

Enforcement Provisions of International Intellectual Property Law in the New Era

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Abstract: China has always placed a high value on intellectual property rights and has formally applied to join the CPTPP, which encourages China to align its laws with the high-level of the CPTPP. This article compares the provisions contained in the CPTPP and in the Chinese domestic laws in the backdrop of the WTO-TRIPS regime, analyzes the main differences among relevant international agreements, and provides suggestions for improving China's intellectual property rights enforcement system. The CPTPP's intellectual property rights enforcement provisions go beyond the WTO-TRIPS mechanism due to its wider scope, stricter standards, clearer remedy standards and measures, and increased enforcement efforts of civil, border, criminal, and other types of enforcement agencies. Even if the Chinese Mainland has already had a sophisticated system of intellectual property law, there are still differences between it and the CPTPP in terms of the aforementioned features. In this regard, China can combine the local situation and do two things: the first is to improve its legislations in necessary areas, such as defining of intellectual property border protection measures for goods in transit and customs enforcement authority, and the second is to apply a flexible interpretation to the CPTPP provisions that give the members discretionary powers so as to strike a balance.

Keywords: Intellectual Property Rights, Enforcement, Chinese Mainland, CPTPP, WTO-TRIPS

I. INTRODUCTION

We are witnessing major changes unfolding in our world, something unseen in a century. The year 2023 marks the presentation of the Report to the 20th National Congress of the Communist Party of China,¹ as well as a special link

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1 Xi Jinping, Hold High the Great Banner of Socialism with Chinese Characteristics and Strive in Unity to Build a Modern Socialist Country in All Respects, http://www.gov.cn/xinwen/2022-10/25/content_5721685.htm (Last Visited on May 19, 2023).

between the year before it and the year after it in the 14th Five-year Plan Period.² Since the Report to the 18th National Congress of the Communist Party of China, the Central Committee of the Communist Party of China (with President Xi Jinping at its core) has attached great importance to work on intellectual property, and the development of intellectual property rights with Chinese characteristics has made historic progress and undergone significant changes; the cause of science and technology innovation has also undergone historic and structural changes. The Report to the 20th National Congress of the Communist Party of China emphasizes that it will lead China to strengthen legal protection of intellectual property rights in order to establish a “foundational system for all-around innovation”, and “refine the systems underpinning the market economy”, such as those for property rights protection, market access, fair competition, and social credit, in order to “improve the business environment”, “protect the rights and interests of foreign investors in accordance with the law”, and foster a “world-class business environment that is market-oriented, law-based, and internationalized”, and so on,³ all of which points the way forward and provides basic guidelines for the development of intellectual property rights in the new era.

At the domestic level, in order to implement the decision and policies of the Communist Party of China and the State Council of the People’s Republic of China on intellectual property rights, we must comprehensively strengthen the protection of intellectual property rights, efficiently promote the application of intellectual property rights, stimulate the innovation vitality of the whole society, and promote the construction of a new development pattern. In accordance with the Outline of the 14th Five-year Plan for the National Economic and Social Development and the Long-range Objectives through the Year 2035 and the Guidelines for Building a Powerful Intellectual Property Country (2021-2035),⁴ the State Council of the People’s Republic of China issued the National Plan for Protection and Application of Intellectual Property Rights during the

2 The Outline of the 14th Five-year Plan for Economic and Social Development and Long-range Objectives through the Year 2035 of the People’s Republic of China, https://www.gov.cn/xinwen/2021-03/13/content_5592681.htm (Last Visited on May 19, 2023).

3 *Supra* n. 1.

4 Guidelines for Building a Powerful Intellectual Property Country (2021-2035), https://www.gov.cn/zhen-gce/2021-09/22/content_5638714.htm (Last Visited on May 19, 2023).

14th Five-year Plan Period in October 2021.⁵ After that, in order to implement the Guidelines for Building a Powerful Intellectual Property Country (2021-2035) and the National Plan for Protection and Application of Intellectual Property Rights during the 14th Five-year Plan Period, to thoroughly implement the strategy of building a powerful intellectual property country, to accelerate the building of a powerful intellectual property country, and to clarify the key tasks and measures for the years 2021 and 2022, the China National Intellectual Property Administration published the 2021-2022 Outline for Building a Powerful Intellectual Property Country and the Annual Promotion Plan for the Implementation of the 14th Five-year Plan in January 2022.⁶

Internationally, in November 2020, President Xi Jinping announced for the first time at the APEC Informal Leaders' Meeting that China would actively consider joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁷ This policy position was reiterated at the Central Economic Work Conference in late 2020⁸ and in the Government Work Report released in 2021.⁹ On September 16, 2021, the Minister for Commerce of the People's Republic of China Wang Wentao submitted an official written letter of China's formal application to join the CPTPP to Mr. Damien Peter O'Connor, Minister for Trade and Export Growth of New Zealand, the Depository of the CPTPP.¹⁰

The CPTPP is a comprehensive free trade agreement covering the full range of trade in goods and services, technical barriers, intellectual property rights, government procurement and competition policy. The CPTPP is known

5 National Plan for Protection and Application of Intellectual Property Rights during the 14th Five-year Plan Period, http://www.gov.cn/zhengce/content/2021-10/28/content_5647274.htm (Last Visited on May 19, 2023).

6 2021-2022 Outline for Building a Powerful Intellectual Property Country and the Annual Promotion Plan for the Implementation of the 14th Five-year Plan, http://www.gov.cn/xinwen/2022-01/05/content_5666493.htm (Last Visited on May 19, 2023).

7 Xi Jinping attended the 27th informal meeting of APEC leaders and delivered an important speech, https://www.gov.cn/xinwen/2020-11/21/content_5563112.htm (Last Visited on May 19, 2023).

8 Central Economic Work Conference was held in Beijing, <http://www.mofcom.gov.cn/article/i/jyjl/j/202012/20201203024670.shtml> (Last Visited on May 19, 2023).

9 Li Keqiang, Report on the Work of the Government — Delivered at the Fourth Session of the 13th National People's Congress of the People's Republic of China on March 5, 2021, <https://www.gov.cn/guowuyuan/zfgz-bg.htm> (Last Visited on May 19, 2023).

10 China formally submits its application to join the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), http://www.gov.cn/xinwen/2021-09/16/content_5637879.htm (Last Visited on May 19, 2023).

for inheriting most of the rules of the Trans-Pacific Partnership Agreement (TPP).¹¹ On December 30, 2018, the CPTPP entered into force after being signed by 11 countries, namely Japan, Canada, Australia, Chile, New Zealand, Singapore, Brunei, Malaysia, Vietnam, Mexico and Peru. The signatories represent 13% of the total world GDP and markets of close to 500 million people.¹²

On February 1, 2021, the United Kingdom formally applied to join the CPTPP and in June of 2021, the CPTPP initiated the United Kingdom's accession process and established a working group. On March 31, 2023, the United Kingdom government announced that it had substantially concluded negotiations on the accession to the CPTPP.¹³ This is the largest trade agreement concluded since Brexit, making the United Kingdom the first European country to join the CPTPP.

Will the accession of the United Kingdom, the first country to join the CPTPP since 2018, encourage other countries or regions to join the CPTPP? It

11 The TPP was originally conceived by four APEC members — Brunei, Chile, New Zealand and Singapore — as a regional economic and trade agreement to promote trade liberalization in the Asia-Pacific region, and in July 2005, the four countries signed the Trans-Pacific Strategic Economic Partnership (TPSEP). In November 2009, the then US President Barack Obama announced that the United States would join the TPP negotiations, and the agreement's influence rapidly spread, with seven other Asia-Pacific countries, including Australia, Japan, Canada and South Korea, also announcing their participation in the TPP negotiations. Finally, on February 4, 2016, the TPP agreement was formally signed in Auckland, New Zealand, by representatives of 12 countries — the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam — and became one of the most important achievements of the Obama administration in the field of economy and trade. But the TPP did not really come into effect after the signing of the agreement as the subsequent US President Donald Trump signed an executive order announcing the withdrawal of the US from the agreement as soon as he took office in January 2017. In the same year, the TPP was reorganized as the CPTPP, with Japan, the largest economy among the remaining members, leading the negotiations. In March 2018, 11 members signed the CPTPP agreement in Santiago, Chile, after waiving 22 provisions of the agreement that the US favored but many other countries opposed. The agreement came into force on December 30, 2018. The 11 members of the CPTPP currently account for 13.2% of the world economy and 15% of total trade. Geographically, it spans both sides of the Pacific Ocean, making it the largest regional free trade organization in terms of size.

12 Daniela Stratulat, *Trade Policy Insights: New TPP Trade Agreement — “No” to Protectionism*, <https://www.spglobal.com/marketintelligence/en/mi/research-analysis/trade-policy-insights-new-tpp-trade-agreement.html> (Last Visited on May 19, 2023).

