WORKING PAPER

TRIPS, Strategic Competition and Global Welfare

IP AT THE INTERSECTION OF LAW AND POWER

Version Control No. 1.2

Frederick M. Abbott
Edward Ball Eminent Scholar Professor of International Law
Florida State University College of Law, USA

Presented at Texas A & M Symposium

TRIPS Agreement at 25

March 29, 2019 **Fort Worth, Texas**

TRIPS, Strategic Competition and Global Welfare

IP AT THE INTERSECTION OF LAW AND POWER

The 25th Anniversary of the TRIPS Agreement marks also the 25th Anniversary of the entry into force of the WTO Agreement. We should not consider one without the other since the TRIPS Agreement is integrated in the WTO as a Multilateral Trade Agreement (MTA) applying to all Members. The WTO as an institution has become a focal point for international tensions arising from a drift away from multilateralism toward bilateralism, plurilateralism and even nationalism. Rhetoric notwithstanding, each nation has historically sought to promote its national interest, and the choice of institutional instrument has reflected a judgment regarding where that interest might be best pursued. The US commitment to multilateral institutions in the wake of the Second World War did not reflect some newly-formed belief in the universal goodwill of nations -- to the contrary, the experience of the First and Second World Wars could hardly have exposed deeper flaws in human nature and government institutions -- but rather a belief that US interests were best protected through the broad global stability that might be achieved through multilateral governance. It also represented a strategic calculation that a multilaterally-linked coalition of capitalist states would serve as a buffer to Soviet expansion.

The breakup of the Soviet Union and the shift in China's perspective on international economic engagement led those two powers to enter the WTO system. But, perhaps more importantly, the period between 1989 and 2019 has witnessed a dramatic shift in the balance of global economic power. Aging demographics, stultifying industrial policy and neglect of the military have reduced the economic weight of Europe; while China has rapidly emerged as the second most powerful economic area behind the United States, and with countries like India beginning to assert themselves both economically and militarily. The old GATT, from an effective power standpoint, was a club of wealthy Western economic powers making rules for themselves and countries dependent on them. The balance of governance power has shifted dramatically from China's entry in 2001, and I am not sure that the remaining countries would anymore look so dismissively at the prospect of renewing the WTO subsequent to an exit by the United States. If we really want to go it alone, we might just be allowed to do that.

The later GATT system and the early WTO system were each grounded in a belief in the "rule of law" as a means to promote economic efficiency and public welfare, and a belief that peaceful multilateral trade relations served the common good. Grounding in the rule of law has broken down.

The global economy -- with military options almost necessarily linked -- may be more fragile than is generally given credit. The US financial system and economy are almost fully computerized. A coordinated digital assault on less than a dozen private financial institutions could well paralyze the economy overnight. Our utilities and transport systems are vulnerable to cyber-attack. Leaving aside more conventional weapons, the United States could be reduced to a situation of relative anarchy overnight, and we are not prepared for this. Other major economies are perhaps equally digitized and face similar risks. From a systemic standpoint, today the technology of most concern is not embodied within a particular innovation requiring, or not requiring, effective patent protection, a new super-hero movie whose revenue stream requires protection by copyright, or a luxury watch whose brand name needs protection. The technology that needs protecting is that of a global technological infrastructure that is linked together in ways that allow penetration into the most critical infrastructure of societies.

This is part of a larger picture in which "policy planners" have lost control of the global digital environment. The United States has become a "surveillance state" seemingly by happenstance. Corporate policies to collect data on individual behavior have morphed into deeply intrusive continuous surveillance, including through seemingly benign mechanisms such as "wearable trackers". China has introduced a system of "social credits" which represents a much more conscious transition to continuous monitoring (see also WeChat tracking), but the end result of US happenstance and Chinese policy planning may be largely the same. We are all living in surveillance states. Just yesterday morning, there was a report on Bloomberg that the United States is demanding that Chinese investment in the hook-up app "Grindr" be withdrawn because of fears that its users will be subject to Chinese government blackmail.

The TRIPS Agreement was not designed to deal with the current state of international technology affairs. The Internet was hardly a "thing" at the commencement of the Uruguay Round, and negotiations were too complex and far advanced by the early 1990s -- when one might have had a decent glimmer about its possibilities -- to introduce rules specifically tailored to the digital environment. It was left to the WIPO Copyright and Performances and Phonograms Treaties to address the online environment at the multilateral level, and then in a limited way. In this regard, the TRIPS Agreement is not terribly relevant, nor are proposals that have been floated at the WTO for a plurilateral agreement on electronic commerce.

At this 25th anniversary of the TRIPS Agreement, disputes between the United States, the EU/Europe and Japan, on one side, and China on the other, center on China's IP enforcement practices generally, on China's policies alleged to force technology transfer, and on the issue of mainly (though not exclusively) state-sponsored cyber-intrusion. Neither the TRIPS Agreement as such nor the WTO more generally are having much influence on these disputes. The United States has brought a complaint about some patent licensing practices that may (or may not) state a valid claim with respect to national treatment on a few points, but hardly the stuff of a major rethinking of IP relations. On the mundane issues surrounding enforcement of IP, and using patents as a paradigm, we are well past the day when China was not issuing and/or serious about patents, and patent quality is improving. China, may be granting too many invention patents (even putting aside the question of quality). And, there is a substantial amount of evidence that its courts are enforcing them.

