

## ACTA and the Destabilization of TRIPS

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### Abstract:

A significant divide has developed between the large portion of the WTO membership which sees little or no benefit from the TRIPS undertakings and the small number of advanced economy members who seek ever greater IP standards. This chasm – between those who now judge TRIPS to be overreaching and those who find TRIPS to be inadequate – raises doubt as to whether a TRIPS consensus continues to exist. Our story is one of two regrets: that TRIPS did not go far enough, that TRIPS went too far. In particular, the call for more IP protection, known as ‘TRIPS Plus’, has led to even greater fragmentation of the global intellectual property system. To ask for more, when the other side wishes to offer less, is a path to a potential breakdown. By pursuing TRIPS Plus, through new free trade agreements, and in particular through the negotiation and implementation of the 2010 Anti-Counterfeiting Trade Agreement (ACTA) is to risk losing the moral force behind TRIPS. ACTA is a critique of TRIPS - its very core signals a diagnosis that TRIPS inadequately addressed the problem of IP enforcement. After ACTA, one cannot read TRIPS as expressing the common understanding of the world community as to the minimum standard of IP protection. ACTA formalizes a rift between the developed world and many other countries (it is these non-signatory countries where 'counterfeiting' and 'piracy' are perceived to be most prevalent). With ACTA, the developed world (led by the United States) is playing a high-stakes game. It seeks to destabilize TRIPS in order to induce movement. But in so doing, it also necessarily undercuts the prestige, normative pull, and - perhaps - legitimacy of TRIPS. For if one group of WTO members distance themselves from TRIPS (due to its asserted ineffectiveness or obsolescence), so too might another group. **Ironically, what all these countries might share is a judgment that TRIPS is failing - though of course their respective prescriptions for reform would differ.** ACTA may prove strangely counterproductive. Instead of achieving higher IP standards, it may lead to an increasingly resented, and hence less effective, observation of TRIPS.

### 1. From TRIPS to TRIPS Plus

#### 1.1 The Unravelling of the Grand Bargain

... **The Grand Bargain refers to the central set of commitments made by the founding WTO membership that led to the incorporation of TRIPS into the international trade system.** Had TRIPS been presented as a stand-alone treaty, it would have been unlikely that any but a small group of countries would have undertaken its obligations. The globalization of intellectual property standards greatly favours the small number of countries which host ownership of the greater part of valuable intellectual property. Most countries have few owners of internationally valued intellectual property (IP); for these countries (both poor and mid-level countries) intellectual property recognition creates obligations to make significant outbound wealth transfers. Only a few countries are net recipients of royalties. Unlike trade in goods which in theory benefits all participating parties, the recognition of IP rights benefits a discrete few. As a matter of economic self-interest, most countries would prefer a weak, if non-existent national intellectual property regime.

The promoters of TRIPS (chiefly the United States and Europe) were able to persuade the greater part of the WTO community to accept minimum standards of intellectual property protection by offering market access in other sectors, notably agriculture and textiles. **This linkage, between recognition of IP rights and access to markets for developing world products, a peculiar result of the Uruguay Round, constitutes the Grand Bargain.**

At a decade and a half of distance from the foundation of the WTO, many WTO members have come to regret the making of the Grand Bargain. **On the one hand, a strident block of anti-IP countries, led by Brazil and India, oppose any expansion of IP obligations at the global level and consistently urge minimizing interpretations of TRIPS commitments within WTO dispute settlement.** Further, effective market access in the newly covered sectors (agriculture and textiles) have disappointed the developing block. With little realized benefits, the mandates of IP recognition (and the costs and headaches associated with IP enforcement) are presently seen as an even greater burden on the larger WTO membership.

**On the other hand, the knowledge economy country block, led by the United States, Europe and Japan, are pushing for greater IP protection than is required by TRIPS, with an emphasis on IP enforcement, in various international settings. The dissatisfaction felt by advanced countries is that TRIPS did not go far enough.** Between these two species of regret, it is clear there would be no Grand Bargain reached today; that is, there would be no global consensus reached to erect TRIPS.

**While TRIPS extended basic IP protection throughout the WTO area, it has - in the view of the United States, Europe and Japan - largely failed to bring about meaningful protection for rights holders from the scourge of counterfeiters and other unauthorized users.**<sup>2</sup> TRIPS was certainly a step in the right direction, the advanced economies believe, as all WTO members were required to provide basic IP rights. Post-TRIPS experience has shown, however, a large enforcement gap. **The increase in international trade facilitated by the construction and the expansion of the WTO regime (including the important accession of China to the WTO) has been accompanied by growth in IP piracy.** In the absence of meaningful enforcement of the rights established by TRIPS, the TRIPS achievements seem illusory.

... 1.2 Regime Shift Redux

The WTO structure, which provided for the triumphant extension of basic IP coverage throughout most of the globe, has become an increasingly unreceptive site for any expansionist IP agenda.<sup>5</sup> This is partly due to disappointment perceived by the larger part of the WTO membership (that is, the WTO's less developed members) with the implementation of the Grand Bargain.<sup>6</sup> The unhappiness due to the non-achievement of sought-for market access is a political fact that has increased the general hostility felt by much of the world to the recognition of IP rights.

