"The Brazilian Strategy of "Transversalization" of the Development Agenda"

The Political Economy of Intellectual Property Rights in New and Emerging Economies

DRAFT VERSION

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1. INTRODUCTION

In October 2007, Susan Schwab, former United States Trade Representative (USTR), announced that the United States would open negotiations with certain specific partners for the adoption of a new international regulatory framework for enforcement of intellectual property rights (IPRs) and that these negotiations would not be subjected to any existing international institutions\(^1\). Formally, the negotiations would begin in 2008, during a meeting in Geneva with the presence of government representatives from the U.S., European Union, Japan, Canada, Switzerland, Australia, South Korea, Mexico, Morocco and New Zealand. After 11 rounds of negotiations, during nearly three years, the Anti-Counterfeiting Trade Agreement (ACTA) was concluded and the final version published and opened for signature in May 2011\(^2\). Just one year later, the European Parliament rejected the agreement but the U.S. attempts to strengthen international mechanisms for protection of IPRs have not been abated. In 2010, U.S. joined the Trans-Pacific Partnership Agreement (TPP) negotiations, aiming to insert specific IPRs rules in this agreement in a similar way to those contained in ACTA and other preferential agreements recently negotiated.

The velocity of the negotiations and the conclusion of an agreement as complex and controversial as ACTA could be explained by the prior coincidence of interests between the actors involved. They had already expressed the need for a mechanism with ACTA characteristics and, somehow, tested its construction in other occasions\(^3\). Obviously, the existence of a ‘prior understanding’ did not prevent the manifestation of differences between those involved in the negotiations, however the most relevant players converged in their views about the agreement spirit and on their general objective – the need to strengthen the intellectual property rights of its citizens and businesses globally\(^4\).

Moreover, the main demandeur of the Agreement, the United States, had also directed their political efforts to strengthen international IP enforcement patterns. Since the adoption of the Trade-Related Aspects of Intellectual Property Rights agreement (TRIPS), U.S. and other developed countries, especially Japan and European Union, are trying to strength international IPRs beyond the minimum standards established by the

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\(^2\) The final version can be found at USTR website: [http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf](http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf)

\(^3\) Since 2005 Japanese government, followed by US and EU, have manifested the need of establishing an agreement to deal with the worldwide problem of counterfeiting and piracy. (Bitton, 2012; Sell, 2010). Going back a bit further, during the Tokyo Round, a similar proposition was presented but refused.

\(^4\) During the twentieth century, this question has had a constant presence in the statements and initiatives of the G8. For example, with the establishment of the “IPR Taskforce on anti-counterfeiting and piracy” and the Heiligendamm Dialogue - a dialogue forum between the G8 members and developing countries (Brazil, China, India, México, and South Africa).
agreement. However, the difficulty of moving forward with this maximalist agenda within TRIPS Council forced U.S. to, once again, adopt a forum shifting strategy for building international standards with TRIPS-plus standards, negotiating international IP rules in more diversified trading forums (Helfer, 2004; Sell, 2011).

Since the end of George W. Bush administration, at least, and during Barack Obama administration, the enforcement of IPRs figures at the center of U.S. trade policy, getting high priority on the U.S IPRs maximalist agenda, as well as its policy of cooperation with other developed countries. What have been called an enforcement agenda (Flynn, 2011; Geiger, 2012; Halbert, 2011; Sell, 2011; Ilias, 2012).

In this sense, ACTA negotiations, and more recently the TPP, represent an important chapter of the US global strategy for the expansion and strengthening of IPRs. Both agreements, despite the form and content differences seek to maximize international IP protection and have the strengthening of enforcement patterns as the main objective (Rens, 2010; Flynn, 2011; Michael, 2010; Sell, 2011). These political efforts come from the biased perception of some developed countries and its main business groups that IPRs violations has increased dramatically in recent years, causing major damage to the economy and welfare of these citizens (Correa, 2009). And more important that TRIPS

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5 In general terms, TRIPS-plus agreements are those containing broader and deeper provision than those contained in TRIPS.