In addition to repeating the US claims concerning China's patent law, the European Union is seeking to bootstrap a few statements about technology transfer into an investment-related claim, but almost certainly its complaint against China makes claims that are outside the legitimate scope of the negotiated terms of the TRIPS Agreement, or China's accession protocol. It seems very doubtful that existing WTO rules will cure the EU's problems.

The United States has attempted to address forced technology transfer in the investment context, by which I refer to an explicit or implicit condition for the licensing or transfer of technology imposed by a government as a condition to approving a direct investment, by express prohibition in TIAs (see, e.g., Article 9.10 of the draft TPP, now incorporated in the CPTPP , and in NAFTA 2.0). The United States walked away from the TPP, and therefore from its own negotiated solution for much of Asia. As of today, it is doubtful that the United States believes it has a forced technology transfer problem with Canada or Mexico.

The problems of the WTO and technology go beyond US/EU-China relations. India is asserting a right to technological independence as evidenced by its preference for locally-manufactured alternative energy products, and the India-Solar case may be just the cutting-edge of demands for national technological autonomy. It would be paradoxical if US demands for local production were somehow deemed more justifiable than Indian demands for national production, or for that matter China's strategic plan for becoming a technological powerhouse.

To get to the core of current conflicts regarding technology misappropriation, there would need to be an enforceable agreement that prevented governments and private sector entities from using the tools of cyber-intrusion to acquire technology. Such tools have become the weapons of modern political and commercial warfare, and the difficulties of verification and enforceability present in connection with negotiating enforceable agreements on arms

control are present here. The United States has been leading an effort toward including more stringent, including criminal, trade secret protections in bilateral and plurilateral trade and investment agreements (TIAs), but such rules seem unlikely to constrain the behavior of state or state-sponsored cyber-forces. Private sector enterprises might be influenced, at least at the margin, by a new set of trade secret rules, but jurisdictional issues will persist, and enforceable legal rules will prove elusive. Moreover, even assuming for the sake of argument that China and the United States could agree to lay down their cyber-weapons, what about Russia, Iran and other states that have demonstrated sophisticated cyber-intrusion capabilities and are less constrained by international economic relations? Yes, Russia is a member of the WTO, but is anyone under the impression that the Putin Government is constrained by the WTO Agreement?

From the standpoint of the WTO, the TRIPS Agreement and the rule of law, could a dispute about cyber-intrusion ever realistically be the subject of a dispute settlement panel adjudication, and/or appeal to the Appellate Body, in a way that would have an impact in the "real world"? Would the United States or China be willing to submit evidence to the DSB regarding the manner in which it traced a cyber-intruder? If accused by the United States of some type of violation, would China respond with evidence regarding the operation of its cyber-intrusion units? This all seems rather improbable.

Also, the WTO and its dispute settlement mechanism operate at a speed that could best be described as "glacial", and today that ordinary glacial pace is further impeded by political obstacles in the appointment of Appellate Body Members, and so forth, threatening to render the system catatonic. With information moving around the globe in nanoseconds, waiting six years for a DSB decision that still needs to be implemented seems just a trifle outmoded.

The WTO continues to be a consensus-based organization. Just as with the Uruguay Round negotiations, solving problems only among a coalition of the willing will not get to the more important unwilling. The prospects of negotiating a "Grand Bargain" in today's international environment seem negligible. The conclusion of the Buenos Aires Ministerial was quasi-pathetic as WTO members could not even agree whether they were in the midst of a continuing round of trade negotiations or had ended it. And this uncertainty seems to have persisted through the December 2018 informal heads of delegation meeting in Geneva. Focus has now shifted to the potential for negotiation of plurilateral agreements under the auspices of the WTO, but while the WTO is in the midst of a governance crisis it seems unlikely that much progress will be made in this forum.

Insiders at the Appellate Body view the US action holding up appointments from a strategic standpoint; that is, the US is worried that the DSB is going to be ruling against it in matters such as steel tariffs and national security, and refusing the appointment of judges seems like a good way to prevent the court from ruling. This is a virtually pure rejection of the rule of law by the United States.

The other major Trump Administration demand is to eliminate preferences in favor of developing countries, or at least to eliminate the practice of self-designation as a developing country. This is a more reasonable demand, at least in the context of a country like China which appears to have passed the point at which it requires exceptional trade preferences. Whether there might be a more stratified and/or nuanced system for differential treatment is a question that has been around WTO circles for a long time. It certainly bears on IP matters, for example in relation to the treatment of LDCs and medicines patents.

Of the many improbable beliefs espoused by the Trump Administration, the idea that the United States is going to force China back into a situation of dependence on US technology may be one of the most improbable. What Trump has done is convince the Europeans more than ever of their dependence on China and other Asian markets for future economic growth, and he hastened or reinforced a pivot away from North America. Donald Trump has used his visits to Europe to insult, berate and belittle traditional allies, while reserving praise for Vladimir Putin. Again, a rejection of the rule of law.

