wattanaputtipaisan, this volume.

¹⁶ As discussed in the chapter by S. Frankel and M. Richardson, this volume.

¹⁷ The term ‘first-tier newly industrialized economies’ is used here for countries that are now commonly regarded as developed economies, but that have achieved this status in recent years.

different reasons, is visible in the position of Australia and New Zealand.¹⁸ These two countries also belong to the ‘club’ of industrialized economies and are, thus, expected to provide IP protection in accordance with that status, although they remain importers of much IP protected material. Arup shows that conflicting position with the example of pharmaceutical patent protection in Australia, following the Australia–US Free Trade Agreement. The chapter by Frankel and Richardson explains why and how New Zealand is different, even in comparison to its larger neighbour across the Tasman Sea. Much will depend on the outcome of the Trans-Pacific Partnership negotiations, however, which New Zealand has joined.

Not represented in this book are the least developed economies and WTO members, which in 2013 have been granted a further extension until 2021 to bring their IP systems into accordance with the standards of TRIPS.¹⁹ It is important to note, however, that the decision of the Council for TRIPS expressly excludes Articles 3, 4 and 5 from the extension. This means that it is theoretically possible even for least developed countries to attract higher IP standards, for example via regional agreements in which they are involved, such as those of ASEAN.²⁰ In an environment of generally higher standards and to attract foreign investment, they nevertheless often grant TRIPS standard protection in anticipation of the higher standards that will have to be introduced in the future. An example is the IP law of Laos, which already includes plant variety protection required under TRIPS.²¹ The conclusion of FTAs by regional groupings, of which they are members, could theoretically also subject these countries to TRIPS-plus standards negotiated for those members of a grouping at more advanced stages of economic development. A reference to the transitional periods under the TRIPS Agreement, as in the ASEAN–Australia–New Zealand FTA is, therefore, of crucial importance.²²

Developing countries are positioning themselves relative to their technological strength and in accordance with long-term economic and strategic objectives. In general, they have been wary of IP content in FTAs. However, Japan succeeded in concluding Economic Partnership Agreements (EPAs) with quite similar TRIPS-plus content with the older ASEAN members Indonesia, Malaysia, Thailand and the Philippines. Of these countries, Malaysia, discussed in the chapter by Lim Heng Ghee, this volume,²³ is particularly interesting. Although Malaysia’s bilateral

¹⁸ Frankel (2012), p. 169, refers to New Zealand, Singapore and even Australia as ‘small developed countries’.

¹⁹ Council for Trade-Related Aspects of Intellectual Property Rights, Extension of the Transition Period Under Article 66.1 for Least Developed Country Members, Decision of the Council for TRIPS of 11 June 2013, WTO Doc. IP/IC/64 of 12 June 2013.

²⁰ See, for example, the TRIPS-plus provisions in the ASEAN–Australia New Zealand FTA discussed in the chapter by Lim Heng Gee, this volume.

²¹ See Section IV ‘New Plant Variety’ of Law No. 01/NA of December 20, 2011 on Intellectual Property, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=310926. Accessed 26 February 2014.

²² See Article 11 of AANZFTA, available at <http://www.dfat.gov.au/fta/aanzfta/chapters/chapter13.html>. Accessed 24 January 2014.

²³ See the chapter by Lim Heng Gee, this volume.

negotiations with the United States were abandoned, the country has recently joined the Trans-Pacific Partnership negotiations. Similarly to the earlier negotiations concerning the ‘plurilateral’²⁴ Anti-Counterfeiting Trade Agreement (ACTA),²⁵ the TPP negotiations have attracted criticism because of their secrecy and the narrow definitions of relevant stakeholders.²⁶ However, the drafts of a proposed intellectual chapter for the agreement were leaked in 2011²⁷ and in 2013.²⁸ The draft IP chapter has since been criticized for its extensive TRIPS-plus content.²⁹ US influence in this group is obviously strong and the United States is joined predominantly by countries that have already concluded bilateral agreements with TRIPS-plus content and/or have also signed ACTA and could thus be seen as not having much to lose if they sign up to another treaty with high IP protection. For some countries like New Zealand, however, this is not true,³⁰ as is also the case with Vietnam and Malaysia, two developing countries that are involved and which so far have clearly had different interests to those of the United States with regards to intellectual property.³¹ It remains to be seen, therefore, as to what extent the strategic interest in concluding a geographically expansive and inclusive agreement will ultimately trump the desire to establish higher IP standards. It will also be interesting to see what kind of IP standards countries involved in the TPP negotiations will propose during the Regional Comprehensive Economic Partnership (RCEP) Agreement negotiations under the leadership of ASEAN and involving the ASEAN+6 countries (ASEAN plus China, Japan, Korea, Australia, New Zealand and India).³² Although many regional countries try to downplay the rivalry between the United States and China, media sources are seeing the two agreements to some extent as competing, because China has not been invited to join the TPP and the United States is not included in the RCEP negotiations. When the US budget crisis forced President Obama in October 2013 to cancel his travel to Asia for bilateral meetings, the Asia-Pacific Economic Cooperation (APEC) meeting and the East Asia Summit, this was seen in parts of Asia as a missed opportunity to promote the TPP and as ceding ground to the Chinese.³³ The APEC meeting was