13 Conclusion of Negotiations on the Accession of the United Kingdom of Great Britain and Northern Ireland to the Comprehensive and Progressive Trans-Pacific Partnership, <https://www.gov.uk/government/publications/comprehensive-and-progressive-agreement-for-trans-pacific-partnershipcptpp-conclusion-of-negotiations/conclusion-of-negotiations-on-the-accession-of-the-united-kingdom-of-great-britain-and-northern-ireland-to-the-comprehensive-and-progressive-trans-pac> (Last Visited on May 19, 2023).

depends on the benefits the CPTPP will bring in the future. China, Costa Rica, Ecuador, Uruguay and some other regions such as Chinese Taipei, have all formally applied to join. The United States was a member of the CPTPP's predecessor, the TPP, which was negotiated under the presidency of Barack Obama, but it formally withdrew under the presidency of Donald Trump. It is not yet clear whether the United States will apply to join again. The accession of new members to the CPTPP requires the unanimous consent of all existing members. So far, the application of China has been opposed by Australia, although its position is likely to soften, and the application of Chinese Taipei is controversial. Nevertheless, the CPTPP has the potential to provide significant trade opportunities for the members and, therefore, remains highly attractive, and only time will tell the true value of the CPTPP membership.¹⁴

The United States dominated or dominates international treaties such as the TPP and the Agreement between the United States of America, the United Mexican States, and Canada (USMCA).¹⁵ After a study of these treaties, there are four characteristics worth noting. First, compared with World Trade Organization (WTO) rules, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹⁶ these treaties' intellectual property rights rules lay more emphasis on the enforcement mechanism. Second, these treaties are more inclined towards protecting the interests of intellectual property rights holders than the public interest. Third, they emphasize "super-WTO-TRIPS obligations" or "TRIPS-plus obligations", which are close to or consistent with the United States' domestic laws and regulations. Fourth, their intellectual property rights protection system has changed from being "trade-related" to "investment-related", including the settlement of intellectual property rights disputes with host countries through Investor-state Dispute Settlement (ISDS).

This article focuses on the enforcement mechanism of the CPTPP, especially in comparison with the WTO-TRIPS rules, analyzes the points that are

14 British Foreign Policy Group: UK accedes to CPTPP, But What Does It Mean for the UK?, <https://bfpbg.co.uk/2023/03/uk-accession-cptpp/> (Last Visited on May 19, 2023).

15 Fu Huang'an and Li Xiaofu, New Changes in the Sino-US Trade War and China's Legal Response, *Journal of WTO and China*, Vol. 11, No. 2, 2021, pp. 108-115.

16 World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (Last Visited on May 19, 2023).

different from Chinese domestic laws and regulations, and proposes counter-measures and suggestions at the end.

II. FEATURES AND REQUIREMENTS OF THE CPTPP INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT PROVISIONS

A. Requirements of the WTO-TRIPS Intellectual Property Rights Enforcement Provisions

WTO and its predecessor General Agreement on Tariffs and Trade (GATT), along with various regional trade agreements, have always been the two wheels that promote the development of global trade rules. Regional trade agreements are usually pioneering and leading. For example, as soon as the GATT promoted the reduction of tariffs and other non-tariff barriers to trade in goods, the European Community (EC) began to eliminate tariffs, implement common coal and steel policies, agricultural policies, and coordinate the domestic policies of member countries of the EC. Looking back at the history of the formation of the international protection regime for intellectual property, with the establishment of the principle of minimum protection standards, intellectual property legislations have continued to advance towards integration and high standardization.¹⁷ The countries that dominate international rules on intellectual property choose bilateralism or multilateralism, or a mix of unilateralism and bilateralism, depending on the time, place, and event, thus contributing to the ratchet effect of international protection of intellectual property.¹⁸ The development of the system of international protection of intellectual property rights can be roughly divided into three periods: first, the period of the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886); second, the period of the World Intellectual Property Organization (WIPO) formed in

17 Wu Handong, Changes and Developments in the International Protection System of Intellectual Property Rights, *Chinese Journal of Law*, No. 3, 2005, pp. 126-140.

18 Yang Jing, *Study on Intellectual Property Provisions in Free Trade Agreements*, Law Press China, 2013, pp. 23-24.

1967; and third, the period of the WTO-TRIPS agreements (1995). The above history, with the TRIPS agreement as a reference point, can also be divided into the pre-TRIPS era and the post-TRIPS era.

Most of the international treaties on intellectual property rights in the pre-TRIPS era focused on the principles and substantive provisions of intellectual property rights, but the enforcement provisions were seldom effective. There was a lack of necessary enforcement measures, including penalties, fines and general restrictions, as well as dispute settlement mechanisms, thus turning some treaties into “soft laws” that lacked legally binding force.¹⁹ During this period, the enforcement of intellectual property rights was mainly governed by each country’s own laws. However, the domestic laws of many developing countries lacked effective enforcement measures and were insufficient to protect the rights and interests of intellectual property rights holders in developed countries. Therefore, within the framework of the WTO, developed nations, such as the United States, and their domestic private sector groups actively promoted the formation of the WTO-TRIPS agreement.²⁰ Part III of the TRIPS agreement (from Article 41 to Article 61) contains unprecedented specific provisions, including general obligations, civil and administrative procedures and remedies, provisional measures, border measures and criminal procedures. It also delegated to the judiciary the final decision on the legality of each enforcement measure, essentially taking the international intellectual property rights legal system from the substantive to the procedural level.²¹ The WTO dispute settlement mechanism has also made the enforcement provisions of the TRIPS agreement much more effective. At the same time, the TRIPS agreement itself takes into account the differences among the intellectual property law systems of various member states and their enforcement capabilities, and its enforcement provisions include some provisions that give some leeway and room for interpretation, imparting the members more policy flexibility in executing the

¹⁹ *Supra* n. 17, p. 126.

²⁰ Susan K. Sell, Post-TRIPS Developments: The Tension between Commercial and Social Agendas in the Context of Intellectual Property, *Florida Journal of International Law*, Vol. 14, No. 2, 2002, pp. 194-195.

²¹ Gian Carlo Moschini, Intellectual Property Rights and the World Trade Organization: Retrospect and Prospects, https://www.card.iastate.edu/faculty/profiles/giancarlo_moschini/moschini-trips-preprint-oct-04.pdf (Last Visited on May 19, 2023).

agreement.²² It is remarkable that Article 41 of the TRIPS agreement not only emphasizes improving intellectual property rights enforcement measures, but also strikes a balance between “avoiding the creation of barriers to legitimate trade” and “providing for safeguards against their abuse”.

In the post-TRIPS era, due to the stagnation of multilateral intellectual property law negotiations, the influence of the WTO-WIPO multilateral system in the process of intellectual property restructuring has weakened. Developed member states originally expected that the WTO dispute settlement mechanism could change the lack of protection of traditional intellectual property rights, but the results were not as expected. As of May 17, 2023, the WTO Dispute Settlement Body has accepted a total of 617 cases and only 44 cases cite the TRIPS agreement in the request for consultations.²³ Therefore, preferential trade agreements, such as bilateral free trade agreements and regional trade agreements, have multiplied and are gaining momentum in recent years. In terms of both the scope of the issues discussed and the intricacy and sophistication of the legal standards, the US-led regional negotiations excelled at the Doha Round of world trade negotiations.²⁴

China is a member of the Regional Comprehensive Economic Partnership (RCEP), which follows the rules and spirit of the WTO-TRIPS regime. The RCEP involves 83 intellectual property clauses²⁵ in Chapter 11, which is the chapter with the most amount of content and of the longest length in the Regional Comprehensive Economic Partnership charter. It not only includes the main issues of traditional intellectual property rights, but also reflects the new developments in the trend of intellectual property protection. It states that the definition and application of “intellectual property rights”, which include copyrights and related rights, trademarks, geographical indications, industrial designs, patents, lay-out designs (topographies) of integrated circuits, protection of

22 Liu Hua and Zhou Ying, Intellectual Property Policy Options for Developing Countries under the Flexibility of the TRIPS Agreement, *Intellectual Property*, No. 2, 2009, pp. 57-65.

23 WTO, Disputes by Agreement, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (Last Visited on May 19, 2023).

24 Liu Jingdong, MTA vs. PTA: Dilemma and Prospect of Rule of Law of International Trade, *Chinese Review of International Law*, No. 5, 2015, pp. 92-93.

25 Regional Comprehensive Economic Partnership, https://fta.mofcom.gov.cn/rcep/rcep_new.shtml (Last Visited on May 19, 2023).

plant varieties, and protection of undisclosed information, are entirely congruent with those in the TRIPS agreement. The protection of copyright and related rights requires contracting members to ratify and join the two “Internet Treaties” of WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, adding provisions for online electronic applications for trademarks, patents and industrial designs, anti-unfair competition related to domain names, and intellectual property enforcement in the digital environment. The intellectual property issue is one of the most difficult issues covered by the RCEP. Reducing imbalances in intellectual property ownership is a painstaking process that requires systematic research into the sources of intellectual property rights imbalances. Since it encompasses lower- and middle-income countries, pursues high quality and focuses on inclusivity, it succeeds in taking into account the interests of various member nations in a more comprehensive manner. But its intellectual property rights protection mechanism is weaker than that of the CPTPP.