6 When we refer to legal standards, procedures or policies aimed at ensuring the enforcement of intellectual property rights, we are emphasizing measures that allow the legal provisions established on the subject, ie, those that permit rights and obligations of a right holder to be more incisive and effectively executed. That is, legal changes aimed to establish stricter civil and criminal remedies; the establishment of courts and other institutions specifically geared to decide on the matter; the empowerment of agencies and officials in monitoring and punishing infractions, highlighting customs officers, specialized police agencies, health surveillance, etc.; the creation of technical committees focused on the development of plans and strategies to combat the infringement of intellectual property rights; the implementation of plans for international cooperation for facilitating cross-border action, among other measures.

7 In its simplest terms, the enforcement agenda represents a shift of the efforts of multinational intellectual property holders and their allied governments from a goal of escalating substantive intellectual property requirements in global legislation, to a focus on lowering the costs and raising the penalties for the enforcement of existing rights. But this simple description masks the agenda’s primary goal, which is to shift a higher percentage of intellectual property enforcement costs towards the public. The enforcement agenda promotes expanding the public’s role in enforcement through criminalization and other forms of public prosecution; expanded use of border searches and seizures; sponsorship of publicly funded education and technical assistance campaigns; creation of new government “IP Czars” and other specialized government offices, task forces and courts; and increasing coordination between enforcement agencies and private industry. At the same time, its measures seek to decrease the cost and improve the “deterrent” efficacy of private enforcement through minimizing due process rights of those accused of infringement; escalating penalties for infringement, including for end users of infringing products; and extending liability to third party platforms and intermediaries that are easier to find and litigate against and which potentially cut off larger collections of accused infringers (Flynn, 2011: 905).


9 the most controversial topics are definitely the criminalization of counterfeiting and piracy; and also the technological measures that impacts the Internet
left much flexibility, specifically in the *enforcement* of rights section\(^{10}\). Flexibilities not solved within the WTO Dispute Settling Body interpretation\(^1\) (YU, 2012).

In this sense, the U.S. maximalist agenda is conducted in a way to enhance the harmonization of IP protection and limiting or eliminating flexibilities and limitations to private rights contained in TRIPS, through the negotiation of multilateral, preferential or plurilateral agreements that increase the scope of what is considered subject of protection, the duration of rights and an increase in forms of enforcement. As pointed out by Rens (2010) “the enforcement agenda, taking the guise of strengthening the enforcement of existing rights, attempts to enact national laws and to create policies and practices that effectively eliminate existing limitations and exceptions in the current international intellectual property regime” (Rens, 2010: 03)\(^{12}\)

The debates about the effects of the protection of IPRs over economic development, especially the international harmonization these norms, have shown the inadequacy of exacerbated strengthening policies of knowledge control. More importantly, they have shown how the private protection of knowledge affects a large portion of public policies essential to developing countries – public health policies, access to knowledge, agro development and food security are the most relevant examples\(^{13}\).

Therefore, we can say that the ACTA and TPP negotiations are inserted in the U.S. grand strategy of *forum shifting* for strengthening international standards of IP protection and somehow represent a response to the resistance of some developing countries to accede to TRIPS-plus standards multilaterally. Most importantly, we understand these agreements as a response to the conclusion of the *Development Agenda* negotiations at the World Intellectual Property Organization (WIPO) and the advancement of other propositions internationally defended by Brazil and other developing countries.

Two weeks before Schwab’s announcement, the WIPO General Assembly adopted, with open U.S. disagreement, the 45 recommendations of the *Development Agenda* and the creation of a permanent committee to deal with this particular issue – the *Committee*

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\(^{10}\) This is what Peter Yu has called the TRIPS Achilles’ Heel

\(^{11}\) *China – Measures affecting the Protection and Enforcement of Intellectual Property Rights (DS362)*

\(^{12}\) The general theme of TRIPS-plus rules, as mentioned above, is to advance in the regulation of intellectual property protections beyond those minimum obligations established within the TRIPS. In this sense, it would be precisely this existing flexibilities that still allow a small degree of discretion to signatory countries for implementing the provisions contained in the agreement which are being "attacked" by the TRIPS-plus rules.

on Development and Intellectual Property (CDIP) (May, 2007; Khor, Shashikant, 2009). In general, we can say that the main objectives and principles of the Development Agenda are inconsistent with U.S and other developed countries interests, which also aimed the strengthening and harmonization of IP rights within WIPO. But, at the same time, the “Friends of Development” could resist to this project and advance in defense of preserving some flexibilities, exceptions and limitations to IPRs with the approval of the Development Agenda (May, 2007; Musungu, 2010; Slade, 2011; Muzaka, 2012).