²⁴ On the definition of ‘plurilateral’ as including like-minded national spanning several regions, see Bayne (2011).

²⁵ On ACTA, see Yu (2011) and Antons and Garcia (2011).

²⁶ Prestowitz (2013). See also the criticisms voiced by Malaysian NGOs, as discussed in the chapter by Lim Heng Gee, this volume.

²⁷ It is available at <http://www.keepthewebopen.com/tpp>. Accessed 17 October 2013.

²⁸ <http://wikileaks.org/tpp/static/pdf/wikileaks-secret-TPP-treaty-IP-chapter.pdf>. Accessed 24 January 2014.

²⁹ Frankel (2012).

³⁰ See the chapter by S. Frankel and M. Richardson, this volume.

³¹ See the chapter by Lim Heng Gee, this volume. For Vietnam’s reasons to join the TPP negotiations, see Brown (2013).

³² On this agreement and its role in bridging some of the other agreements and negotiations, see Wignaraja (2013).

³³ Perlez (2013) and Callick (2013).

disappointing for US TPP negotiators, as a declaration by Korea to join the negotiations did not eventuate and the Malaysian Prime Minister questioned the tight end of the year deadline for the conclusion of the TPP.³⁴

3 The Structure of the Book and the Contributions in Context

The first part of the book examines FTAs in the context of WTO and international law and sets the scene for the following chapters. In Chap. 2, Antons and Thampapillai provide ‘An Overview of Free Trade Agreements in the Asia Pacific Region with a Particular Focus on Intellectual Property’. The chapter begins with an explanation of the geographical focus and meaning of the term ‘Asia Pacific’ in this book. They believe that the focus is useful to avoid a Eurocentric view based on inherited colonial laws and to take account of the increasing interaction between countries and people in this part of the world. Of the many different definitions of ‘Asia Pacific’ one that is identical with the ASEAN+6 group (ASEAN plus Japan, China, Korea, India, Australia and New Zealand) is found to be most suited for this project, also in view of the potential membership of an ASEAN Regional Comprehensive Economic Partnership (RCEP) agreement.

The authors continue by explaining the background of the FTA activities in the region. The difficulties experienced in the WTO Doha Round combined with the aftermath of the Asian Financial Crisis of 1997/98 to trigger the intense negotiations within the Asia Pacific. Statistics of the Asian Development Bank show that the countries covered in this book plus Pakistan are leading the FTA initiatives in the region. Many smaller countries are also implementing FTAs at the moment, mainly because they are part of larger regional groupings (such as ASEAN) that have concluded agreements. ASEAN has been at the forefront of FTA activities and is also the fundamental building block for the larger regional groupings such as ASEAN+3 (plus Japan, Korea and China) and ASEAN+6. There are similar regional clusters in the Pacific, on the Arabian Peninsula, in Eurasia, Central Asia and the Middle East and in South Asia. Much attention has recently been paid to the Trans-Pacific Partnership Agreement, which includes APEC members on both sides of the Pacific. The TPP is likely to have TRIPS-plus standards, which will also bind Asian developing country members.

The authors then examine the existing agreements and find that they reach from those that stress limitations to intellectual property rights to those with TRIPS-plus standards. In between are clusters of agreements that express limited support for IP rights, foresee consultation on IP matters, reaffirm existing obligations under TRIPS and other international conventions, or focus on cooperation and collaboration. Cooperation and collaboration includes technical cooperation in relation to

³⁴ Perlez and Cochrane (2013).