The CPTPP²⁶ inherited most of the TPP provisions after suspending 22 of them, half of which are intellectual property provisions, including provisions related to national treatment clauses, protection targets, protection duration and protection measures.²⁷ It has higher standards than the RCEP, for example, the CPTPP’s protection of trademarks includes scent marks, it increases the protection for agricultural chemical products and pharmaceutical products, emphasizes that the scope of protection of reproduction rights includes reproduction in electronic form, the protection for copyright lasts for 70 years after the author’s death, it protects “unfixed” performance, and it also imposes infringement liability on internet service providers. The CPTPP sets out in detail the protection standards for each type of intellectual property rights and makes strict regulations for their implementation. Its protection of intellectual property rights is more flexible than that of the RCEP.²⁸

26 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, <http://www.mofcom.gov.cn/article/zwgk/bnjg/202101/20210103030014.shtml> (Last Visited on May 19, 2023).

27 Bai Jie and Su Qingyi, Rules, Impact and China’s Countermeasures: A Comparative Study of CPTPP and TPP, *International Economic Review*, No. 1, 2019, p. 63.

28 Quan Yi, Comparison of CPTPP and RCEP Agreement Framework and Its Rules, <https://219.216.224.100/ywyj/qydt/73749.htm> (Last Visited on May 19, 2023).

B. Challenges for the Chinese Mainland from Relevant Provisions of the CPTPP

The CPTPP intellectual property enforcement provisions represent a comprehensive and high level of protection from the opinions of western countries, while also paying attention to the evolving patterns of intellectual property rights and infringement, and providing a more adequate remedy for rights holders. These provisions are characterized by: i) stronger civil, administrative and criminal law requirements for intellectual property rights protection; ii) expanded intellectual property border measures; and iii) limited flexibilities in comparison to the TRIPS agreement. These intellectual property rights enforcement provisions are in the form of the free-trade-agreements-related paradigm represented by the United States and the European Union.²⁹

Firstly, the general enforcement standards of the CPTPP have become more stringent. On one level, Paragraph 2 of Article 18.71 (General Obligations) of the CPTPP expands the scope of enforcement, specifically requiring the contracting members to raise the standards of enforcement of intellectual property rights in the digital environment. The members are required to “confirm that the enforcement procedures set forth in Article 18.74 (Civil and Administrative Procedures and Remedies), Article 18.75 (Provisional Measures) and Article 18.77 (Criminal Procedures and Penalties) are established to the same extent with respect to acts of trademark infringement, as well as copyright or related rights infringement, in the digital environment”. Since there is no corresponding provision for online conduct in the TRIPS agreement, the domestic equivalent of the CPTPP in the Chinese Mainland currently are mainly the Regulations for the Protection of the Right of Communication through Information Network. According to Article 1 of the Regulations, they were formulated “for the purpose of protecting the right of communication through information network enjoyed by copyright owners, performers, and producers of sound and video recordings...”. The provisions of Paragraph 2 of Article 18.71 of the CPTPP clearly sets forth high standards.³⁰

29 Su-Ju Kang, Convergences and Divergences of Intellectual Property-Related Provisions in the EU-Asia-Pacific Trade Partnership Agreements, *International Business Law Journal*, No. 5, 2020, p. 798.

30 Huang Gui, Prohibitive Norms and Exception Clauses of the Data Localization in RCEP, *Foundation for Law and International Affairs Review*, Vol. 3, No. 1, 2022, p. 92.

Secondly, as per Paragraph 5 of Article 18.71 of the CPTPP, the contracting member states are expected to put in place an enforcement mechanism of high standard by taking into account “the need for proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties, as well as the interests of third parties”. Such prescriptions are not found in the WTO-TRIPS system or in the intellectual property laws and regulations of the Chinese Mainland. Meanwhile, the CPTPP has very clear and specific provisions on the standards for redressal of infringement of intellectual property rights, which cover remedies, calculation of the amount of damages, bearing of litigation costs, handling of infringing goods and infringing tools and materials, statutory damages or additional damages for copyright and trademark infringement, and so on. Specifically, with respect to civil procedures and remedies, Paragraph 4 of Article 18.74 of the CPTPP and Article 24 of Chapter 15 of the Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Korea (China-Korea FTA),³¹ for the calculation of civil damages, provide that the judicial authority shall have the right to order the infringer to pay the profits attributable to the infringing activity, and in calculating such profits, it shall, in particular, take into account the lost profits of the right holder, the market price, the suggested retail price, or any other reasonable method of measurement proposed by the right holder. Article 54 of the Copyright Law of the People’s Republic of China,³² Article 63 of the Trademark Law of the People’s Republic of China,³³ and Article 71 of the Patent Law of the People’s Republic of China³⁴ propose that compensation shall either be based on the actual losses suffered by the rights holder or the infringer’s unlawful gains, and if the actual losses and the unlawful gains are difficult to calculate, compensation may be given by reference to the applicable royalties. Finally, if the actual losses of the

31 Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Korea, http://fta.mofcom.gov.cn/korea/korea_special.shtml (Last Visited on May 19, 2023).

32 The Copyright Law of the People’s Republic of China, <http://www.npc.gov.cn/npc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml> (Last Visited on May 19, 2023).

33 The Trademark Law of the People’s Republic of China, <http://www.npc.gov.cn/npc/c30834/201905/dac65eec798444e821a1e06a347f3ee.shtml> (Last Visited on May 19, 2023).

34 The Patent Law of the People’s Republic of China, <http://www.npc.gov.cn/npc/c30834/202011/82354d98e70947c09dbc5e4eeb78bdf3.shtml> (Last Visited on May 19, 2023).

rights holder, the unlawful gains of the infringer and the royalties of the right are difficult to calculate, the court shall determine an amount as statutory damages according to the circumstances of the infringement, and at the same time, for intentional infringement with serious circumstances, the court may require the infringer to pay punitive damages of more than twice and less than five times the amount determined by the above methods. Thus, the provisions on civil damages in the CPTPP and in the China-Korea FTA are not in conflict with Chinese domestic laws and, in fact, they can provide a reference point for concrete confirmation of the actual losses suffered by the rights holder and the illegal income of the infringer in the Chinese Mainland. The CPTPP also requires the member states to establish systems of either statutory damages or punitive damages or both. Both statutory damages and punitive damages have been established in the Chinese Mainland (including by way of Article 54 of the Copyright Law of the People's Republic of China and Article 63 of the Trademark Law of the People's Republic of China).

However, the judicial authorities of the member states have the right to order the alleged infringer to provide relevant information about the infringement upon the request of the rights holder, including details of the identity of the infringing party and related information, the means of production and the channels of distribution of the infringing goods, and so on. This provision differs significantly from Article 47 of the TRIPS agreement. According to the TRIPS agreement, the WTO members only “may” provide that the judicial authorities have the right to order the infringer to provide relevant information about the infringement and other activities, while the CPTPP makes it mandatory for the contracting members to enact this provision. The CPTPP also expands the scope of information to be provided by the alleged infringer, and no longer requires that the provision of information should be proportionate to the seriousness of the infringement. The CPTPP requires not only the infringer to provide information pertaining to the infringement, but also requires an alleged infringer to provide relevant information.

The civil enforcement standards have also changed a lot. Article 18.74 of the CPTPP raises the standard for infringement. On one hand, the CPTPP requires the member states to establish and maintain a system that provides for one or more of the “pre-established damages or additional damages” for “the

infringement of copyright or related rights protecting works, phonograms or performances” and for “trademarks counterfeiting”. The commentary to this provision clarifies that “additional damages may include exemplary or punitive damages”.

On the other hand, it requires that the member states’ judicial systems award “the amount stipulated in the statutory compensation is sufficient to compensate the right holder for the damage suffered by the infringement” in order to “deter” future infringements; in the case of additional damages, it has been stipulated that the contracting members’ judiciary “shall have the authority to award such additional damages as they consider appropriate, having regard to all relevant matters, including the nature of the infringing conduct and the need to deter similar infringements in the future”. Such a provision prescribes a higher standard than that of “compensation payment” as contained in Article 45 of the TRIPS agreement, or the “compensation principle” in Chinese domestic intellectual property laws and regulations and judicial practice.

