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THE WTO TRIPS AGREEMENT IN THE POST-WTO WORLD: THE EMERGING COMMON LAW OF INTERNATIONAL IP

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The World Trade Organization's (WTO) role in international trade governance has eroded over the past two decades, and that trend has accelerated under the second Trump Administration in the United States. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was negotiated during the Uruguay Round to provide baseline standards of intellectual property (IP) protection and enforcement, combined with legalised WTO dispute settlement. This essay explores the continuing role of the TRIPS Agreement in the post-WTO international economic order, suggesting that the fate of the WTO from a governance (including dispute settlement) standpoint, and that of the TRIPS Agreement from a norm-setting standpoint, are largely distinct. TRIPS Agreement standards have become sufficiently embedded in the national laws of WTO Members, integrated into other trade agreements and arrangements, and otherwise referenced as baseline IP standards to have achieved the status of a type of common law, in the sense of a lex mercatoria, that should persist as benchmark standards for intellectual property protection and enforcement regardless of the fate of the WTO as an institution.

TABLE OF CONTENTS

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The author discussed the idea of the TRIPS Agreement as common law at a meeting of international intellectual property experts convened at the Texas A&M University College of Law on September 25–26, 2025. The dialogue surrounding the future of the WTO and TRIPS Agreement made a significant contribution to the development of this essay. At this meeting it was decided that future gatherings of the group will be referred to as the "Reichman Roundtable" in honor of our dear and distinguished colleague, Prof. Jerome (Jerry) Reichman.).

I. THE WTO AND THE LIMITS OF LEGALISATION

The TRIPS Agreement has been a relative success in that it has largely fulfilled the ambitions of its architects. Whether the WTO survives as a weakened international institution or is replaced by other trading arrangements, the core elements of the TRIPS Agreement will continue to play an important role in international economic relations as a "common law" of the international intellectual property system.

The WTO was formally established on January 1, 1995, taking over for the General Agreement on Tariffs and Trade (GATT), initially established in 1947 through a Protocol of Provisional Application. One of the main underlying objectives of the new WTO was to "deeply legalise" the international trading system through a fairly detailed set of rules applicable to all its Members. Those rules would be subject to interpretation by a newly created Appellate Body (AB). Members committed themselves to bringing trade disputes for resolution by the WTO Dispute Settlement Body, for which the AB would serve as the rule interpreter.[1] Members were expected to comply with the rulings of the AB or, in the less-preferred alternative, to suffer the withdrawal of trade concessions on failure to comply.

China's entry into the WTO in late 2001 changed the external and internal dynamics of the organisation. A certain degree of change was widely anticipated. Bringing a large and growing economy with substantial external political influence into the WTO was bound to affect the decision-making environment.[2] What was not so well anticipated was the impact that an export-driven Chinese economy built around

[1] *See* Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R ¶ 7.21, ¶¶ 7.35-7.39. (Dec. 22, 1999).

[2] *See* F. M. ABBOTT, CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT (F.M. Abbott ed., 1998).

government preferences and subsidisation would have on the economies of high-income WTO Members; nor was the extent to which technology transfers from high-income-country based multinational corporations would aid in the process.

Recent efforts by the United States, the European Union and other high-income regions to curtail the impact of Chinese exports on their own economies have bypassed the template of WTO rule interpretation and enforcement. Instead, unilateral and bilateral measures are relied upon. A gradual process of movement away from the WTO as the focal point of trade negotiation and rule enforcement that began in the early 2000s has accelerated to such an extent that today the WTO is largely an afterthought in trade negotiations and government behaviour. Whether this means that the WTO will "go away" or remain as "background" is difficult to assess, and whether a pendulum will swing back in favour of the WTO in 10 years is beyond our predictive capability. [3]

What the period from 1995 to 2025 appears to have demonstrated is that the idea that trade relations could be managed through a process of deep legalisation was not robust. The key economic interests of powerful economic actors are not amenable to control by a small group of trade experts sitting as judges and telling the United States, the European Union, and China how they should behave. It was perhaps a worthwhile experiment, but it is fair to say that some highly regarded trade experts have understood that there is more to trade relations than international legal rules and that there were limits to judicialising the international trading system.[4]

II. THE EVOLUTION OF THE TRIPS AGREEMENT

One of the "crowning achievements" of the GATT Uruguay Round from the standpoint of the high-income countries was the conclusion and adoption of the TRIPS Agreement.[5] The TRIPS Agreement is one of three Multilateral Trade

[3] Failure to reform the institution of the WTO is not at the heart of its decline in relevance, which is principally attributable to major shifts in the global political and economic environments that have undermined the impetus for cooperation. A reverse swing of the pendulum would require a change in the global political and economic environments. Of course, proposals for the structural reform of the WTO have been a feature of the Geneva landscape for more than 20 years, and Member states continue to put reform proposals on the agenda; *See* PETER SUTHERLAND et al., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM, WTO (2004).