IP offices and administration. Some of these mid-level agreements are modestly TRIPS-plus in that they require accession to or compliance with international agreements that are not yet referred to in TRIPS. The Japanese Economic Partnership Agreements with various ASEAN countries in particular have TRIPS-plus provisions related to border measures, well-known trade marks, the WIPO internet treaties and UPOV standards for plant varieties. Substantial TRIPS-plus provisions, finally, are to be found in the US FTAs with the region's industrialized high income countries—Australia, Singapore and Korea.

The authors conclude that the relatively modest IP provisions in many agreements among Asia-Pacific countries confirm that there is little enthusiasm and support for a further raising of the standards beyond the WTO TRIPS agreement. Rather, motivated by a regional supply chain, Asia-Pacific countries seem more concerned about deepening their trade linkages. Rather than appearing like a 'spaghetti bowl', regional FTA activities more resemble overlapping clusters, with the most active players negotiating across regions. 'Soft diplomacy' is important as are new and alternative forms of intellectual property rights, for example those related to traditional knowledge and traditional cultural expressions.

In Chap. 3, Reto M. Hilty and Thomas Jaeger examine the legal effects and policy considerations and ask 'What Is Wrong with FTAs'? The chapter asks how TRIPS-plus FTAs relate to the pre-existing TRIPS regime and to each other and whether there is potential for conflict under international law. They find that this potential is overall rather low. TRIPS explicitly allows parties to implement more extensive protection and a similar effect is achieved via the 'favourability rule' of agreements such as the Berne Convention, Universal Copyright Convention and the 1961 Rome Convention. Because TRIPS forms the underlying legal framework for the activities in the Asia-Pacific, the provision related to National Treatment (NT) and the 'Most Favoured Nation' (MFN) clause apply. MFN requires that parties 'immediately extend any advantage, favour, privilege or immunity granted by a Member to the national of any other country' in relation to IP 'to the nationals of all other Members' of TRIPS. The NT principle obliges parties to 'accord to nationals of other Members treatment no less favourable than that of its own nationals'. Together, these principles work to ensure a 'bottom-line' for obligations and ensure that a state party is always bound by the highest standard to which it has agreed. The authors show how effective these rules are in avoiding conflict between agreements, but point out that this comes at the cost of triggering an upwards spiral in IP protection. These higher standards are transposed from the domestic to the international level, based on the NT principle, and from the bi- or multilateral FTA to a universalist setting, based on the MFN clause.

In the second part of their chapter, the authors examine countries at different levels of technological development and interest in IP protection. They conclude that there is a substantial risk for IP related trade-offs that are ultimately harmful to domestic economies, in particular for developing and least developed countries. They also provide some initial thoughts on remedies. One option would be a GATT-type enabling clause in Article 4 of TRIPS exempting agreements beneficial for developing countries or least developed countries from the effects of the MFN

clause and NT principle. Alternatively, predictable ceilings for international IP protection could be provided by allowing for opt-outs for such countries under certain conditions. Finally, there could be global agreement on countermeasures to prevent misuse of rights beyond the sphere of antitrust law. The authors conclude that far more information about the legal, economic and socio-political effects in the countries concerned is necessary to devise really effective remedies.

Part II of the book brings a political economy perspective to Free Trade Agreements in the Asia-Pacific region. In Chap. 4, John Ravenhill analyzes 'What Drives Regionalism in East Asia: And Why It Matters'. Ravenhill argues that, in negotiating for preferential trade agreements (PTAs), as he prefers to call them, political and diplomatic motivations were dominant over economic ones. He explains that most of the growth in intra-regional trade occurred in fact in the three Chinas (PRC, Hong Kong and Taiwan) and that the conventional assumption of a recent de-linking of the Asian economies from their traditional extra-regional export markets is wrong. Intra-regional trade increased largely from 1985 to 1995 in the wake of the Plaza Accord, but to a lesser extent after the Asian Crisis of 1997/1998. Ravenhill questions other economic theories about countries' motivations for PTAs, many of which are based on the economic and political rationality of a country like the United States. In the context of East Asia's authoritarian and quasi-democratic polities, however, states enjoy far more autonomy from domestic interests. Even the Japan–Mexico agreement, which was often regarded as driven by domestic business interests, had been superseded by sectoral promotion programs and was no longer needed by the time of its implementation. China's proposal for a PTA with ASEAN and other geo-political concerns were ultimately more important than such business considerations. This is also confirmed by a general willingness of the stronger negotiating partner to accept agreements that are not comprehensive in their coverage and that explore the flexibilities of Articles XXIV.8 and XXIV of the GATT. Attitudes may shift after the conclusion of Korea's comprehensive agreements with the EU and United States that prompted Japan to ask for a similar agreement with the EU and to join the TPP negotiations; however, Ravenhill still concludes that political and diplomatic considerations continue to shape East Asian regionalism via such different models as the TPP (led by the United States) and the Regional Comprehensive Partnership Agreement (led by ASEAN).