It also strengthens law enforcement efforts. Paragraph 12 of Article 18.74 of the CPTPP requires the destruction of infringing goods in civil judicial proceedings “without compensation of any sort except in exceptional circumstances” and the destruction or disposal of materials and tools used in the manufacture or creation of infringing goods outside the channels of commerce without undue delay and without compensation of any sort. This penalty is more severe than the stipulation of “disposal outside the channels of commerce” contained in Article 46 (Other Remedies) of the TRIPS agreement, as well as the penalties provided for in legislations of the Chinese Mainland. According to Article 27 of the Regulations on the Customs Protection of Intellectual Property Rights of the Peoples’ Republic of China, where the confiscated goods infringing upon an intellectual property can be used for any public welfare purpose, the customs authority shall transfer them to the relevant commonweal institutions; if the intellectual property rights holder has an intent of purchase, the customs may transfer the goods to the intellectual property rights holder non-gratuitously. If the confiscated goods infringing upon an intellectual property right are unable to be used for any commonweal purposes and the intellectual property rights holder has no intent of purchase, the customs agency may lawfully auction them after the infringing features have been eliminated;

and if the infringing features are unable to be eliminated, the customs agency shall destroy such goods. Paragraph 6 of Article 18.77 of the CPTPP contains similar provisions. The relevant rules in the Chinese Mainland, the RCEP and the China-Korea FTA all provide for the destruction of tools and materials “primarily used in the manufacture” of the pirated and counterfeit trademarked goods, but the CPTPP removes the word “primarily” from this stipulation and expands the range of materials and tools that can be destroyed, thereby increasing the efforts to combat pirated and counterfeit goods.³⁵

Additionally, the border enforcement standard is something new to the Chinese Mainland. Under Article 18.76 (Special Requirements Related to Border Measures) of the CPTPP, the types of infringing goods are expanded. Paragraph 1 of Article 18.76 of the CPTPP requires that the contracting members shall “provide for applications to suspend the release of, or to detain, any suspected counterfeit or confusingly similar trademark or pirated copyright goods that are imported into the territory of the Party”. “Confusingly similar trademark” is not subject to Section 4 (Special Requirements Related to Border Measures) of Part III (Enforcement of Intellectual Property Rights) of the TRIPS agreement, and Article 51 of the TRIPS agreement only requires border measures to be applied to “counterfeit trademark or pirated copyright goods”. Moreover, the commentary to Paragraph 1 of Article 18.76 of the CPTPP only explains “counterfeit trademark goods” and “pirated copyright goods”. The types of intellectual property rights protected by border measures in the Chinese Mainland are broader than those under the CPTPP, but the scope of border measures in the China-Korea FTA is generally broader than that in the CPTPP and in the Chinese Mainland. The scope of application of intellectual property border measures in the Chinese Mainland includes trademark rights, patent rights (including inventions, utility models and designs), copyright and related rights, and two types of special marks (Olympic and World Expo marks), while the scope of application of the CPTPP intellectual property border measures includes counterfeit trademark goods, pirated goods, and confusingly similar trademark goods. The scope of application of the China-Korea FTA intellectual property border measures includes counterfeit trademark

35 Michael Blakeney, Scope of the Intellectual Property Chapter of the Trans-Pacific Partnership Agreement (TPPA), *International Trade Law and Regulation*, Vol. 21, No. 1, 2015, p. 14.

goods, pirated goods, goods infringing on patent, plant diversity, and registered designs or geographical indication rights. However, it should be noted that the border measures under the China-Korea FTA do not regulate “confusingly similar trademark goods” as stipulated in the CPTPP, while the laws of the Chinese Mainland include them in their scope of regulation.

Then, by including trans-shipment of pirated and counterfeit trademark goods within the scope of intellectual property border measures, the CPTPP intends to expand the global fight against pirated and counterfeit trademark goods.³⁶ Similarly, Article 100 of the Customs Law of the People’s Republic of China³⁷ includes trans-shipment goods within the scope of goods meant for import and export under customs supervision, and Article 44 of the Customs Law of the People’s Republic of China provides that the customs authorities may ensure protection of intellectual property rights, in relation to goods meant for import and export, according to relevant laws and regulations. It seems that the scope of application of the Chinese Mainland’s intellectual property border measures should include trans-shipment goods. However, Article 91 of the Customs Law of the People’s Republic of China only provides for the confiscation of infringing goods imported or exported, and the imposition of fines or criminal liability, while Article 2 of the Regulations on Customs Protection of Intellectual Property Rights of the People’s Republic of China specifies that the scope of customs protection for intellectual property rights only covers imported and exported goods, but not trans-shipment goods. In summary, laws of the Chinese Mainland do not actually provide for intellectual property border protection measures for trans-shipment goods.³⁸

Border measures are also delineated in more segments. Paragraph 5 of Article 18.76 of the CPTPP requires that “each Party shall provide that its competent authorities may initiate border measures *ex officio* with respect to goods under customs control”, including three types of goods therein: imported goods, goods destined for export or in transit, and goods “that are suspected of

36 Jessica C. Lai, Border Enforcement of Intellectual Property Rights: A Look at New Zealand, *International Review of Intellectual Property and Competition Law*, Vol. 50, No. 7, 2019, p. 792.

37 Customs Law of the People’s Republic of China, http://huangpu.customs.gov.cn/huangpu_customs/bgdw-bacjsfw/zcf/4660495/index.html (Last Visited on May 19, 2023).

38 Zhu Qiuyuan, Consideration of TPP/CPTPP IPR Border Protection Provisions from China’s Perspective and Corresponding Suggestions, *Electronic Intellectual Property*, No. 3, 2018, pp. 13-26.

being counterfeit trademark goods or pirated copyright goods”. This is another expansion of the scale of enforcement of Section 4 of Part III of the TRIPS agreement. The TRIPS agreement only requires border measures to be applied to imports, and Article 51 states in particular that “Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories”. According to Article 2 of the Regulations on Customs Protection of Intellectual Property Rights of the People’s Republic of China, China adopts border measures to protect “the exclusive right to use trademarks, copyrights, rights related to copyrights, and patents that are related to import and export goods and are protected by the laws and administrative regulations of the People’s Republic of China”. Although from this perspective, the border measures in the Chinese Mainland also have the qualities of “super-TRIPS intellectual property rights enforcement measures”, but on comparison, the relevant provisions of the CPTPP are of a higher standard. There are more rules in the CPTPP for determining infringement. Since Paragraph 5 of Article 18.76 of the CPTPP extends the meaning of goods that can be subjected to border measures to include “goods in transit”, logically speaking, the scope of the law applicable to the infringement of intellectual property rights in relation to the relevant goods or acts has also been expanded, i.e., the law applicable to the infringement of intellectual property rights in relation to imported goods is the law of the importing country, and the law applicable to the infringement of intellectual property rights in relation to goods exclusively for export is the law of the exporting country. The applicable law for infringement of intellectual property rights in relation to goods meant for export is the law of the exporting country, and the applicable law for infringement of intellectual property rights in relation to goods in transit is the law of the transit country. Such a stipulation is not only of a higher standard than that of the enforcement measures in the TRIPS agreement, but also more stringent than the requirements contained in some FTAs between the United States and other countries/regions.

In terms of criminal law measures, on one hand, the difference exists between the thresholds for criminalization of intellectual property rights infringement, which was also noted in the WTO case DS362. In this case, the United States initiated a WTO dispute against the Chinese government over China’s

enforcement of intellectual property rights.³⁹ The United States has learned a lesson and has adopted a very specific interpretation of the meaning of “commercial scale” in relation to the criminalization threshold contained in Article 61 of the TRIPS agreement, and the CPTPP has inherited this interpretation from the TPP by specifically interpreting the meaning of “commercial scale” of piracy as that having the purpose of commercial interests or having a significant impact on the market-related interests of copyright and related rights holders. Article 217 of the Criminal Law of the People’s Republic of China defines the crime of infringement of copyright as an act “for the purpose of making profit” and requires that the amount of illegal gains be relatively large. Therefore, the standard for criminalization of intellectual property rights infringement under the CPTPP is actually lower than that contained in the laws of the Chinese Mainland. On the other hand, the CPTPP also provides for criminal law procedures and penalties for the intentional importation and domestic use of infringing labels or packaging, while Article 215 of the Criminal Law of the People’s Republic of China separately provides for the crime of forging or making representations or selling such representations of other persons’ registered trademarks.⁴⁰ Article 18.77 of the CPTPP (Criminal Procedures and Penalties) reduces the subjective element in determining intellectual property crimes. Paragraph 1 of Article 18.77 requires member states to “provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale”. In determining the “commercial scale” element, the CPTPP does not require the presence of “commercial advantage or financial gain”. Section 5 (Criminal Procedures) of Part III (Enforcement of Intellectual Property Rights) of the TRIPS agreement does not exclude “commercial advantage or financial gain” from the meaning of “commercial scale”, and in terms of Chinese domestic

39 See *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (Last Visited on May 19, 2023). In this case, the Panel held that “commercial scale” under TRIPS agreement’s Article 61 is a typical or common commercial practice in terms of quantity or degree, and that whether it constitutes commercial scale depends on the quantity and degree of counterfeiting and piracy, which in turn depends on the specific circumstances of the market and the product. Therefore, whether criminal penalties should be imposed depends on the specific circumstances of each trademark counterfeiting or piracy case.