Therefore, the Development Agenda, which was born as a response to the demands of some developed countries within WIPO, but also outside multilateralism – of continuous and systematic move forward on international IP regulations – could be understood as part of a broad but fragmented and non-coordinated agenda conducted by a large group of non-developed countries. An agenda for IP flexibilities – ie. WIPO Development Agenda is part of a set of actions, which aims to ensure the maintenance and deepening of the remaining flexibilities in the multilateral IP regime, allowing countries to minimally adapt their national IP systems to specific national demands. This is a very important issue, because of the continuous increase in the complexity of IP international system and the interference of the private protection of knowledge on key public policies for social-economic development.

The advance of this flexibilities agenda, in opposition to a coordinate policy from developed countries of advancing a multifaceted agenda of IP hatchet is directly related to the need of some developing countries of safeguarding their freedom and capacity of making use of TRIPS flexibilities in the adequacy of their national systems of IP protection. Those flexibilities are in jeopardy with the negotiation of TRIPS-plus agreements. Over the last years, China, India, and South Africa have adopted or reformed their existing legislations in a way to guaranty proper usage of the flexibilities contained in the agreement; Brazil intends to do a deep and profound reform of its copyright and patent legislations, compatible only with the gaps left by the agreement.

The potentiation of this domestic-international articulation, which permeates the need to maintain and amplify the policy space for the conformation of IP norms, would depend on the strengthening of more articulate actions from developing countries. Collaboration policies, which can encompass a set of formal initiatives – with the construction of coalitions for specific negotiations; informal strategies to form coherent positions on certain themes; or technical cooperation policies to promote the construction of national systems of IP protection.

The extent of possibilities of cooperation among developing countries also faces historical difficulties and even positions and demands coordination difficulties. But as claims Latif (2005) those approach policies pervade the “pursuit (…) of a common position with a view to influencing international standard-setting in a way which takes into account their interests and priorities (Latif, 2005: 29).
So, this paper will discuss some of the south-south collaboration initiatives on IP, from a Brazilian perspective, to foster the agenda for maintenance and strengthening IP flexibilities. To understand these south-south initiatives we have to look at a broader scenario, trying to understand the risks posed by the US maximalist agenda and the need for strengthening the power of action of developing countries to move forward with these flexibilities agenda. Hence, the paper has two main parts.

On the first one, we analyze the risks posed by the US maximalist agenda and the *forum shifting* strategy for the multilateral IPRs regime. The general idea is that the migration of the norm-setting process to arenas and like-minded partners would weaken multilateralism. In this sense, Brazilian government's and other developing countries’ concerns are put, more broadly, on the impairment or distortion of some of its agenda and demands, which have advanced relatively in multilateral forums. Agreements negotiated outside the multilateral institutions can lead to an eventual evacuation of the discussions that take place in WTO and WIPO and other relevant multilateral institutions. In this sense, the multiplication of TRIPS-plus norms also produces concerns regarding the imbalance in the rules that could further limit the already limited existing freedoms and flexibilities in the TRIPS Agreement.

The second part of this paper relates to the first and refers to the constraints that this maximalist agenda negotiated outside multilateral institutions could impose to the south-south collaboration strategies and south-south coalitions who hold important positions in international institutions. Also, how these countries are dealing with this threat and acting to foster the flexibilities agenda. One first dimension deals directly with the resistance, in general, to TRIPS-plus norms negotiated in multilateral institutions, but also in preferential negotiations. The first ones impose constrains to developing countries *policy space* and the second ones impact multilateralism. On the other hand, we have to ask what these developing countries are doing outside and inside multilateralism to strength the *policy space* left.

2. US MAXIMALIST AGENDA AND THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

The US maximalist agenda, that have ACTA and TPP as the most recent chapters, is the result of a political process that has been developed since the early 1980s. At this moment U.S. began a strong campaign for the strengthening and harmonization of international IP rules. This movement was conducted through unilateral pressure on some US trading partners, but especially with the use of a *forum shifting* strategy that led to the introduction of a specific agreement on the IPRs multilateral trade regime, during the GATT Uruguay Round (1986-1994). The adoption of TRIPS profoundly changed the international regime of intellectual property and brought the international
rules closer to the existing standard of protection in the U.S. (Doremus, 1995; Sell, 2003; Drahos, 2002; Correa, 1997).