And, in this regard, we have to accept, I think, that there are significant parts of the technology transfer problem that will not, and perhaps cannot, be addressed by the WTO or the TRIPS Agreement. At the very least, an investment-related agreement that addressed IP would need to be negotiated, and there are so many issues associated with such a potential agreement, and so many possibilities for strategic gaming by interested industry groups that this seems a problematic road to problem-solving.

It may be important to acknowledge that global governance of international IP relations, and trade relations more broadly, is no longer a matter of shaking hands with members of an elite club of democratically governed states. It is no longer so evident in significant parts of the world that the United States and Europe are governed by models that are necessarily more effective than others. And, the situation in Europe, even beyond Brexit, raises new issues regarding the integration of the European continent. Not only do we have strongman governments in Hungary and Poland, but the Italian government has decided to pursue independent trade negotiations with China, a matter that goes to the fundamental structure of EU trade relations grounded in the common commercial policy. Who is the EU representing in the TRIPS Council? Will we continue to have the silent individual EU Member States, or will Italy soon decide that

it is tired of deferring to the Commission? Along with a newly independent UK, this would add yet another disintegrative element to the WTO environment.

Is there anything to celebrate on this 25th Anniversary of the TRIPS Agreement? The purpose of the TRIPS Agreement is today distilling into its essence: a mechanism for protecting the pharmaceutical industry that is threatening to bankrupt the health-care budgets of most of the world's governments.

To be clear, none of this is to suggest that trade and investment negotiating and deal-making is going away, or that new deals will not include rules regarding intellectual property, cyber-theft and/or transfer of technology. But, the deals are being made to advance specialized interests, such to protect biologic pharmaceuticals and to curtail the use of competition law in the interest of advancing particular mercantile interests. The deals will be bilateral or among coalitions of the willing, and not at the WTO. And, there is very unlikely to be a TRIPS Agreement 2.0 for another decade.

On the other hand, if we had an interest in creating an environment secure and safe for producers of innovative products and content, while providing access to information of importance to individuals, and at the same time protecting against the encroachment of the surveillance states and their private sector enterprises on privacy, would there be a way to achieve that through some type of multilateral agreement?

We could envision a globally applicable agreement on information that lays out rights in favor of individuals and enterprises to access information, to protect personal information, and to provide limited rights to innovators to protect investments in innovation for a short time. Such an agreement could be negotiated under the umbrella of a new multilateral institution that took its place among the current architecture of multilateral institutions. Something like the Global Information Organization, or "GIO", established by a Global Information Agreement.

The new GIO could include rules on information security (e.g., against cyber-intrusion), and establish sanctions for governments and/or private sector enterprises that violated those rules. The GIO could have rules that address the right of individuals to protect their personal data and prevent its transmission or use without consent. The new GIO could establish rules regarding compensation for uses of information and technology without the consent of the owner, and the circumstances under which such consent could be avoided. I could go on.

But an organization with this broad scope and scale is a fantasy. National governments have very different attitudes about personal privacy and access to information. The United States has already made its view known that a data agreement at the WTO must allow transborder transmission and storage of data, while the EU has made its view known that the data of EU citizens must be stored locally. Private sector enterprises do not want to be constrained in the uses they make of personal data, and in any case do not appear to be very competent in taking measures to protect it.

Rather than indulging in fantasy, what then are we left with? I am not sure that I would go so far as to say the present international environment is or will remain purely Hobbesian. Nods are given to the importance of negotiating and complying with international rules -- but as much in the breach as in good practice. So, we muddle through with daily updates regarding the latest round of negotiations, and a rather chaotic life proceeding from day-to-day.

Would the election of a new government in the United States result in a material difference in the possibilities for the future? It could hardly be worse than under the current regime. And, perhaps that is the point. It is hard to be optimistic when the political architecture of the globe is rapidly disintegrating.

The TRIPS Council has devolved into a debating society. And, I am reluctant to venture into ways to improve the effectiveness of the TRIPS Council because the WTO as an institution continues to strongly favor the large industrial and post-industrial corporations who effectively make policy through captured trade regulators.

Private sector companies are always adapting to changing circumstances. They are not relying on bureaucrats in Geneva or in Washington to enable their activities. In terms of technology and IP, solutions will be technical. More will be spent on hardening networks, encrypting product technologies, implementing block chain supply systems, more carefully vetting and controlling employee behavior, and defending corporate interests in our chaotic global environment. So, if you have understood me to be saying that multinational business is going to be substantially damaged by the present state of affairs, that is not where I come out. Global economic growth may be constrained by a percentage point or two, and that will make lifting individual incomes somewhat slower. But, absent devolution into open cyber-warfare or overt military hostilities, what we are talking about is on the margins of economic development.

There is a strong impetus for at least a temporary cease-fire in the current trade war between the United States and China because the global economy has been sending

signals of a slowdown, and the leaders of the major economies are not helped by economic contraction. But, the systemic issues are not going to be resolved in the near to medium term. They will be with us for a while.

The TRIPS Agreement is a side note in this.

An Imprint of BlueAntWorks