40 Criminal Law of the People’s Republic of China, <http://www.npc.gov.cn/npc/c30834/202012/850abff47854495e9871997bf64803b6.shtml%20> (Last Visited on May 19, 2023).

judicial practice, “financial gain” is one of the elements considered for determining intellectual property crimes in the Chinese Mainland.⁴¹

Lastly, the CPTPP increases the number and types of intellectual property crimes. Paragraph 2 of Article 18.77 of the CPTPP requires the members to “treat willful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties”. China’s domestic intellectual property crimes are mainly regulated by Section 7 (Crimes of Infringing on Intellectual Property Rights) of Chapter 3 of the Criminal Law of the People’s Republic of China (Crimes of Disrupting the Order of the Socialist Market Economy). The provisions of Paragraph 2 of Article 18.77 of the CPTPP are neither present in the WTO/TRIPS regime, nor in the domestic criminal law provisions in the Chinese Mainland. Moreover, Paragraph 5 of Article 18.77 of the CPTPP requires that the contracting members make provisions within their respective domestic legislations for “criminal liability for aiding and abetting” of offences relating to intellectual property rights created under the CPTPP. This is tantamount to an addition to the domestic laws of the contracting members.

III. SUGGESTIONS FOR CHINA’S INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT PROVISIONS IN THE NEW ERA

A. The Direction of Reform of China’s Intellectual Property Rights Enforcement Provisions

In the post-TRIPS era, the influence of the WTO-WIPO multilateral system in the process of intellectual property reconfiguration has weakened due to the standstill of multilateral negotiations on intellectual property rights.⁴² Developed countries expected the WTO dispute settlement process to address the deficiencies in the old intellectual property rights standards that lacked safeguards,

41 Zheng Xujiang, On the Dynamic Nature and Countermeasures to Criminal Protection of Intellectual Property as Shown by TPP, *Journal of Ningbo University (Liberal Arts Edition)*, No. 3, 2016, p. 107.

42 Chu Tong, Analysis of the IPR International Rules and China’s Solution under the Background of Mega-regional Trade Agreements, *International Economic and Trade Research*, No. 9, 2019, pp. 80-95.

but the outcomes have been disappointing.⁴³ The United States of America has, therefore, opted for bilateralism, using bilateral investment treaties and FTAs as the main platform to promote bilateral and regional rules in their favor.⁴⁴ Such a platform shift has contributed to a ratchet effect on the international intellectual property protection system. The ratchet effect on international intellectual property protection means that each time bilateral or multilateral standards for international intellectual property protection are set, they must not deviate from the existing standards, but still set higher standards than the existing ones, i.e., only progress should be made. This is also an important reason for the inclusion of TRIPS-plus provisions in FTAs.⁴⁵

The possession of a mature set of textual templates, or at least a relatively stable and clear paradigm style, is a sign of a country's rights of economic and trade rule-making and international discourse.⁴⁶ The Chinese Mainland has entered the era of strong protection for intellectual property rights after a new round of revision of intellectual property laws and regulations. It is clear that FTAs are a negotiation venue and an important platform for the Chinese Mainland to realize its intellectual property rights policy propositions and legal solutions.⁴⁷ In the new round of FTA negotiations, the Chinese government should no longer simply reject or passively accept the relevant TRIPS-plus intellectual property rights enforcement provisions, but should make specific and necessary proposals based on its domestic laws, and strive to formulate a new paradigm for China's FTA related intellectual property rights enforcement provisions in order to enhance China's international discourse. This paradigm construction can effectively remedy the defects of confusing arrangements of intellectual property rights enforcement provisions in China's FTAs and the lack of basic

43 For example, in the WTO case DS362, the Dispute Settlement Body for the first time interpreted some of the enforcement provisions of the TRIPS Agreement, but did not establish the "strict, uniform and high standard" of enforcement obligations envisaged by the US through the dispute decision.

44 Katrina Moberg, Private Industry's Impact on US Trade Law and International Intellectual Property Law: A Study of Post-TRIPS US Bilateral Agreements and the Capture of the USTR, *Journal of the Patent and Trade-mark Office Society*, Vol. 96, No. 2, 2014, pp. 228-256.

45 Timothy P. Trainer, Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation), *John Marshall Review of Intellectual Property Law*, Vol. 8, No. 1, 2008, pp. 47-79.

46 Liu Bin, Systematization of Intellectual Property Texts of China's Free Trade Agreements, *Global Law Review*, No. 4, 2016, p. 179.

47 Wu Handong, The Basic Orientation of Changes in Intellectual Property Law in China, *Social Sciences in China*, No. 8, 2018, pp. 108-207.

stability of important rules.

As mentioned above, intellectual property rights enforcement rules in the Chinese Mainland are scattered among the Copyright Law of the People's Republic of China, the Trademark Law of the People's Republic of China, the Patent Law of the People's Republic of China, the Criminal Law of the People's Republic of China, the Customs Law of the People's Republic of China, and other regulations. Overall, the intellectual property enforcement rules of the CPTPP are significantly stricter than those of the RCEP and the China-Korea FTA, but they are not very different from those in force in the Chinese Mainland, especially with respect to civil procedures and remedies, border measures, and criminal procedures and penalties. These differences in rules may constitute an institutional barrier to China joining the CPTPP.

B. Revision of Relevant Domestic Legislations as a Response to External Changes

Since the Chinese Mainland does not specify the intellectual property border measures for trans-shipment goods, the Chinese Mainland is bound to face pressure to amend the relevant domestic legislations in the process of joining the CPTPP. The academic community in the Chinese Mainland has many opposing views on intellectual property border measures for trans-shipment goods, arguing that intellectual property border enforcement for trans-shipment goods will restrict the free flow of goods and will likely violate the territoriality of intellectual property rights. However, as the construction of a strong intellectual property country continues to advance and the crackdown on pirated and counterfeit goods becomes increasingly severe, intellectual property border measures for trans-shipment goods are increasingly reasonable and necessary in the Chinese Mainland.⁴⁸

The concept of “goods in transit” has different meanings in different legislations and contexts. Article 100 of the Customs Law of the People's Republic of China adopts a narrow concept of “goods in transit”, distinguishing “transit goods” from “trans-shipment goods”. “Transit goods” are those which pass

48 Liu bin and Yu Xiangshan, Research on Intellectual Property Enforcement Provisions of China's Free Trade Agreement — Also Comment on the Related Challenges to China's Accession to the CPTPP, *Journal of International Law*, No. 1, 2022, p. 86.

through the territory by land, while “trans-shipment goods” are those which do not pass through the territory by land but call for a change of the means of transport at a place with a customs office. At the same time, Article 100 of the Customs Law of the People’s Republic of China also identifies goods carried into and out of the territory by the same vessel or aircraft as “through goods”. In addition, Article 100 of the Customs Law of the People’s Republic of China defines transit, trans-shipment and through goods as goods which come from a place outside the territory and pass through the territory enroute to a place outside the territory. Paragraph (f) of Article 5 of the Anti-Counterfeiting Trade Agreement (ACTA)⁴⁹ adopts a broad definition of “customs transit”, which is defined as “the customs procedure under which goods are transported under customs control from one customs office to another”. The scope of this provision covers “transit goods”, “trans-shipment goods” and “through goods” in the Chinese Mainland. In addition, the term “transit” in the ACTA includes not only transportation between customs borders, but also transportation within the same customs territory. The CPTPP does not provide for the scope of “goods in transit”, but only includes shipments within the same customs territory in the commentary to Article 18.76 for “goods in transit”. Therefore, “goods in transit” in the CPTPP is a very broad concept, and each contracting member may give it a broad or narrow interpretation according to its own domestic laws or international rules. For the sake of convenience, in this article, a broader definition of the term “goods in transit” has been adopted, similar to the ACTA.

Excessively strict intellectual property border measures for goods in transit may adversely affect the freedom of trade and also attract the suspicion of violating the principle of territoriality of intellectual property rights. Therefore, this requires intellectual property border measures for goods in transit to strike a balance between intellectual property rights protection and freedom of trade.⁵⁰ The CPTPP does not specify the scope of all that is included as “goods in transit”, leaving their specific meaning to be interpreted as per domestic laws of the member states, or as per international rules. Therefore, the rules

49 Anti-Counterfeiting Trade Agreement, <https://ustr.gov/acta> (Last Visited on May 19, 2023).

50 Vincenzo Di Cataldo, Goods in Transit and Trademark Law (and Intellectual Property Law?), *International Review of Intellectual Property and Competition Law*, Vol. 49, No. 4, 2018, p. 436.

give the members a lot of policy flexibility. Some scholars point out that the construction of intellectual property border measures for goods in transit in the Chinese Mainland can actively draw on the experience of the European Union.⁵¹ The European Union classifies goods in transit into goods for “internal transit” and “external transit”, where “internal transit” refers to the movement of the European Union goods from one point to another within the customs territory of the European Union, and “external transit” concerns the transport of non-EU goods from one point to the point of destination within the customs territory of the European Union. In the case of “internal transit”, the goods in transit have already entered the European Union market, therefore, intellectual property rights enforcement at the border is less controversial. In the case of “external transit”, the goods in transit do not necessarily enter the European Union market. Therefore, the European Union adopts the “possibility of market entry” theory to regulate external transit.⁵² The “possibility of market entry” refers to measures taken by the rights holder, or *ex officio* by customs authorities, against goods in transit where there is evidence of a “substantial possibility” of entry into the European Union market. According to statistics, from 2016 to 2019, the European Union customs border enforcement of intellectual property rights on “external transit” goods accounted for a very small percentage of all intellectual property border enforcement cases, which shows that the European Union’s “possibility of market entry” rule does not significantly affect the free flow of goods or increase the enforcement burden on customs agencies.⁵³

The United States and the European Union members handle the issue of trademark infringement on “goods in transit” differently. In the 1979 case of *A.T. Cross Co. v. Sunil Trading Corp.* (467 F.Supp.47, S.D.N.Y., 1979), the plaintiff, A.T. Cross Co., brings this action against defendants, the Sunil Trading Corporation and Narsing N. Narson, alleging trademark infringement, unfair competition and false designation of origin under the Lanham Act, 15 U.S.C. § § 1051 et seq. The plaintiff, A.T. Cross Co., is a Rhode Island corporation who

51 Wang Qian, Study on IPR Border Enforcement of Goods in Transit in Shanghai Free Trade Zone, *Oriental Law*, No. 4, 2015, pp. 37-46.

