TRIPS, Strategic Competition and Global Welfare:
IP at the Intersection of Law and Power

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Introduction

- Establishment of the WTO, including the TRIPS Agreement, was an alternative and reaction to the NIEO demands of developing countries from the late 1960s
  - TRIPS Agreement was largely based on demands from the United States, Europe and Japan regarding strengthened IP protections in developing countries
  - TRIPS Agreement made only cursory reference to transfer of technology
- China joined the WTO in 2001and has “emerged” as a major economic power
- No longer a neat division between developed/industrialized (HICs) and developing countries (LMICs)

Introduction

- As of late 2019 the world economic system has been devolving toward nationalism (long-lasting or transitory?)
  - Fragmentation of the global economy is not a good thing
- China's successful economic and technological transformation did not depend on "following the rules" of the WTO system, nor did it depend on flouting those rules.
  - China succeeded because of its characteristics as a country and its economic circumstances. China developed a sophisticated technological development plan to take advantage of its characteristics
- Foreseeable that China's entry in 2001 would make the WTO a less comfortable place for US, EU, Japan
  - Eventual need for readjustment also foreseeable

Technology and Development: China

- Historical factors
  - Large population, offering a substantial labor pool that in its earlier developmental phase was available at relatively low wages
  - Strong central government
  - Started development path with a weak IP system, allowed leapfrogging
  - Culture highly values education and science
  - 2001 WTO terms facilitated access to foreign markets, while allowing protection of domestic market during a transition
  - Initial tolerance of environmental harm

Technology and Development: China

- Later day China
  - Large population has transitioned to attractive consumer market
  - Chinese firms tightly integrated in global supply chains
  - Private enterprise encouraged to a certain degree
  - IP protection significantly strengthened and enforcement likewise improved
  - Foreign direct investment, particularly involving technology transfer, encouraged
  - Government has engaged in detailed planning for achieving leadership in key technology areas
  - Economic and military power is adequate to resist pressures from third country governments
  - Environmental issues being addressed

China and the limits of technology transfer

- “Graduating” from technology importing to “technology neutral” country, on the path to becoming technology exporting country
- Facing concerted push back by the United States and several other HICs based on its industrial policy. Various elements:
  - Military-strategic overlay
  - History of foreign industry enablement
  - “Non-traditional” IP licensing conditions
  - Enforcement against anticompetitive practices
  - Alleged forced technology transfer
  - Alleged cyber-intrusion
- Chinese IP owners begin to enforce abroad

China and the limits of technology transfer

- US trade sanctions on China may be positive from the standpoint of China's technological ascendance as it forces decoupling
- Idea that imposing trade sanctions on China will derail its drive towards technological parity with the US and Europe "far-fetched" -- even if short-term slowdown
- Unlikely to result in substantial "on-shoring" or "re-shoring" of manufacturing jobs to the United States
  - Reallocation to other countries more likely
- Gradual shift in China's principal export markets

Legal aspects - History

- Since China's opening-up in late 1980s, the US (and to lesser extent EU) express concern about China's substantive IP laws and the enforcement.
- Concerns addressed in bilateral agreements between US and China in early 1990s
- Addressed in some detail in China's Accession Protocol to the WTO in 2001
- Dispute settlement proceeding initiated by US (*China-Enforcement* 2009)
- Continuing complaints in USTR's annual Special 301 Reports
- Various Commissions and more informal groups involving US and Chinese participants over the years

Legal aspects - History

- USTR's 2018 Section 301 Findings regarding China's IP and technology transfer practices specifically relies on those parts of US Section 301 not requiring a finding of WTO-inconsistent measures or practices in order to justify remedial action by the United States
- Appears to implicitly accept that at least some of the practices USTR addresses in the Report are not inconsistent with China's TRIPS Agreement or Protocol of Accession obligations, but rather are unilaterally considered unreasonable or discriminatory

Licensing

- US March 2018 WTO RFC identified alleged discriminatory (i.e. national treatment) patent licensing practices
- Doubtful that China's patent licensing conditions in absence of alleged national treatment violation inconsistent with the TRIPS Agreement or other trade rules
- Panel proceeding suspended at US request
- Implies settlement – terms not public
- Relatively minor economic consequences

“Forced” technology transfer

- Main allegations in the 301 Findings are Chinese government, at the national and subnational levels, effectively compels foreign investors in China to transfer technology to domestic joint venture partners as a condition of approving inward investments, or in other contexts such as conditioning regulatory approvals
  - Informal – without paper trail
  - MNC “victims” reluctant to self-identify
- WTO Agreements, including the TRIPS Agreement, not “investment agreements”. USTR’s allegations addressed to conditions imposed on “direct investors”

“Forced” technology transfer

- TRIMS Agreement addresses requirements that may be imposed on exporters of products to WTO Members (e.g., US companies), that include practices such as requiring use of locally-produced goods in the importing Member (e.g., China)
- Paragraph 7.3 of China’s Accession Protocol references transfer of technology in context of TRIMS Agreement
- Transfer of technology claims of revised EU RFC (Dec. 2018) based on paragraphs 49 and 203 of the Working Party Report, incorporated through 342 of that Report and paragraph 1.2 of the Protocol of Accession into China’s accession commitments