In Chap. 5, Thitapha Wattanapruttipaisan examines 'The Topology of ASEAN FTAs, with Special Reference to IP-Related Provisions'. She sets the scene by looking at the economic challenges the region has had to face in recent years. The East Asian Financial Crisis of 1997/1998, the deflating of the 'dot.com' bubble, the Second Gulf War and an outbreak of severe acute respiratory syndrome (SARS) as well as intensifying competition from China all contributed to a sense of urgency to efforts by governments in the region to seek better integration of ASEAN countries as well as strategic links to other Asia-Pacific economies. The result was the 'ASEAN Vision 2020' with its pillars of the ASEAN Economic Community, ASEAN Political-Security Community and ASEAN Socio-Cultural Community.

Strategic plans for integration were the 'Roadmap for the Integration of ASEAN' (2002) the 'Framework Agreement for the Integration of Priority Sectors' (2004) and the 'ASEAN IPR Action Plan 2004–2010'. Of particularly importance is ASEAN's relationship with its ten dialogue partners: Australia, New Zealand, Canada, Japan, United States, EU, Korea, India, China and Russia. ASEAN concluded FTAs with its regional partners, among these is one concluded jointly by Australia and New Zealand with ASEAN jointly as the Closer Economic Relations Trade Agreement grouping (CER). Negotiations with the EU are on hold, but a Trade and Investment Framework Agreement (TIFA) was concluded with the US in 2006. Most recently, negotiations have started on a Regional Comprehensive Economic Partnership Agreement.

Statistics show the rise in importance of China for ASEAN trade and a decline in the share of Japan, the EU and US. It was also the Framework Agreement between ASEAN and China that triggered a wave of similar negotiations and led within three years to ASEAN agreements with India, Japan and Korea. The author shows the differences in the frameworks of the agreements with Asian partners in comparison to those concluded in the CER and under negotiation with the EU. Whereas the intra-ASEAN agreements foresee a 'brick by brick' implementation via further detailed agreements, the CER and EU agreements are more comprehensive in scope and are to be concluded as a single undertaking. Regarding intellectual property, the agreements with Asian partners focus on collaboration. The template of EU negotiations includes many TRIPS-plus provisions, whereas the CER agreement includes modest TRIPS-plus obligations, described by the author as a 'middle way' between the more stringent EU approach and the collaborative agreements in Asia. The author concludes that an ideal implementation scenario would comprise collaborative IP programs that develop strong synergies and a sense of ownership of the beneficiaries.

The third part of the book is devoted to the strategies regarding intellectual property in the Free Trade and Economic Partnership Agreements of the United States, the EU and Japan, technology exporting countries that aim for a considerable raising of IP standards in comparison with the WTO TRIPS Agreement. In Chap. 6, 'The Interrelated Roles of FTAs, IP and the United States', Robert Lutz shows that a split of sentiment about FTAs is not confined to Asia-Pacific developing countries, but is also to be felt in the United States. It is a split between the desire to increase US leverage in the world and a fear of job losses and competition from countries with lower labour and environmental standards. The chapter provides an introduction to the difficulties of US trade policy making. Like others in the Asia-Pacific 'noodle bowl' of agreements, the US shifted to the bilateral and regional level in view of the apparent failure of the WTO Doha Round negotiations. The shared authority between executive and legislative branches and the non-self-executing nature of obligations makes US trade negotiations particularly difficult. The Obama administration, for example, has been without 'fast track' or 'trade promotion authority' for several years before Congress exercised TPA authority to pass implementing bills for the FTAs with Colombia, Panama and South Korea in 2012.



<http://www.springer.com/978-3-642-30887-1>

Intellectual Property and Free Trade Agreements in the
Asia-Pacific Region

Antons, C.; Hilty, R.M. (Eds.)

2015, VIII, 438 p., Hardcover

ISBN: 978-3-642-30887-1