52 Wang Chunrui, EU Issues Customs Enforcement Guidance on Intellectual Property Rights for Goods in Transit, *China Customs*, No. 6, 2012, pp. 42-43.

53 *Supra* n. 49, p. 90.

has for over one hundred years manufactured Cross writing instruments. Defendant, the Sunil Trading Corporation, is a New York corporation in the business of exporting general merchandise. The individual defendant, Narsing N. Narson, is an officer and moving force behind the Sunil Trading Corporation. Although not a United States citizen, Narsing N. Narson has resided in the United States for the past six years. This case involves a highly sophisticated scheme in which bogus Cross pens, manufactured in a foreign country, were being passed through the United States by use of New York's foreign trade zone for shipment to still another foreign country for ultimate sale as genuine Cross pens "made in the USA". The American courts have held that even if goods in transit do not enter the United States market, they are subject to the United States intellectual property laws. In the case of *Ocean Garden Inc. v. Marktrade Co.* (953 F.2d 500, 1991), the American court once again reiterated the above point of view, holding that the defendant's products passed through the Los Angeles Free Trade Zone during transportation, which constituted trademark infringement. In 2003, the European Union issued Regulation No. 1383/2003 on customs actions and measures for products suspected of violating and infringing intellectual property rights, which stipulates that goods passing through the European Union customs border, regardless of whether they are stored, loaded and unloaded in the European Union customs territory, and regardless of whether the mode of transportation is changed, can be considered as goods passing through the customs territory of the European Union as long as the origin of the goods is outside the customs territory of the European Union, and the customs agencies of the European Union member states can enforce the law if and when they suspect infringement.⁵⁴

However, the treatment by each of the member states is not completely the same. Belgium and the Netherlands adopt the theory of virtual manufacturing and believe that transit goods can be suspected of infringement and can be seized. In contrast, the British courts have held that there is no right to take measures against goods without evidence that they may be placed on the European Union market. In this regard, the European Court of Justice responded that the theory and law of virtual manufacturing have no basis, and the obligee

54 Wu Zhiyong and Yuan Tian, New Developments in IPR Protection under CPTPP/TPP Agreement and Responses, <https://www.ccpit-fta.com/3d7e7253c1355a6d5b8a2ef018c380da.html> (Last Visited on May 19, 2023).

must prove that the batch of goods may enter the European Union market.

For China, first of all, the concepts of “transit”, “trans-shipment” and “through” goods in Article 100 of the Customs Law of the People’s Republic of China are similar to the concept of “external transit” in the European Union. Therefore, on the one hand, the Chinese Mainland may refer to the CPTPP and the European Union rules to include transit, trans-shipment and through of counterfeit trademark and pirated goods in the scope of application of intellectual property border measures; on the other hand, the application and *ex officio* initiation of intellectual property border enforcement procedures for goods in transit must be accompanied by the proof that the goods in question have a “substantial possibility of entering China’s market”, thus balancing the conflict between intellectual property rights protection and free trade.

Secondly, the customs agencies in the pilot free trade zones and the special customs supervision zones should be granted the necessary enforcement authority for the supervision of goods in transit, otherwise the intellectual property border measures for goods in transit will be null and void. At present, the laws and regulations of the Chinese Mainland do not provide for the enforcement authority of the customs agencies in the pilot free trade zone and the special customs supervision zones for intellectual property border measures. At the same time, the State Council of the People’s Republic of China and its ministries often refer to the pilot free trade zone as “inside territory and outside customs”, but from the perspective of the Customs Law of the People’s Republic of China, the pilot free trade zone is not “inside territory and outside customs”. The meaning of “inside territory and outside customs” is only for the purpose of exemption of customs duties and convenient customs clearance procedures.⁵⁵ This will lead to the proliferation of intellectual property rights infringement in these areas due to the lack of customs supervision.⁵⁶ It should be noted that the China-Korea FTA has included goods stored in bonded warehouses and free trade pilot zones within the scope of application of intellectual property border measures which, to a certain extent, recognizes that the

55 Zhu Qiuyuan, A Comparative Study on the Regulation of Intellectual Property Rights Infringement at the Border in Special Zones: Refuting the Misconception that Special Supervision Zones Are Inside Territory and Outside Customs, *Journal of Shanghai Customs College*, No. 4, 2012, p. 63.

56 Yang Hong, Special Issues in IP Customs Enforcement in Pilot FTZs and the Improvement of Relevant Institutions in China, *Global Law Review*, No. 2, 2019, pp. 161-175.

geographical scope of customs intellectual property border enforcement measures should include pilot free trade zones and special customs supervision zones. Therefore, the Chinese Mainland should further clarify and provide for the enforcement authority of customs agencies in the Customs Law of the People's Republic of China and the Regulations on the Customs Protection of Intellectual Property Rights of the People's Republic of China.

In terms of the jurisdiction and application of law, the 21 pilot free trade zones in the Chinese Mainland are areas established in accordance with domestic law, which are part of China's territory and still fall under Beijing's judicial sovereignty. Most aspects of the domestic legal system still apply in the 21 pilot free trade zones.⁵⁷ As far as the judgment of whether goods in transit constitute trademark infringement or not is concerned, it involves the inquiry as to whether or not the use of trademarks is only for the goods or services in the field of circulation, or does it also cover the production, transportation, and storage of goods. Fundamentally, the level of trademark protection in the 21 pilot free trade zones should be based on China's basic national conditions and, while abiding by international treaties and considering foreign cases, a comprehensive assessment should be made regarding the level of China's economic development and national economic interests. When trying a specific case, it is not appropriate to mechanically apply a high standard of protection; instead, each case should be judged in the context of its own unique situation. Only when there is sufficient evidence to prove that the transit goods in the free trade zone have the possibility of finally entering the Chinese market, can it be determined whether or not they constitute a trademark infringement. For other situations of transit of goods other than this one, trademark infringement should not be determined across the board, but should be based on the circumstances of each case and given full play to discretion to make a reasonable judgment.⁵⁸

In addition, customs administrative enforcement of intellectual property rights is closely related to the judicial administration of goods in transit. Articles 23 and 36 of the Customs Law of the People's Republic of China clearly stipulate that transit goods are subject to the supervision of China's customs

⁵⁷ *Supra* n. 55.

⁵⁸ *Supra* n. 52, p. 39.

agencies and can be inspected when necessary. However, the Regulations on the Customs Protection of Intellectual Property Rights of the Peoples' Republic of China only limit the scope of protection of the intellectual property rights over import and export goods but do not include the intellectual property issues related to transit goods. In view of the fact that the CPTPP includes "transit goods" within the scope of regulation, it can be considered to include the intellectual property rights in relation to the transit goods that do have the possibility of entering China's domestic market within the scope of application of the customs protection measures stipulated in the Regulations on the Customs Protection of Intellectual Property Rights of the Peoples' Republic of China, so as to grant China's customs agencies the authority to conditionally implement measures for the protection of intellectual property rights over goods in transit.⁵⁹

C. Full Use of Sovereignty for the Implementation of Intellectual Property Rights Enforcement Provisions of the CPTPP

Not all the differences in rules between the CPTPP and China's domestic laws will result in pressure to amend laws and regulations in the Chinese Mainland, and some of the differences can be overcome by exercise of the discretionary power given to the members under the CPTPP.⁶⁰

Article 18.74 and Article 18.75 of the CPTPP on provisional measures and border measures give more discretion to the law enforcement agencies of member states. Article 18.75 especially strengthens the enforcement of intellectual property rights by the customs authorities. However, since the protection standards of the Regulations on the Customs Protection of Intellectual Property Rights of the Peoples' Republic of China have already exceeded those of the WTO-TRIPS regime, all that is necessary is to fine-tune the application of the Regulations by referring to the provisions of the CPTPP so as to better integrate with it. For example, when amending the Regulations on the Customs Protection of Intellectual Property Rights of the Peoples' Republic of China, in light of Paragraph 3 of Article 18.76 of the CPTPP, the obligee is allowed to

⁵⁹ *Supra* n. 55.