[4] *See* OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADING SYSTEM, (1985); ROBERT E. HUDEC, *Thinking about the New Section 301: Beyond Good and Evil*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 113, 116 - 162 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

[5] *See* Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22(4) VANDERBILT J. TRANSNAT'L. L. 689,

Agreements (MTAs) to which all WTO Members are party, recognising that there are certain tiers of commitment within the framework of TRIPS to account for differences in levels of economic development. The TRIPS Agreement established minimum substantive standards of Intellectual Property (IP) protection, a set of obligations with respect to domestic enforcement of those standards, and it subjected those commitments to the discipline of the WTO dispute settlement system.

A principal reason for the negotiation of the TRIPS Agreement was to fill in the significant gaps in international IP norms that existed in the 1980s in the form, inter alia, of the Paris Convention for the Protection of Industrial Property and, to a lesser extent, the Berne Convention for the Protection of Literary and Artistic Works.[6] The foremost gap related to the scope of patentable subject matter that affected the pharmaceutical and agricultural chemical industries, along with standards for treating confidential data submitted for regulatory purposes, but other gaps, such as the lack of an agreed definition of 'trademark', were addressed in the TRIPS Agreement. Flexibilities in IP protection, as well as disciplines relating to those flexibilities, were included.

Subjecting IP practices to WTO dispute settlement attempted to remedy a perceived defect in the pre-existing WIPO-based system that relied on dispute settlement at the International Court of Justice. One of the major attractions of the WTO forum to the IP industry demandeurs was that developing countries, in particular, would be less inclined to breach IP-related commitments if their export sectors, which were often commodity- or agriculture-based, might be subject to penalty.

The TRIPS Agreement was adopted as a compromise between the high-income countries, demanding strong IP protection and enforcement, and the lower-income countries, resisting a push for increased rent transfer-based exploitation of IP assets. From the standpoint of the high-income countries, the TRIPS Agreement was a good beginning, but it was not complete. This led to a continuing post-entry-into-force period of seeking to improve the terms of IP engagement in various bilateral, regional, and plurilateral fora.[7] But, in the meantime, WTO Members throughout

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(1989) [hereinafter Frederick M. Abbott] (for negotiating background and objectives); *see generally* UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT, 3–4 (2005) (concerning the negotiating history and results) at, e.g., 3–4.

[6] Frederick M. Abbott, *supra* note 5, at 702–706.

[7] *See, e.g.*, Frederick M. Abbott, *The Evolution of Public Health Provisions in Preferential Trade and Investment Agreements of the United States*, *in* 4 CURRENT ALLIANCES IN INTERNATIONAL INTELLECTUAL PROPERTY LAWMAKING: THE EMERGENCE AND IMPACT OF MEGA-REGIONALS, GLOBAL PERSPECTIVES FOR THE IP SYSTEM 45, 45-63 (Pedro Roffe & Xavier Seuba eds., 2017).

the world implemented the rules prescribed by the TRIPS Agreement. Not always in the way the high-income country demandeurs of the agreement may have preferred, but well enough.

There are few international agreements that have been so extensively analysed, dissected, and subject to critique as the TRIPS Agreement. It may be fair to say that the agreement satisfies no one, and yet, that imperfect state manages to be tolerated by everyone at this stage.[8] It has become, for all intents and purposes, the "common law" of the international IP system. And illustrating this common law feature, bilateral and regional agreements outside the WTO framework routinely incorporate TRIPS Agreement rules as part of those agreements.[9]

III. WHERE WILL THE TRIPS AGREEMENT GO?

A. The Basis for Decoupling

What is the impact of the declining relevance of the WTO and its rule system? As of late 2025, the world is functioning in a power-centric environment in which the United States, as the principal actor, has been pursuing its own set of objectives and demanding that other countries fall into line. The United States has undertaken a range of actions that are manifestly incompatible with WTO rules, unless one assumes that virtually anything can be done as long as national security concerns are invoked.[10] But if that is the case, and if stating that a measure for reasons of national security insulates it from WTO norms, the norms are not particularly relevant. For how long the United States can dictate trading rules for the international community is "anybody's guess". Most likely, the short-run and long-run results and consequences will differ. We do not know where this whole thing is going.