“Forced” technology transfer

- Arguable semantic ambiguity in paragraphs 49 and 203 of Working Party Report (referring to TRIPS and TRIMS).
- Key question whether second sentence of paragraph 49 was intended to extend scope of WTO subject matter to direct investment as such, or whether relates back to and limited by first sentence:

“The representative of China confirmed that China would only impose, apply or enforce laws, regulations or measures relating to the transfer of technology, production processes, or other proprietary knowledge to an individual or enterprise in its territory that were not inconsistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"). He confirmed that the terms and conditions of technology transfer, production processes or other proprietary knowledge, particularly in the context of an investment, would only require agreement between the parties to the investment. The Working Party took note of these commitments.”

Transfer of technology policy

- When China is approached by multinational company wishing to invest (for example, with the private joint venture partner), is it unreasonable for China to bargain for inward technology transfer as a condition of approving the investment?
- Multinational companies have option of deciding against investment if the terms are deemed too onerous. They will be foregoing access to China's market from which they would otherwise presumably be extracting profits
- US/EU require agreement not to demand technology transfer as a condition for reciprocal access to their domestic markets
- LMIC's generally are trading what may be valuable assets, that is, access to their labor and consumer markets

Cyber-piracy

- USTR Section 301 findings identify Chinese cyber-piracy practices against US industry as unreasonable or discriminatory practices. USTR says that these practices, though perhaps scaled back, continue notwithstanding Chinese government assurances they would cease
  - Alleged that such practices, at least in part, are undertaken through Chinese government agencies, which presumably make pirated technology available to local Chinese companies
- TRIPS "flexibilities" do not include deliberate misappropriation of IP obtained by "theft"
- China has never conceded that its companies and/or military engages in commercial cyber-piracy, nor has it suggested that the practice is condoned under international law

Cyber-piracy

- TRIPS Article 39.1-2 requires Members to maintain laws providing for protection of trade secrets (i.e., undisclosed information)
  - If cyberpiracy is detected within a Member where a foreign enterprise holds trade secrets, that enterprise should be able to bring an action for misappropriation
- US and EU concerned with cyberpiracy that is directed toward US or EU territory
- US and EU maintain trade secret laws that prohibit misappropriation through cyberpiracy within their territories, including criminal provisions. Problem is enforcement
  - Alleged overseas perpetrators
  - Once data walls breached, information difficult to retrieve

Cyber-piracy

- Leaves adversely affected WTO Members with limited options beyond diplomatic/economic retaliation largely outside the court system
  - We are engaged in a trade war at least in a material part based on allegations of cyberpiracy
- Logical solution an inter-governmental agreement banning commercial cyber-intrusion (i.e. directed toward commercial enterprises) and providing some type of mechanism for enforcing the ban.
- Would demonstration of reciprocal capacity for cyber-intrusion induce solution?

Industrial policy

- Major target of USTR's Section 301 Findings was China's Made in China 2025 program
- Irony of US policy encouraging local production and maintaining technological dominance
- When governments plan and decide that a particular outcome is necessary and/or desirable, they move the market in one way or another (e.g., tax incentives)
  - The argument that government should not develop preferred outcomes is certainly contestable
- Government intervention may make it difficult for private sector enterprises within and/or outside the sponsoring country to compete with the "favored" industry. GATT and WTO have addressed this "market displacement"

Industrial policy

- Agreements on Subsidies and Dumping authorize affected Members to address "unfair trading practices" by imposing countervailing duties and/or antidumping duties
- Conundrum: we need governments to plan and to develop preferred outcomes. Otherwise massive carbon emissions, global warming, inadequate healthcare, and other social harms
  - Subsidies Agreement “green exception” for R&D expired
- Answer not “don’t plan”
- Ideally, multilateral negotiations address extent of permissible scope for government intervention and attempt to prescribe offsetting compensatory measures in advance. For example, there might be agreement that new technologies developed through substantial government support would be made available to third countries on basis of reasonable royalty

Some Conclusions

- We are experiencing limits of legal rules. WTO does not encompass all subject matter, and circumstances change substantially
- Matters unlikely to "settle down" until the politicians and diplomats come to an understanding which might then be embedded in legal rules
- Collectively discussing potential reforms at the WTO for many years
- Fields of intellectual property, transfer of technology and investment have been particular subject of “extra-WTO” negotiation, controversy and agreement
  - Controversies broadly reminiscent of GATT Uruguay Round

Some Conclusions

- Most productive approach to reestablishing the multilateral legal system may be to sit back while the political branches establish new “stasis” subsequent to which new rules may be brought to the WTO
- Legal rules and enforcement needed, but could be that WTO DSB is not the right “central repository” for resolving disputes regarding IP, technology transfer and related investment
- May be time to “think outside box”