TRIPS has established a mandatory minimum standard of protection over all forms of knowledge extensive to all WTO countries. More importantly, this minimum standard was established on very high levels for most countries. And for the first time, an international agreement on IP has established mandatory enforcement standards and bound the adequacy and implementation of rules to the Dispute Settlement Body. The result was a strong international harmonization of norms to protect knowledge and its absolute linkage to the logic of production and commerce of goods, submitting a broad array of public policies to this trade-related dimension (Musaka, 2009; Musungu, 2005). Therewith, occurred a severe limitation of policy space for developing countries, unable to adequate its protection systems to national demands and capacity (Shadlen; Ruse-Khan).

However, TRIPS preserves certain flexibilities, allowing minimum freedom of implementation of its norms to signatory countries - as well as a small leeway for adequacy of its protection systems to specific national demands. In sum, TRIPS has allowed some forms of limitation, exception, and rights exhaustion.

Nevertheless, since the conclusion of TRIPS negotiations, the U.S. kept on trying to further strengthen and extend the IPRs protection through the negotiation of new agreements with TRIPS-plus provisions. The difficulties emerging from their demands in WTO TRIPS Council forced U.S. to maintain the strategy of open negotiations in multiples forums – bilateral, regional, plurilateral and multilateral – to advance their agenda with the objective of never lessen the pressure to move forward in the strengthening and harmonization of international standards of protection and enforcement of IPRs. Similarly, the U.S. went through a process of legal transformations, changing its national patterns of protection.

It is important to highlight the fundamental role of US private groups supporting the maximalist agenda. As analyzes Susan Sell, the almost umbilical relationship between US private groups from economic and productive technologically-intensive sectors with government agencies responsible for formulating and conducting international negotiations, especially the United States Trade Representative (USTR), create a type of dependency of the government to the demands of these industries\(^\text{14}\). As pointed out by

\(^{14}\)This close relationship and reciprocity between organized business groups and US policymakers is a very important object of study. Susan Sell has significant works on the subject (Sell, 1995, 2003). Besides these, other important works as Doremus (1995); Coriat, (2002); Drahos (1995). In previous research we also analyze the political participation of organized business groups in negotiating preferential trade agreements with Latin American countries (Menezes and Lima, 2010). As Susan Sell demonstrates (2010) a series of US industrial associations have close participation on the negotiations and conformation of the US IP agenda and are responsible for providing data to the government. The USTR responds almost directly to the interests of these groups and designs its strategies according to their specific demands. ACTA itself was a result of initiatives of industrial sectors of G8 countries.
Halbert, the maximalist agenda is part of a US state policy. Even considering the ideological differences between Democrats and Republicans, the relationship with these private groups and the bases of the IP discourse remains sharply stable.

Nonetheless, the period immediately after TRIPS was marked not only by actions towards strengthening standards of protection. It also experienced a greater assertiveness of some developing countries – which in other times had been organized for the purpose of reforming international rules in the direction of their own interests – that have also scored some victories.

The most emblematic case was certainly the Doha Declaration and Public Health in 2001, which culminated in the amendment of TRIPS Agreement, allowing the use of compulsory license and parallel importation for countries without production capacity of pharmaceuticals. In that sense, on May 2007, the World Health Assembly (WHA) adopted a resolution mandating the provision of technical assistance for the use of TRIPS flexibilities and other relevant decisions in order to promote access to pharmaceutical products. The United States disassociated itself from the decision and in 2008, the World Health Organization (WHO) adopted the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPOA). The adoption of the Development Agenda is inserted in these politics to sustain the flexibilities of IP regime and represents an important victory for developing countries as it definitely barred a specific agenda of harmonization of IP rights in this organization and made an important goal for the agenda that fights for the maintenance of exceptions and limitations of IPRs.

