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Trading's End: Is ACTA The Leading Edge Of A Protectionist Wave?

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It is instructive to watch the difference between what government policymakers say and what they do. The Doha Development Round was launched in 2001 with the promise of trade liberalization for the promotion of development. The DDR is in its extended death throes. Yet, during the timeframe of the DDR, a group of G8-plus countries has managed to negotiate the virtual antithesis of trade liberalization in the form of the plurilateral Anti-Counterfeiting Trade Agreement (ACTA). The ACTA is designed to establish a set of nontransparent trade barriers, all the more remarkable having come out of largely liberal democratic governments.

As has been widely noted, the initial drafts of the ACTA represented a "wish list" of the IP-dependent major industrial companies in the G8 for strong IP enforcement measures, having a tenuous connection to traditional concepts of protection against counterfeiting and piracy. Draft proposals would have mandated extending border measures to patents, including to in-transit goods; mandated rules regarding injunction and damages inconsistent with US law; extended intermediary liability to parties not within court jurisdiction; awarded attorney's fees to prevailing parties; imposed liability on internet service providers to monitor networks for copyright infringement; and so on. Once the early texts were made publicly available through "leaks" and demands of the European Parliament, there was a forceful pushback by European parliamentarians, NGOs and a number of developing country governments in the TRIPS Council. It became clear that the European Parliament would not approve the wish list of the major industrial companies; that USTR could not preempt the prerogative of the US Congress to legislate on patents; that legitimizing the seizure of generic medicines in transit would not be tolerated by the international community.

What the Japanese government termed "ACTA-lite" emerged. While indeed some of the most draconian trade restrictions were removed in the "final" text, a substantial number of very troublesome provisions remain. The 3 December 2010 text would establish civil damages standards untied to market-based injury; extend the scope of mandatory border measures in an ambiguous way (though excluding patents and regulatory data protection); authorize seizure of goods in transit (outside patents and regulatory data), and; require disclosure of information that may threaten legitimate commercial activities.

Probably the most problematic provisions mandate that customs authorities be enabled to act *ex officio* to seize "suspect goods" at the border, without definition of the basis for suspicion, and without mandating that a determination be made regarding the offense the suspect goods allegedly commit. Determinations as to whether goods infringe an intellectual property right are optional (i.e., competent authorities "may determine"). Goods may be held indefinitely. The 3 December 2010 text appears to criminalize activities traditionally undertaken by parallel importers of medicines through its labeling provisions. The criminal provisions effectively overrule the holding of the WTO dispute settlement panel in the China-Enforcement case regarding interpretation of "commercial scale".

The ACTA conveniently does not include provisions comparable to those of the TRIPS Agreement that provide protection to accused infringers, such as time limits for preliminary injunctions during which right holders must act to initiate cases on the merits, and the right to be heard in cases initially acted upon inaudita altera parte. The ACTA negotiating countries have sought to justify the "nonappearance" of protective provisions on grounds that the Parties will maintain their obligations under the TRIPS Agreement. In a strict sense, that may be correct, but it should be recalled that the TRIPS Agreement is not directly effective in the law of the European Union or the United States, and private parties do not have

the right to directly challenge the consistency of national IP law with the TRIPS Agreement before the courts. It would be up to a WTO Member to bring a claim of TRIPS-inconsistency based on ACTA-Party national law in WTO dispute settlement.

The ACTA would establish a new institutional framework outside the WTO, WIPO and other multilateral institutions concerned with IP, trade and related subject matter. Transition provisions allow signatory non-Party countries to participate in decision-making regarding rules and procedures. This rather unusual approach to institution-building makes an assumption that some decision-makers will not have been authorized by their legislatures to join the agreement. The process of future accession to the ACTA may require additional concessions on IP.

There are some strange aspects to the ACTA negotiations. The EU Trade Commissioner, Karel de Gucht, told the European Parliament that inclusion of protection for geographical indications within the scope of the ACTA was essential to achieving EU objectives. Yet the final text on border measures includes only an ambiguous formulation regarding "not discriminating unjustifiably between intellectual property rights". One imagines that USTR and the EU Trade Commissioner interpret this formulation differently, and it is perplexing that the EU could have surrendered its principal ambition.

Perhaps the most baffling aspect of the exercise is the announcement by USTR that it will not seek congressional approval of the ACTA. The US Constitution expressly grants Congress the power to regulate commerce with foreign nations. That express grant distinguishes regulation of international trade from the general allocation of treaty making powers under the Constitution. Moreover, Congress is expressly granted the power to make laws regarding patents and copyrights. It is difficult to identify an area of international agreement-making that more directly entails a constitutional requirement of congressional approval than the ACTA.

USTR has taken the position that the ACTA will require no changes to US law. Therefore, in USTR's view, congressional approval is not required. This argument ignores that the ACTA regulates commerce with foreign nations, whether or not it requires changes to existing domestic law. Beyond that, however, does US law presently grant customs authorities a broad power to seize undefined "suspect goods" at the border as the ACTA requires?

There is an assumption underlying the entire G8 ACTA negotiating effort that extensive and largely unregulated IP border measures protection will benefit G8 industry as multinational companies are able to erect market-entry barriers based on IP. This may be a shortsighted perspective. Chinese enterprises are becoming quite adept at registering IP, and foreseeably enterprises based in other emerging economy countries will be following suit. Should these countries join the ACTA, their customs authorities must be empowered to seize "suspect goods" at their borders. Is it possible that these customs authorities will not be so favorably disposed to US and European imports?

One wonders what the G8 negotiators were thinking about as they negotiated the ACTA. The agreement seems designed to confer extensive authority on customs to seize and hold goods as they enter and/or pass through borders. It is the virtual antithesis to opening markets to international trade. We see the difference between the rhetoric of Doha and the reality: stalling on trade liberalization while erecting new nontransparent trade barriers. Mystifying.

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