More to the point, if the WTO has become ineffectual, what will become of the TRIPS Agreement? Does it matter that the WTO no longer has a functioning dispute settlement system? Does it matter whether the WTO lingers on as an

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[8] Our late colleague Pedro Roffe remarked some years ago that, despite the intensive controversy that surrounded the adoption and first years of implementation of the TRIPS Agreement, it had evolved to the status of a 'fact' of the international economic system accepted as reality by countries at all levels of development.

[9] *See, e.g.*, Agreement between the United States of America, the United Mexican States, and Canada, Chapter 20, July 01, 2020; Comprehensive Economic and Trade Agreement between Canada and European Union, Chapter 20, Can.-Eur., Oct. 28, 2016.

[10] *See, e.g.*, Panel Report, United States — *Certain Measures on Steel and Aluminium Products*, WT/DS544/R, adopted on Dec. 9, 2022 (the United States did not attempt to refute that its actions are contrary to WTO MFN and binding of tariff rules, invoking a national security claim rejected by the Panel).

institution despite its temporary or permanent governance decline?[11] Will the high-income countries, along with "like-minded" States, set up an alternative mechanism for setting norms and addressing disputes for international trade and/or IP? Recall, at least, that a great deal of time and effort went into negotiating the minimum substantive standards of the TRIPS Agreement in the late 1980s and early 1990s, and that those standards have largely been used as the benchmarks for implementation within the domestic legal systems of WTO Members since the agreement entered into force.[12] Major revisions of national IP laws are typically complex processes involving a multiplicity of stakeholders and are not undertaken lightly. National IP laws tend to be "sticky". Whether TRIPS standards persist seems largely independent of whether the WTO continues to maintain its relevance.

B. IP as Asset Protection

It cannot be assumed that, as countries no longer rely on the WTO as an institution, their trading partners will lose interest in protecting IP as "assets". They will continue to care. The two things are independent of each other. It is a common misperception among groups that have challenged the role of the TRIPS Agreement that the alternative is a world free from the active defence of IP assets. We are not sure what an alternative world will look like, but it is unlikely to be one in which countries lose interest in protecting the large capital investments their industries make in technology.

Effective independence of the TRIPS Agreement from the WTO would hark back to the intensive debate that took place when the TRIPS Agreement was negotiated. The question was sharply raised whether IP protection was an appropriate fit within a system otherwise designed to gradually liberalise trading restrictions. Jagdish Bhagwati, among others, considered the introduction of an IP rent-seeking agreement into trade governance as contrary to the objectives of the GATT that

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[11] While the governance failure at the WTO tends to be attributed to the non-workability of the consensus rule, the failure may be more deeply rooted in the concept of multilateral legalisation itself.

[12] *See* WTO Secretariat, *Annual Report on Notifications and Other Information Flows, Council for Trade-Related Aspects of Intellectual Property Rights*, IP/C/W/716 (Mar. 12, 2025):

> 5. In 2024, Members submitted a total of 125 notifications, including 116 notifications of laws and regulations under Article 63.2. Members largely sustained the higher rate of participation observed in 2022 and 2023…
> 16. As time has passed, the yearly composition of the notifications has predictably shifted from "first" (i.e. initial) notifications of a law or regulation to the WTO, to notifications of amendments or revisions, or replacements or consolidations, of previously notified laws or regulations.

would fundamentally change the character of the organisation.[13] Since major industrial interests were pushing for the TRIPS Agreement to protect their investments in research and development (R&D), the question of whether the agreement was consistent with the other objectives sought for the new WTO was ultimately set aside. Yet by the same token, because IP is more of a question of asset protection than market access, a self-standing IP asset protection agreement outside the WTO would not be inconsistent with the debates (i.e., whether it fits within the trade liberalisation framework) characterising the historical genesis of the TRIPS Agreement.