Undoubtedly, we can say that these are victories for developing countries in the tentative of shaping the international IP system in a more permissive way that can effectively be guided by fostering economic and social development. In another way, other important unmet demands still show the direction of important challenges for them. The relationship between TRIPS and Convention on Biological Diversity (CBD) is still a fundamental issue and is still unresolved. More than a decade after the TRIPS Council initiated discussions on this matter, in 2001, developing countries still require an amendment on TRIPS that incorporates prior informed consent, benefit sharing and disclosure requirement to determine the country of origin of the biological material and associated traditional knowledge in patent applications. The last proposal was sent to

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15 I) America’s biggest strength is its innovation and creativity; ii) Secondly, countries outside the United States profit from stealing our ideas, and this hurts us economically; iii) Thirdly, it is the government’s job to establish strong rules that will protect American IP property abroad; iv) Finally, the theft of IP has negative consequences not only to our economic bottom line but to public health—through the distribution of counterfeit goods with the ultimate result that terrorists and criminals profit at the expense of hard-working innovative Americans (HALBERT, 2011)
the TRIPS Council in April 2011. At WIPO, also more than a decade after the creation of the IGC, there is no sign of a consensus on the issue (Latif, 2011).

This scenario of disputes and conflicts between developing and developed countries has increased the debate on the role of intellectual property for development, on the inconsistencies of the international intellectual property rules, on the need for greater balance between private rights and access to knowledge. However, it also led to strengthening U.S. maximalist agenda, which assumed a more aggressive strategy of forum shifting.

On the one hand, through the expansion of themes and the rule-making processes, introducing demands in other multilateral institutions (horizontal forum shifting). In this sense, WIPO and other international institutions received demands for conducting negotiations for the adoption of new international agreements. On the other hand, with the migration of the discussions from the multilateral arena to instances with smaller scope (vertical forum shifting). In turn, numerous preferential trade agreements were negotiated by the U.S containing intellectual property chapters with TRIPS-plus standards and international investments agreements further increasing forms and ways of intellectual property protection (Drahos, Ruse-khan). And more recently, plurilateral negotiations as ACTA and TPP have gained prominence, as well as the attempt of reforming national legislations to enforce intellectual property right nationally and globally. This option to not go through multilateral institutions to advance a TRIPS-plus agenda is extremely controversial and has important consequences for developing countries (Helfer, 2004; Sell, 2010).

The creation of the Office of U.S. Intellectual Property Rights Enforcement Coordinator (IPEC) established an institution to support and coordinate all US policies and

16 Draft Decision to Enhance the Mutual Supportiveness Between the TRIPS Agreements and the CBD: Communication from Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group, and the African Group”. http://wto.org/english/tratop_e/trips_e/ta_docs_e/4_tncw59_e.pdf

17 As signed by Flynn (2013) “Trans-Pacific Partnership as a plurilateral agreement because it has as a prime objective the expansion of membership beyond its original negotiating members and because, despite its potential limitation of membership to the Asia-Pacific Economic Cooperation region, both the negotiating members and the ultimate intended signatories are geographically diverse” (Flynn, 2013)

18 Over the past three decades, U.S. changed its national legislation numerous times, but always toward the strengthening of IP rules and the punishment for infractions. Two draft Laws have recently gained international attention - 'Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act' (PIPA) and the "Stop Online Piracy Act" (SOPA). Proposals dealing with similar highly controversial matters – the fight against piracy and counterfeiting on the Internet, especially the one called facilitated by rogue websites located outside the U.S.. Overall, the two projects aim to increase the capacity for monitoring and the instruments for action by government and right holders in the fight, through legal action, against sale of counterfeit and piracy goods. (Menezes, 2012). But, more important, “all said, the United States has passed over 25 laws expanding some aspect of IP protection since 1995, including recently the Prioritizing Resources and Organization of Intellectual Property (PRO-IP) Act of 2008, which established the first ever copyright “tsar” for the United States, a position that echoes the language of the drug wars”. (Halbert, 2011: 87)

initiatives on IPRs enforcement. One of the first initiatives was the establishment of a grand strategy directly aimed at this purpose, conveyed with the publication of the 2010 Joint Strategic Plan On Intellectual Property Enforcement\textsuperscript{20}. The document domestically envisaged a broad and coordinated action from the federal government to prevent illegal practices, including all US agencies and public institutions that could have any interface with intellectual property rights issues. By controlling procurement, creating way for facilitation of information exchange between rights holders and government, empowerment of control agencies and other public agencies it would seek progress in controlling violations actions nationally. However, the international veins of this strategy are more important – some specific policy options were designed and the maximalist approach of the enforcement agenda gained preeminence:

1. The adoption of cooperation policies with important partners and unilateral actions of border control to stop the entry of illegal goods.; training of US embassies employees to strengthen the capacity of surveillance and support big corporation actions in the enforcement of its private rights.
2. Sustenance of sometimes extremely controversial positions in international organizations that deal specifically with the theme and other international agencies where correlate agendas can be presented.
3. Negotiation of commercial agreements that specifically approach the matter, with a growing effort directed at the conclusion of ACTA and TPP\textsuperscript{21}.
4. it is also relevant to mention the legal changes in the country and the government support to them, especially to the approval of the SOPA and PIPA projects\textsuperscript{22}

Multilaterally, U.S. was an important actor in attempting to build new patterns of protection and enforcement of IPRs. Two important agendas were negotiated in WIPO, which envisaged the construction of new treaties reaching the internationalizing of legal standards established in the U.S – the Digital Agenda and Patent Agenda\textsuperscript{23} (Correa, http://www.whitehouse.gov/omb/intellectualproperty/ipec

\textsuperscript{20} This plan was followed by other two and some other initiatives conducted by IPEC. http://www.whitehouse.gov/omb/intellectualproperty/ipec

\textsuperscript{21} “That’s why USTR is using the full arsenal of tools available to crack down on practices that blatantly harm our businesses, and that includes negotiating proper protections and enforcing our existing agreements, and moving forward on new agreements, including the proposed Anti-Counterfeiting Trade Agreement.” (2010 Joint Strategic Plan On Intellectual Property Enforcement. Page 32)

\textsuperscript{22} As we can read in the IPEC 2011 strategic plan “The PROTECT IP Act would increase law enforcement authority to combat websites that are used to distribute or provide access to infringing products. The introduction of the PROTECT IP Act is an important step towards addressing counterfeiting and piracy online and the websites that steal the intellectual property of hard working Americans. We look forward to continuing to work closely with Chairman Leahy and other members of the Congress to ensure an effective and appropriate approach that addresses the challenges and opportunities of the Internet” (pág. 08)

\textsuperscript{23} At WIPO, US and other developed countries worked for the conclusion of important treaties with TRIPS-plus provisions, as the Digital Agenda (WIPO Copyright Treaty e WIPO Performances and Phonograms Treaty) and a Patent Agenda (the adoption of the Patent Law Treaty; reform of PCT and the negotiation of a draft for a Substantive Patent Law Treaty). A central part of this project of harmonization and strengthening of intellectual property rights globally was conducted within WIPO with the proposed Substantive Patent Law Treaty (SPLT) at Standing Committee of Patents (SCP).
The US has put pressure on WIPO to strengthen the mandate of the Advisory Committee on Enforcement (ACE) with the purpose of including soft law norms, such as the development of best practices and general enforcement orientations. In the multilateral level, there were demands from the US and other developed countries for the WT) to make more efforts in order to establish a permanent enforcement agenda on the TRIPS council.

Despite the existence of two international organizations with expertise to deal with IPRs that already have its own complex and controversial agendas, U.S. has acted over at least 10 years to diversify the international forums to build new TRIPS-plus provisions. This process of horizontal forum shifting has gained such wide proportions that May (2007) has named it as forum proliferation; and Munoz Telles (2009) understands it as a policy of multiple forum capture. In this sense, complex negotiations have migrated to non-specialist institutions, mixing already widely conflicting political agendas with other highly controversial. In this sense, two specific agendas gained prominence within this dimension of U.S. policy. The SECURE (Standards Employed by Customs for Uniform Rights Enforcement) in the World Customs Organization (WCO) and the IMPACT program (International Medical Products Anti-Counterfeiting Taskforce) in the World Health Organization (WHO).

More important to the analysis in question is the US policy to negotiate TRIPS-plus agreements in non multilateral instances. U.S. sponsored many new preferential trade agreements containing TRIPS-plus clauses since the adoption of TRIPS. Latin American countries were one of the main targets at this time (Drahos, 2003; Okediji, 2004; Diaz, 2008; Roffe e Spannerman). The negotiation of this type of commercial agreements is, no doubt, the most effective part of US strategy to the advance of the maximalist agenda, despite the small geographic impact of the initiatives.