Further, experience under TRIPS has brought forward the under-addressed resources question: from the time of the TRIPS negotiation it had never been clear how an effective level of IP enforcement was to be funded in many poorer countries. TRIPS constitutes an unfunded mandate for IP enforcement. While TRIPS calls for the provision of technical assistance (in Article 677), it leaves funding to each member's own resources. Here too is a potential collision: any call for greater IP enforcement inevitably further strains the administrative resources of most countries with little or no compensating capture of value, as most of this gain passes to foreign interests. As Chow has noted, counterfeiters can be powerfully connected – and are inevitably local.<sup>8</sup> Their economic gains largely remain within national confines.

... **The United States made a strategic decision to largely abandon the WTO as the chief site for effecting its expansive IP ambitions - engaging in what Laurence Helfer might recognize as a further 'regime shift'.<sup>9</sup>** Rather, the United States has sought to incrementally bind various countries to IP commitments that exceed the TRIPS minimum standards (that is, TRIPS Plus) in various bilateral trade agreements, beginning with the United States - Australia free trade agreement.<sup>10</sup>

The trajectory of regime shifts is worth noting. **Helfer describes the shift from the UN-based WIPO institution, where developing world concerns about IP are given weight, to the newly minted WTO, where IP burdens were to be compensated by valued concessions in other areas.** After the two-sided disappointments with TRIPS (failure to realize anticipated market access gains by the developing world and the enforcement gap perceived by the advanced economies), the WTO/TRIPS field is no longer promising. For the IP expansionists the new institutional horizon for pursuing TRIPS Plus includes bilateral agreements as well as regional and plurilateral structures.

The United States-Australia Free Trade Agreement is generally considered to be the first exercise in the US pursuit of TRIPS Plus...

### ...1.3 The Road to ACTA

Having achieved some success in persuading various trading partners to accede to enhanced IP enforcement, the United States, together with Japan, launched the Anti-Counterfeiting Trade Agreement (ACTA).<sup>12</sup> The initial impetus for ACTA came with a 2005 anti-counterfeiting proposal by Japan closely followed by a similar proposal from the United States, to which the European Union joined, in October 2007.<sup>13</sup> ACTA was the first plurilateral<sup>14</sup> (as opposed to bilateral) effort to expand the range of TRIPS Plus coverage.<sup>15</sup> The choice of the initial state parties (that is, the founding ACTA negotiating parties) was critical: these were by-and-large 'like-minded' states; states which hosted significant stocks of IP. Japan was the original partner in the ACTA initiative; thereafter the European Union, Japan, Canada, Switzerland, and Korea joined the negotiations.

The ACTA negotiations concluded in December 2010 and it is, as of this writing, open for signature. ACTA represents a deliberate 'regime shift' away from the WTO structure (which houses TRIPS).<sup>16</sup> **Clearly, expanding intellectual property protections is not in the pro-development spirit of the current Doha Round of WTO talks. It is not - and likely could not become - part of the agenda to be considered by the WTO membership within the Doha Round. Any negotiations within the WTO would necessarily involve substantial representation from the newly industrialized, developing and less-developed blocks, and hence significant push-back against expansion of intellectual property rights.** The like-mindedness that can be found in a smaller, club-like setting may favour the formation of substantively more attractive (and ambitious) IP norms than might result in a more cosmopolitan setting.

The removal of the latest phase of global intellectual property law-making from the WTO results in part from a determination to provide for faster tracking than a WTO process could provide. It also involves (with some risk) a de-linking of intellectual property concerns from other issues within the WTO remit. **And it provides splendid isolation from the inconvenient presence of the many WTO members who have been consistently critical of TRIPS, including one economic superpower (China) where enforcement of intellectual property protection is generally perceived to be deficient.**

**Perhaps more telling than the list of those 'like-minded' states participating in ACTA negotiations are the identities of the powerful states (within the WTO) that were excluded from the ACTA process: Brazil, India, and China. There are, of course, significant concerns expressed about counterfeiting and piracy in all these states.<sup>17</sup>**

**17 See e.g. Lawrence A. Kogan, 'Brazil's IP Opportunism Threatens U.S. Private Property Rights', 38 *U Miami Inter-Am L Rev* 1, 7-8 (Fall 2006),** European Commission's annual report on EU Customs Enforcement of Intellectual Property Rights, 'Results at the Border 2009', (22 July 2010) (EU 2009-2010 Customs Action Plan) ('Overall, China continued to be the main source country from where goods suspected of infringing an IPR were sent to the EU (64% of the total amount of articles).') Executive Summary p. 2. <[http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/counterfeit\\_piracy/statistics/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/index_en.htm)>., USTR 'Special Section 301 Report' (30 April 2010), pp. 9-12 Executive Summary, Section I Trends in Counterfeiting and Piracy, Internet and Digital Piracy (Counterfeit goods and internet piracy originating in BRIC countries).

The objectives of the United States in the ACTA negotiations were fairly well-defined. ACTA, in the view of the United States, was not to be a forum for the enlargement of additional substantive intellectual property rights intended to become subject to international mandates. ACTA's sole focus should have been the establishment of effective enforcement standards for the set of rights mandated by TRIPS and other international instruments.