C. IP Rules are Linked

In addition to their existing incorporation in national IP laws, perhaps the simplest and most straightforward mechanism by which the TRIPS Agreement standards are likely to remain relevant is through their incorporation in bilateral, plurilateral, and regional agreements (mainly "preferential trade agreements" (PTAs)). There is precedent even within the TRIPS Agreement for referring to international agreements not in force as incorporated standards, namely the Treaty on Intellectual Property in respect of Integrated Circuits.[14] The fact that the TRIPS Agreement may be part of a WTO Agreement that no longer remains in force or is not relevant to trading powers is not an obstacle to the persistence of TRIPS Agreement standards through other routes. What is not so clear is whether those other agreements would continue to have dispute settlement mechanisms that are "legalised", or rather, will they take the approach of the First Economic Agreement between China and the United States and provide for dispute settlement solely through diplomacy?[15] The first published text of a newly-negotiated trade agreement between the United States and a trading partner (i.e., Malaysia) does not include a legalised dispute settlement mechanism characteristic of WTO or USMCA type dispute settlement, appearing to place matters within the discretion of the country party objecting to a measure to take action pursuant to its domestic law, and otherwise allowing each party to

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[13] Frederick M. Abbott, *The TRIPS Legality of Measures Taken to Address Public Health Crises: Responding to USTR-State-Industry Positions that Undermine the WTO, in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE: ESSAYS IN HONOR OF ROBERT E. HUDEC 311, 314 (D. Kennedy & J. Southwick eds. 2002) (Professor Bhagwati had expressed his views in commentary on a paper presented by the author at an event honouring Prof. Robert Hudec, and it has been referred to in this citation).

[14] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 35 Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (in relation to the IPIC Treaty) [hereinafter TRIPS Agreement].

[15] *See* Frederick M. Abbott, *Technology Governance in a Devolved Global Legal Order: Lessons from the China-USA Strategic Conflict*, *in* A NEW GLOBAL ECONOMIC ORDER, 197, 226 (Chia-Jui Cheng ed., 2022).

terminate the agreement.[16] It may be some time before the intent and effect of the enforcement related provisions of the US-Malaysia Agreement are understood.

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[16] Agreement between the United States of America and Malaysia on Reciprocal Trade, U.S.-Malay., art. 7.4, 7.5, Oct. 26, 2025 (the United States has released the text of an Agreement between the United States of America and Malaysia on Reciprocal Trade of October 26, 2025). The method for resolving disputes places the subject matter solely in the framework of the domestic law of the party challenging the practice of another party, with the option of terminating the agreement on 180 days' notice:

> Article 7.4: Enforcement
> 1. Nothing in this Agreement shall constrain, or otherwise prevent, a Party from imposing additional tariffs to remedy unfair trade practices, to address import surges, to protect its economic or national security, or for other similar reasons consistent with its domestic law.
> 2. If a Party considers that the other Party has not complied with a provision of this Agreement, the Party may review the terms of this Agreement and take action in accordance with applicable domestic law. A Party shall, when practicable, with a view to finding a mutually satisfactory solution, notify and seek consultations in good faith with the other Party prior to taking any action.
> Article 7.5: Termination
> Either Party may terminate this Agreement by written notification to the other Party. Termination shall take effect 180 days after the date of the notification.

This mechanism is a substantial departure from the typical conception of international dispute settlement, and even less structured than the diplomatic process envisioned in the First Economic Agreement between China and the United States. The US-Malaysia Agreement states the parties recognise rights and obligations under the WTO agreements (e.g., art. 7.1), which is itself qualified by permissive language regarding pursuit of national public policy objectives. While the newly negotiated agreement does not expressly preclude either party from challenging the measures of another in WTO dispute settlement (except where this is specifically excluded, e.g., regarding rebates and direct taxes on exports of the other party (art. 2.12 (2)), there is a tension with the provision on enforcement that makes the domestic law of each party the controlling legal standard. There is a provision of the US-Malaysia agreement addressing Intellectual Property (art. 2.6), limited to imposing obligations on Malaysia to provide robust standards of protection, including effective criminal and border enforcement against copyright and trademark infringements. Footnote 4 of the US-Malaysia Agreement incorporates by reference the definition of "intellectual property" of the TRIPS Agreement referring to all categories of IP that are subject to Sections 1 through 7 of Part II, adding reference to technological protection measures and rights management.

It is not yet clear whether the Trump Administration intends to submit the agreements it is negotiating with a substantial number of trading partners for approval by the U.S. Congress, which would typically be a constitutional requirement for approval of US trade agreements.