24 The SECURE aim was to establish a relationship between counterfeit of medicines and public health risks, seeking the establishment of provisions other than those contained in TRIPS to enlarge the scope of practices considered illegal and provide mechanisms of action to governments, especially, the expansion of possibilities of embargo by stakeholders of suspect products. Customs authorities should expand their powers to act beyond the control of products entering into the country, but also on goods in transit. The authorities would be authorized to retain, seize and destroy goods that infringe all kinds of intellectual property rights. Also, they were given the power of "ex officio" apprehension: giving customs authorities, regardless of manifestation of stakeholder and based only on suspicion, the power to seize goods. The agenda also suggested the WCO could develop a model law for intellectual property rights with the purpose of shaping national systems, harmonizing international practices in broader measures than those on TRIPS. In short, two principles of the trading regime would be under attack: free transit for trade facilitation, under Article V of GATT, and the principle of territoriality of intellectual property rights. This last principle would be affected specifically in the case of the possibility of seizure of goods in transit. In 2009 this project was replaced for the “WCO Counterfeiting and Piracy (CAP) Group.

25 The proposal under negotiation at WHO has great similarities with SECURE. It also focuses on customs and enforcement measures to the extent of such measures for goods in transit. This is a comprehensive policy, implemented under pressure and coordination of interested companies, with the stated purpose of creating a large network to control and prevent the sale of counterfeit drugs between countries. Through the initiative coordinated by WHO, governments and various companies, including U.S. companies supported by the government, have sought to build an understanding of intellectual property and ways to combat infringements of those rights in a more broadly and strong form.
More recently, especially after 2007, the US has dedicated more attention to the negotiation of plurilateral agreements with like-minded partners. ACTA, negotiated between 2007 and 2010, already discarded; and TPP, which US joined in 2010, are examples of this new face of the maximalist US strategy.

The envisioned ACTA will include commitments in three areas: (1) strengthening international cooperation, (2) improving enforcement practices, and (3) providing a strong legal framework for IPR enforcement”. ACTA goes significantly further on the minimum standards of TRIPS and strengthens the discretion of the authorities in the application of civil enforcement, border measures, criminal enforcement and creates instruments to regulate the rights of intellectual property in the digital environment (Bitton, 2012; Kaminski, 2011; Yu, 2012).

As pointed by Flynn, TPP is also a plurilateral agreement that “attempts to harmonize substantive patent and data protection law in the TPP membership to U.S. standards on multiple controversial topics, including broadening scope of patentability, lengthening patent terms, imposing data exclusivity and patent/registration “linkage” requirements, and restraining numerous flexibilities in the TRIPS Agreement”

This strengthening of the rules of observance of rights and especially the way the agreement was negotiated has worrisome implications, because, as Susan Sell states:

> While some of the substantive provisions are in fact TRIPS-plus and even U.S.-plus, it is also TRIPS-minus insofar as it omits any TRIPS flexibilities, and U.S.-minus because it lacks provisions for fair use, limitations and exceptions to copyright, and due process provisions to protect the innocent. It sharply reduces policy space for developing countries to design appropriate policies for their public policy for innovation and economic development. (Sell, 2011: 457)

Flynn equally ponders about the export of unbalanced standards different from the ones in the US. Internally, the US has a minimally balanced legislation, maintaining important users rights such as “fair use”. However, in international negotiations this balance attempt is ignored: the international agenda of the US searches the harmonization looking at the interests of right holders only26 (Flynn, 2013:124).

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26 Band (2012) shares the same argument: “The U.S. IP system is based on a careful balance between creators’ interests in the control of their work and societies’ interest in the access to those works. SOPA, PIPA, and TPP lack this historic balance. In other words, the U.S. copyright law has built-in limitations that ensure balance between the Copyright Clause and the First Amendment. The U.S. proposal for the TPP IP chapter lacks the balance found in U.S. IP law. (Band, 2012).
3. SOUTH-SOUTH COLLABORATION ON IPR.