⁶⁰ Qu xiangdong, Research on Vietnam Law Amendments under CPTPP Intellectual Property Rules and Its Enlightenment to China, *Wuhan University International Law Review*, No. 3, 2022, pp. 143-156.

supply guarantees of equal value, in various forms, including guarantees for customs protection cases nationwide for a period of time. Thus, when the customs agencies provide protection for the registered intellectual property rights *ex officio*, it is no longer necessary to require the obligee to submit a case application and guarantee within 3 working days after the delivery of the written notice from the customs office to suspend the release of the goods, which can reduce the procedural burden of the obligee.⁶¹

The CPTPP provides domestic jurisdictions with the authority to order the destruction of tools and materials that “have been used” in the manufacture of pirated and counterfeit trademarked goods, while Article 63 of the Trademark Law of the People’s Republic of China and Article 53 of the Copyright Law of the People’s Republic of China provide that the court may order the destruction of materials and tools that have been “primarily used” in the manufacture of pirated and counterfeit trademarked goods. However, in practice, both the “primarily used” and “have been used” standards need to be determined by the judicial authorities on a case-by-case basis. According to the Chinese scholars,⁶² as of September 1, 2021, there were 43 cases involving Paragraph 4 of Article 63 of the Trademark Law of the People’s Republic of China, of which only in the “Dispute over Trademark Rights of Jingtian Company” and in the “Dispute over Trademark Rights of Shantu Liquor Company” did the court order the defendants to destroy the infringing products and the molds used to produce the infringing products. In most of the other cases, either the parties involved did not ask for the destruction of the tools and materials used to manufacture the infringing goods, or the court did not support the claim.⁶³ Therefore, there is a lack of relevant cases in the judicial practice of the Chinese Mainland regarding the determination of the scope of this destruction. However, on August 13, 2020, the Office of the National Leading Group on the Fight against IPR Infringement and Counterfeiting, together with the Supreme People’s Court of the People’s Republic of China, the Supreme People’s Procuratorate of the People’s Republic of China and eight other departments, jointly

61 Guan Yuying, CPTPP Intellectual Property Provisions and the Response of Chinese Legal System, *Law Science Magazine*, No. 2, 2022, p. 106.

62 *Supra* n. 49, p. 91.

63 Tianjin First Intermediate People’s Court, (2020) Jin 01 Min Chu No. 900 Civil Judgment, Xiamen City Huli District People’s Court, Fujian Province, (2019) Min 0206 Min Chu No. 8558 Civil Judgment.

issued the Opinions on Strengthening the Destruction of Infringing and Counterfeit Goods.⁶⁴ The document stipulates that the execution subject of destruction shall be administrative law enforcement and judicial case handling units at or above the county level, and specifies the scope of destruction, namely, counterfeit registered trademarks, illegally manufactured registered trademarks, infringing copies of copyrighted materials and instruments, molds and other tools mainly used for manufacturing counterfeit registered trademarks, and other infringing and counterfeit goods that shall be destroyed according to law. This scope of destruction is actually a refinement of Article 60 and Article 63 of the Trademark Law of the People's Republic of China, as well as Article 53 and Article 54 of the Copyright Law of the People's Republic of China, which helps administrative law enforcement and judicial case handling units to clarify the scope of goods, tools and materials that can be destroyed in practice.⁶⁵

From the perspective of textual interpretation, the scope of the phrase “have been used” is broader than that of “primarily used”, but the scope of destruction of materials and tools “primarily used” in the manufacture of infringing goods as specified in the Opinions on Strengthening the Destruction of Infringing and Counterfeit Goods basically covers most of the materials and tools in the manufacturing process of infringing goods; so, in practice, “primarily used” and “have been used” do not differ greatly. At the same time, since the CPTPP gives the members certain discretionary powers, the members can determine for themselves the scope of the tools and materials that “have been used” and that have been “primarily used” in the manufacture of pirated and counterfeit trademark goods in accordance with the features of their respective judicial systems. Therefore, the differences in the rules on the scope of destruction will, basically, not hinder China's accession to the CPTPP.

The CPTPP's regulations on criminal procedures and punishment measures are the most stringent part of the entire chapter on intellectual property, which significantly improves the international standards of protection for intellectual property rights by lowering the threshold for criminalization. Criminal penalties are not only aimed at criminal acts of infringement of copyright and

64 Opinions on Strengthening the Destruction of Infringing and Counterfeit Goods, https://www.gov.cn/jzhengce/zhengceku/2020-08/22/content_5536677.htm (Last Visited on May 19, 2023).

65 *Supra* n. 48, p. 92.

related rights, trademark rights and rights to trade secrets, but also against acts of destruction of technological protection measures and information rights management. With respect to the criminalization thresholds, in the field of copyright and related rights, as mentioned earlier, the CPTPP specifically divides the “commercial scale” of the criminalization of piracy into acts committed for the purpose of commercial interests and acts not committed for the purpose of commercial interests. Article 217 of the Criminal Law of the People’s Republic of China stipulates that the crime of copyright infringement requires “the purpose of making profit” as an element and a motive and “the amount of illegal gains” should be “relatively large or huge”. However, the CPTPP does not specify the standard for the interpretation of “substantial prejudicial impact”, but only provides in Footnote No. 127 that “a Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace”. Thus, it can be seen that the CPTPP gives the members certain discretionary powers on this issue. Further, in the WTO case DS362, the panel held that whether or not an infringement has occurred on a “commercial scale” under Article 61 of the TRIPS agreement depends on the amount and extent of counterfeiting and piracy, which is either large or small depending on the market and the product. Therefore, the provisions of Article 61 of the TRIPS agreement on the meaning of commercial scale and penalties are uncertain, and whether or not to impose criminal penalties depends on the specific circumstances of the different instances of trademark counterfeiting or piracy, which requires a certain degree of discretion on the part of the judicial bodies of the members. The CPTPP, although the meaning of “commercial scale” has been further interpreted in the TRIPS agreement, still follows the interpretation of the Panel in the above-mentioned WTO case DS362 in determining the threshold for criminalization in trademark counterfeiting and piracy cases, and gives the judicial authorities of the contracting members the power to make determinations in specific cases.

The text of the treaties shows that the intellectual property rights enforcement provisions of both the CPTPP and the TRIPS agreement adopt a model whereby “the judicial authorities of the contracting members shall have the authority to take certain actions or issue certain orders” to regulate, without

setting down when such authority ought to be exercised or what limits a state must or could place on the exercise of such authority.⁶⁶ To sum up, in view of the discretionary power granted by the CPTPP to the contracting members, the courts of the contracting members can explain “significant adverse effects on the market interests of the right holders” in judicial practice, so as to interpret the criminal measures clauses of the CPTPP in their own favor.⁶⁷ In the negotiation process of China seeking to join the CPTPP, it is possible to take a more open-minded view of the impact of the CPTPP’s raising of the threshold for criminalizing intellectual property rights infringement.

By way of Article 18.78, the CPTPP includes the infringement of rights to trade secrets within the scope of criminal liability, and lists the circumstances that should be subject to criminal punishment, including infringements in the form of computer intrusion. When China revised the Anti-unfair Competition Law of the People’s Republic of China in 2019, electronic intrusion was clearly defined as an act of infringement of rights over trade secrets. Article 219 of the revised Criminal Law of the People’s Republic of China that was implemented in 2021 also makes provisions for various serious crimes, including electronic intrusion. Commercial secrets infringement should be subject to criminal punishment, and there is an additional flexible discretionary condition of “serious circumstances” in the ingredients of the offences. At the same time, certain sentences were newly added to the revised Criminal Law of the People’s Republic of China, which provide for the imposition of criminal penalties on acts of “stealing, spying on, buying, or illegally providing commercial secrets for overseas institutions, organizations, or personnel”. This provision expands the scope of foreign jurisdictions for the protection of trade secrets in the Chinese Mainland, which is consistent with the non-mandatory requirements of the CPTPP.⁶⁸

In terms of the criminal liability for infringing labels and packaging, the CPTPP requires the members to include in the application of criminal measures the intentional importation and domestic use, on a commercial scale, of

66 Kimberlee Weatherall, Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties, *American University International Law Review*, Vol. 32, No. 1, 2016, pp. 232-233.

67 Haik Gasparyan, The TPP and Beyond: The Vital Role of Judicial Discretion in the Enforcement of International Copyright Rules, *Southwestern Journal of International Law*, Vol. 23, No. 2, 2017, p. 327.

68 *Supra* n. 61, pp. 107-108.

labels and packaging bearing unauthorized trademarks in the course of trade. The Footnote No. 129 of the CPTPP specifically interprets the phrase “wilful importation”, in Paragraph 3 of Article 18.77 of the CPTPP, of infringing labels or packaging. This is a provision of the CPTPP that is likely to have a negative impact on China’s foreign-related custom processing industry, while the Criminal Law of the People’s Republic of China still lacks provisions for similar crimes. In 2020, China adopted Amendment XI of the Criminal Law of the People’s Republic of China.⁶⁹ It provides for the crime of illegally manufacturing or selling copies of registered trademarks (Article 215 of the Criminal Law of the People’s Republic of China), which is not strictly equivalent to the abovementioned requirements of the CPTPP, although it is somewhat related.