D. A Role for WIPO?

It is also possible that the TRIPS Agreement could move its institutional link from the WTO to WIPO.[17] What the WTO brought to the international IP table (that WIPO did not) was a form of dispute settlement that incorporated "teeth" in the form of the potential for withdrawal of trade concessions if a country fails to comply with its obligations. WIPO agreements have typically relied on potential recourse to the International Court of Justice, a feature which has not been used and which IP-owner stakeholder groups and high-income countries are not likely to view as a robust alternative to WTO dispute settlement, assuming that robust dispute settlement is their preference. However, it is worthwhile noting that WIPO has an active Arbitration and Mediation Center which, in the more limited area of Internet domain name dispute resolution, has an excellent track record, along with a more modest portfolio for settling other types of IP disputes. But if used as a model for expedited dispute settlement proceedings, it is not beyond possibility that the WIPO Arbitration and Mediation Center could serve as a dispute settlement framework for a TRIPS Agreement that migrates from the WTO to WIPO. In terms of further rulemaking, WIPO has an advantage over the WTO in that consensus decision-making is not required, something that could work to the advantage of diverse constellations of countries.

Would it matter whether an alternative WIPO based dispute settlement mechanism incorporated a mechanism for strong enforcement, such as the WTO model authorising withdrawal of trade concessions? Perhaps not. Whether or not a formal mechanism exists, a successful party in a dispute proceeding might well undertake the imposition of "penalties" in the form of trade concession withdrawal against a losing party that fails to implement a remedy based on an arbitral decision. If the world has moved away from WTO governance, this may not entail a significant difference from WTO practice, as strict compliance with WTO Dispute Settlement Body rulings is largely a voluntary matter. Moreover, compliance with decisions of international dispute settlement bodies usually, but not always, takes place voluntarily, assuming the parties have consented to the jurisdiction of the dispute settlement authority.

E. A New Self-Standing Agreement?

As another alternative, there is nothing preventing an amenable group of countries from adopting the TRIPS Agreement as a self-standing international agreement among themselves, including some form of dispute settlement. If this did not entail

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[17] *See* Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3(1) J. INT'L. ECON. L. 63 (2000) (for an early discussion of the legal and political relationship between WIPO and the WTO).

modification of the TRIPS Agreement rules, the effect of such a transition would be modest. Issues might arise if there was a contemporaneous effort to "modernise" or otherwise change the TRIPS Agreement standards. The "risk factor" involved in such a modification exercise may be illustrated by the ill-fated effort to conclude the Anti-Counterfeiting Trade Agreement (ACTA) in 2007-11.[18] ACTA ran into obstacles because various groups viewed IP-dependent industry efforts to extend protections beyond those embodied in the TRIPS Agreement as overreach and vehemently contested its entry into force. Problematically, ACTA standards were not, at the time, compatible with the domestic law of negotiating parties, implying an effort to circumvent domestic guardrails against IP abuse.

Hence, would an effort to negotiate a new set of internationally agreed IP standards fare better in 2026 than in 2010?[19] On one side, a new agreement could address issues associated with the digital environment that have not yet been multilaterally addressed and, in principle, could do that in a way that reflects an appropriate balance. On the other side, IP-dependent industries look at multilateral negotiations as an opportunity to extend their revenue-generating capacities and are not known for tempering their demands. There is reason to doubt that things have changed very much since 2010.

What are some of the new issues that could productively be embraced by a new or modernised multilateral IP agreement?[20] We can envisage that Artificial Intelligence (AI) technologies will require some adaptations in the way that patent and copyright law are framed and implemented, e.g., refinements to the application of criteria of patentability. Negotiating questions might flow from the evolution of AI and its use to create and distribute content.[21] Is it within the bounds of fair use in copyright for AI providers to train their large language models (LLMs) using copyrighted materials? Given the multiplicity of countries involved and their respective interests, as well as the lobbying power of the AI providers, could multilateral negotiations achieve some consensus on this complex set of questions? These are the types of

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[18] *See* Frederick M. Abbott, *An Overview of the Agreement Contents and Features*, *in* THE ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA: GENESIS AND AFTERMATH 31, 45 (Pedro Roffe and Xavier Seuba eds., 2014).

[19] *See generally id.*

[20] BlueAntWorks Studio, *Intellectual Property at the Science and Technology Frontier: AI, Biotechnology & Quantum Computing*, YOUTUBE (Jul. 24, 2025), https://youtu.be/1JwmigzpU5g?si=TyTjzeeSRDiWL2Bo (the author has addressed specific elements of patent, copyright, trade secret and other law that may require adjustments to accommodate developments in AI, Quantum Computing, Biotechnology and other "frontier" technologies in a series of 10 lectures delivered at the Xiamen Academy of International Law (China) in July 2025, with accompanying linked PowerPoints).

[21] Might the proliferation of 'deep fake' technology suggest the need for rules prohibiting the imitation of personal images and voices to create falsified or deceptive content?

issues that would be challenging to address in an international agreement. The initial process of adjusting to new technologies has historically involved the evolution of jurisprudence through court decisions, with codification following.

Another major lingering problem in the technology space concerns cyber piracy in its many forms, ranging from hijacking and ransom demands on digital systems to theft of trade secret information across borders. Identity theft using IP is a large-scale problem, including in the domain name and email spaces.[22] Are these types of issues capable of being negotiated among a multinational group? How will enforcement challenges be addressed?

The author is disinclined to label a new effort to negotiate international standards that reflect the advances in technology since 1995 as some form of TRIPS 2.0 exercise. There is no reason to carry the weight of the TRIPS Agreement into a new effort.

Despite what may be the need to address the challenges associated with new digital technologies, disparities in national interests and perspectives may preclude common understandings. We could place the United States and China on opposite sides of the spectrum when considering issues such as free speech and fair use, and we could ask whether their perspectives on the regulation of digital technologies could be reconciled. And the spectrum is much broader than that. What about India and Brazil? Or Indonesia?

Given the range of complexities involved, starting and completing a multilateral negotiating round dedicated to reaching consensus on new IP and technology regulation appears a daunting challenge.

F. PTAs and IP

The seemingly plausible alternative is a period of bilateral, plurilateral and/or regional negotiations in which countries exercise whatever leverage they may possess to achieve the results they consider serve their better interests. A subsidiary question

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[22] *See* Frederick M., Abbott, 100 *Years of International IP – Reflections on Past, Present and Future*, 41 Cardoza Arts & Entertainment L. J. 415. 419-421 (2023); *see also*, HOGAN LOVELLS, Domain Name News: June, 2025, (June 30, 2025), https://www.hoganlovells.com/en/publications/domain-name-news-june-2025 (domain name registrars generally are not required to verify the identity of registrants, thereby promoting the use of Internet domain names in the commission of fraud) (this observation is based on the author's 25 years' experience serving as a dispute settlement panellist for the WIPO Arbitration and Mediation Center, having rendered decisions in numerous cases involving online fraud based on falsification of domain name registrant identity data).

is how all of this would fit into the general ideas of MFN, national treatment, and other doctrines that have been the bedrock of the international trading system. At present, we do not know. As the Trump Administration expends national capital dealing with foreign counterparts, will either the United States or the counterparts be interested in sharing the results of their negotiations with third countries? What will the price be, if any?

IV. HEADWINDS

The general thesis of this essay is that TRIPS Agreement rules will persist notwithstanding a declining role for the WTO. Nonetheless, there are some potential obstacles that may stand in the way. Some illustrations from the United States may be useful.

A. Patent revenue taxes

Secretary of Commerce Howard Lutnick has floated the idea of assessing fees on patent owners for revenues secured on the basis of their patents.[23] The details are not yet clear, but if such a proposal becomes law, this would represent a break with the historic treatment of patents, essentially imposing a supplemental tax on patent owners for doing business in the United States. Perhaps because the subject was not within the traditional realm of patents,[24] whether a country may impose a supplemental tax specifically directed toward revenues based on the exercise of patent rights is not directly addressed in the TRIPS Agreement. There is a tangential reference in Article 62.1, but it would take considerable bootstrapping for that language to approve or disapprove of such taxes.[25]

You might say that it was outside the contemplation of the parties at the time the TRIPS Agreement was negotiated. A WTO Member challenging the imposition of such taxes on one of its companies doing business in the United States could do so as a non-violation nullification or impairment cause of action, but such actions are

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[23] *See, e.g.*, Amrith Ramkumar, *Trump Administration Weighs Patent System Overhaul to Raise Revenue*, WALL ST. J., (Jul. 28, 2025), https://www.wsj.com/politics/policy/patent-system-overhaul-18e0f06f.