However, the CPTPP does not give a specific interpretation of the phrase “domestic use”, and the specific meaning of “domestic use” is left to each contracting party to clarify over the course of judicial practice. Original equipment manufacturer, also known for “foreign label processing”, refers to the domestic processing party accepting the commission of the foreign commissioner, processing the products and attaching the trademark according to the requirements of the foreign commissioner, and delivering all the products to the foreign commissioner for selling them abroad, and the overseas consignor pays the processing fee to the domestic processing party. In the judicial practice of the Chinese Mainland, the cases of “Original Equipment Manufacturer” often involve the determination of “domestic use”, but the courts in the Chinese Mainland have long been divided on this issue. In the 2009 Shanghai High People’s Court case of “JOLIDA” mark, the Shanghai High People’s Court held that the trademark used by JOLIDA was a legal trademark of JOLIDA in the United States and all of its products were exported to the United States. Therefore, the products in question did not play a role in the process of identifying the source of the goods in the domestic market and in determining whether or not they would cause confusion and misunderstanding among the domestic consumers, thereby constituting infringement.⁷⁰ Subsequently, on July 1, 2010, the General Office of the Supreme People’s Court responded to the General

69 Amendment XI of the Criminal Law of the People’s Republic of China, <https://www.npc.gov.cn/npc/c30834/202012/850abff47854495e9871997bf64803b6.shtml> (Last Visited on May 19, 2023).

70 Shanghai High People’s Court (2009) Final Judgment No. 65.

Administration of Customs, which clarified that the export products of Original Equipment Manufacturer (OEM) did not constitute infringement. In the 2015 Supreme People's Court of the People's Republic of China guiding case "PRETUL", the Supreme People's Court of the People's Republic of China made it clear that the products of foreign-related custom processing are not sold in China's market, that is, they will not play a role in determining trademark in the Chinese Mainland, and the behavior of the entrusted processing party attaching the logo is not the "use" in the sense of trademark law.⁷¹ In the 2017 "DONGFENG" case, the Supreme People's Court of the People's Republic of China adopted the same view as in the "PRETUL" case, holding that foreign-licensed processing does not constitute "use" within the meaning of trademark law. At the same time, the "DONGFENG" case is more notable for clarifying the "duty of reasonable care" of the foreign licensee.⁷² However, in the 2019 "HONDA" case, the Supreme People's Court of the People's Republic of China changed its decade-old view and held that the act of "trademark use" is an objective act and should be interpreted consistently, as a whole, according to the Trademark Law of the People's Republic of China, regardless of whether the product is sold and circulated in China; as long as it has the possibility of showing the source of the goods, it should be considered as a "use" in the sense of trademark law. Furthermore, the Supreme People's Court of the People's Republic of China also pointed out that "likely to cause confusion" under the Trademark Law of the People's Republic of China does not imply that confusion has actually occurred, but merely refers to the possibility of confusion being caused in the minds of people.⁷³

It can, thus, be seen from the above cases that, firstly, the Supreme People's Court of the People's Republic of China's determination of "trademark use" in cases of foreign-labeled processing has evolved with economic development of the nation, from the initial restrictive interpretation that foreign-labeled processing does not constitute "use" under trademark rules, to the subsequent broad interpretation that flexibly determines on a case-by-case basis whether foreign-labeled processing has the ability to point out the origin of

71 Supreme People's Court (2014) No. 38 Civil Judgment.

72 Supreme People's Court (2016) No. 339 Civil Judgment.

73 Supreme People's Court (2019) No. 138 Civil Judgment.

goods. Foreign-labeled processing trade is a significant mode of foreign trade in the Chinese Mainland. However, in judicial practice, a certain mode of trade cannot be simply and definitively considered as an exception to the infringement of trademark rights, otherwise, it will also violate the basic rule of trademark infringement cases of going by the unique facts of individual cases.⁷⁴ Secondly, the Supreme People's Court of the People's Republic of China in the "DONGFENG" case clarified that trademark infringement requires the infringer to have failed to exercise "reasonable care". However, in the "PRETUL" and "HONDA" cases, the Supreme People's Court of the People's Republic of China's did not mention this lapse in duty. With regard to the "duty of reasonable care", Article 1165 of the Civil Code of the People's Republic of China⁷⁵ states that "an actor who through his fault infringes upon another person's civil-law rights and interests shall bear tort liability", implying that the actor must exercise due care and caution, pay attention to others, and try to avoid the occurrence of the result. The exercise of the "duty of reasonable care" should be regarded as a test for determination of fault. At the same time, trademark infringement belongs to the category of civil wrongs, and the elements of civil infringement usually include behavior, details of damage caused, causal relationship, and subjective fault. Therefore, in assessing the subjective fault of the entrusted party, i.e., in assessing whether an instance of international contract processing is an infringement of trademark rights, what should be considered is whether or not the party took "reasonable care". Meanwhile, Footnote No. 130 of Article 18.77 of the CPTPP mentions that in determining criminal liability for "wilful importation" or "domestic use" of infringing labels or packaging, the contracting members may take into account the "attempts to commit a trademark offence". To a certain extent, this provision also regards trademark infringement as a "subjective fault", rather than an instance of no-fault liability.

Therefore, this article agrees with the view of domestic scholars in determining whether foreign-licensed processing constitutes "use" in the sense of trademark law in each case, instead of excluding it from the process of

74 Zhang Taolue and Yin Xiaolu, Determination of Trademark Infringement Liability of OEM Trustees: A Reflection on OEM-related Judicial Decisions in China, *International Business Research*, No. 2, 2020, pp. 65-77.

75 Civil Code of the People's Republic of China, <https://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml> (Last Visited on May 19, 2023).

determination of trademark infringement in a broad-brush manner. In addition, “the duty of reasonable care” should be incorporated into the process of determination of the constitutive elements of trademark infringement in the case of contract processing, i.e., in determining whether the trustee of contract processing has examined the legal rights of the principal, and whether the trustee is subjectively at fault, and then in determining whether or not it constitutes infringement. The “duty of reasonable care” is in essence a restriction on the broad interpretation of “trademark use” in foreign-related contract processing cases, as well as a balance between the interests of the trademark owner and the interests of the trustee of foreign-related contract processing. Finally, although the lack of uniformity in the application of the law in cases involving foreign-branded processing does prevent Chinese Mainland from joining the CPTPP, the existing rules of the CPTPP can provide guidance for the manner of implementation of the law in cases involving foreign-branded processing in the Chinese Mainland.⁷⁶

IV. CONCLUSION

The CPTPP has been successfully applied to a new generation of trade and investment policies centered on regulatory integration. Although the RCEP is becoming more and more comprehensive, it is still a traditional free trade agreement. It is a fact that the CPTPP is not comparable to the TPP in terms of economic scale, trade size and international investment without the United States as its member. Without the participation of the world’s largest economy, the CPTPP has less influence on the global economy than it could have had. Still, the CPTPP is based on the improvements to the TPP’s “new generation of trade rules” and retains the majority of the TPP’s original wording and high-standards for a regional trade agreement.⁷⁷ The CPTPP is meant to improve the level of intellectual property rights protection through stricter laws and better enforcement. For example, each party is required to initiate border measures for goods under customs supervision, including goods imported, ready to be

⁷⁶ *Supra* n. 49, p. 96.

⁷⁷ Zhang Sichen, On CPTPP’s Impacts, Prospects and China’s Choices under the New Situation, *Northeast Asia Economic Research*, No. 2, 2021, p. 77.

exported, as well as goods in transit that are suspected of being counterfeit trademark goods or pirated goods.

The establishment of the RCEP indicates significant progress on the Asian path, although this progress is not along the original Asian path. At the same time, this development does not imply that China has taken the lead in the development of the Asia-Pacific Free Trade Area, but it does demonstrate that the United States was not wise to have withdrawn from the TPP. Therefore, a return to the CPTPP is in the strategic interest of the United States. Once the United States returns to the CPTPP fold, the Asia-Pacific region will re-create the competition between the US-led path and the China-led path. So, until the United States joins as a member, China's membership in the CPTPP can be a strategic move, depending on how far China adopts and implements the CPTPP rules and how willing the other CPTPP members are to do the same. The CPTPP, after all, is more liberalized than the RCEP.⁷⁸

At the same time, as the construction of a strong intellectual property country continues to advance, China should overcome its inherent resistance to high-standard international intellectual property rules and analyze the reasonableness and feasibility of these high-standard rules in the context of its own national conditions and its domestic intellectual property legal system. If China seeks to join the CPTPP, the aspect of the intellectual property rights enforcement system will basically not pose an obstacle as long as it is handled properly.⁷⁹

78 Cheng Dazhong, Wang Ning and Zhen Yang, China's Participation in the RCEP: Basis, Rules, Prospects, *Academic Monthly*, No. 3, 2021, p. 47.

79 Fan Ying, Characteristics, Influence of CPTPP and China's Countermeasures, *Contemporary World*, Vol. 38, No. 9, 2018, pp. 8-12.