[24] *See, e.g.*, Alex Mengden, *Patent Box Regimes in Europe, 2025,* TAX FOUND. EUR., (2025), https://taxfoundation.org/data/all/eu/patent-box-regimes-europe/ (there are, however, countries that provide tax preferences based on income derived from patents and other IP intended to encourage investments in innovation).

[25] TRIPS Agreement, *supra* note 14, art. 62 (Article 62 of the TRIPS Agreement reads, "1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.").

not permitted under the TRIPS Agreement, presenting another layer of challenge. If the imposition of patent-based revenue taxes is not addressed by the TRIPS Agreement, it would not matter whether WTO dispute settlement could address it or not, or whether a bilateral, plurilateral, or regional arrangement could address it under incorporated TRIPS Agreement rules. This might bring into question the relevance of TRIPS standards as the international trading system moves forward.

B. Patents and national security

Another scenario is that the United States or some other country decides that its national interest requires that it suspend or eliminate the rights of foreign nationals of "disfavoured" countries from securing or maintaining patent rights within its territory. So, to illustrate, based on national security concerns, the Trump Administration might decide that Chinese companies may no longer own United States' patents because this is a threat to US national interest or security. Of course, there are strong reasons why the United States would refrain from taking such steps, particularly because it would face reciprocal action by the affected country. Continuing the illustration, China could eliminate patent protection for American companies doing business in China. It seems "more likely than not" that US industry would lose substantially more asset value from termination of its patent rights in China than Chinese industry would lose from termination of patent rights in the United States, recognising that the balance in this area has been shifting.[26]

C. Implications for the common law

Either of the two detours suggested above may fundamentally be at odds with the TRIPS Agreement, the second quite clearly. Yet this may not interfere with the general thesis of this essay that the TRIPS Agreement may persist as common law notwithstanding the absence of a link to the WTO. In the case of curtailing the rights of foreign nationals to maintain patent protection in the United States, the United States could make a case to its "like-minded" trading partners that acting in the national interest is acceptable in the new TRIPS as common law order. If the imposition of a patent-based revenue tax was implemented on a national treatment basis (i.e., it would apply to all patent owners regardless of nationality), the United States could make the case that this is a grey area even within the TRIPS Agreement.

V. THE COMMON-LAW FUTURE

It is no secret that the international community is currently subject to a wide range of pushes and pulls reflecting a multiplicity of national, regional, personal,

[26] The author is not aware of a detailed cost-benefit analysis of the potential consequences of a national security patent cancellation measure directed at a foreign country.

ecological, and other interests. Yet there has developed a common understanding among governments, private sector enterprises, and individuals that maintaining a baseline of international intellectual property norms serves a useful purpose and that moving backwards is not a realistic alternative. In this highly uncertain environment, the TRIPS Agreement may best be understood as a genus of common law. The term "common law" is used here in the context of a "common commercial law" (or *lex mercatoria*) or "common commercial code" that evolves among participants in a business sector and reflects their understanding regarding what types of behaviour are appropriate and which are not.

A very good example of this can be found in the collective body of decisions of the dispute settlement panellists applying the Uniform Domain Name Dispute Resolution Policy (UDRP) administered by the WIPO Arbitration and Mediation Center. Although disputes arise among parties from many jurisdictions, and dispute settlement panellists are based in many jurisdictions, there has evolved a solid common understanding of the legal relationship between trademarks and domain names that is applied in panel decisions. The WIPO Arbitration and Mediation Center provides a set of guiding jurisprudential "summaries" that have evolved based on the decisions of panellists over the past 25 years, the WIPO Jurisprudential Overview.[27] This is in the nature of a common body of law interpreting the UDRP, yet not anchored in a particular national legal system. Dispute settlement panellists are not "bound" by the guiding summaries, which provide options to address context, but panellists understand that the system is built around expectations and that departures from the common understanding of the rules should be explained. Expectations are not to be upset lightly.

As far as the TRIPS Agreement goes, this essay refrains from characterising it as "customary international law". We avoid the philosophical debates that arise when custom and international law are linked together. Governments are not "bound" to implement and apply intellectual property norms in a specific way based on past practice, whether or not they follow the TRIPS Agreement rules. Instead, it is a matter of maintaining a reasonable semblance of international economic expectations and order through a shared understanding: the common law of the TRIPS Agreement.

[27] WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO Overview of WIPO Panel Views on Selected UDRP Questions (3rd ed., 2017).