To analyze the international negotiations on IPRs, specially the U.S. maximalist agenda and the role of south-south collaboration, it is important to observe the international scenario in which these negotiations occur in a broader way, considering the international system structure and the configuration of forces between the main actors involved in the process of continuous adjustment of the international regime. In this sense, we must observe the impacts that the proliferation of TRIPS-plus agreements could cause to the system’s organization, but especially its impact on the propositions and demands of developing countries. In general, it is possible to identify two main general understandings of the Brazilian government and other important developing countries about the impacts of U.S. maximalist agenda.

Therefore, from the analysis of the possible impacts generated by the multiplication of international norms with TRIPS-plus standards, especially those negotiated outside the multilateral arena, we can comprehend the reactions adopted within and outside multilateral institutions and the importance of south-south collaboration to strengthen some demands of some developing countries. Nonetheless, it is important to highlight that the actions of those countries are not merely reaction, but are certainly affected by the strong maximalist activism of developed countries, especially the US. Even more importantly, the actions of those countries to strengthen a flexibility agenda is vital to their interests in terms of development.

3.1. Some Impacts of the Maximalist agenda on Developing Countries Demands

The main concern of the Brazilian government and of other developing countries refers to the eventual weakening of multilateralism and fragmentation of international negotiations in IPRs, with the proliferation of agreements negotiated in preferential instances and among like-minded countries. Thereat, there would be the risk of distortion and impairment of developing countries demands and agendas. The limitation of the flexibilities agenda, relatively advanced on multilateral discussions – especially with the WIPO Development Agenda – would have a consequence of diminishing the policy space of these countries, which still intend a better equating of their IP legislations to sustain socio-economic development policies.

The migration of negotiations to preferential spheres, outside the multilateral instances, with the participation of like-minded countries, prevents the contraposition of diverging positions and a better balance of discussions and demands. Even more problematic is the fact that negotiations are, in the recent cases of ACTA and TPP, in secrecy.
Negotiations between closed doors prevent that social organizations interested in the discussions can participate and opine about matter of great international relevance.

Moreover, Brazilian government and other developing countries remained concerned that ACTA and TPP could be placed as a standard for future negotiations and an instrument of pressuring countries to adhere to TRIPS-plus standards. In this way it could become a mandatory standard for future U.S. trade partners. Thus, without changing the overall structure of TRIPS, ACTA and TPP would imply higher standards that countries could take, but leaving a significant capacity of pressure for U.S. over its partners.

In Schwab’s words, ACTA would be a new and broader enforcement reference that countries would adhere voluntarily, but would also be a new standard for U.S. trading partners. Even never entering “in force”, ACTA was planned to be the most advanced, most well-rounded part of a multifaceted strategy to stimulate, via coercive or cooperative actions, the strengthening of specific dimension of TRIPS-plus rules. For a Brazilian representative, it was also a major concern.

It is reasonable to assume that once ACTA was concluded, U.S. would put pressure on other trading partners for their accession. We must consider that the U.S. eventually invoke the non-compliance to ACTA as a reason to include a country in the "Special 301".

"Brazil reiterated its concern regarding the implementation of a stringent international standard for the “enforcement” of intellectual property rights with the Anti-Counterfeiting Trade Agreement (ACTA), which eventually would be used as an instrument of pressure against developing countries.”

Within this same logic, ACTA and TPP could also serve as legal framework for later multilateral negotiations or even in the future be transformed in an international pattern, seeking to advance over the multilateral regime. This concern about the risk of these new norm and protection being included in a multilateral forum, especially the WTO, is not unrealistic, as described by Ilias (2012). “For example, Japanese trade officials have stated, ‘We very much want to make ACTA a model for forming international rules within the WTO framework.' The same analyst says several

27 “set a new, higher benchmark for enforcement that countries can join on a voluntary basis.”
28 BRASEMB OFAFFAIRSINWASHINGTONTO26/10/2007
29 De DELBRASOMC Outdooron 27/11/2009(MVA
30 During ACTA negotiations, the establishment of a permanent committee was very worrying for countries.
commentators have expressed concerns about the possibility of this type of agreement circumscribing the multilateral processes.

The option of escaping multilateral institutions, and consequently the pressures and demands from developing countries, results in a strong unbalance of the produced norms. The difficulty in advancing in WIPO and WTO has transformed the preferential negotiations into a viable solution for the US, which could avoid the resistance of countries such as Brazil, India, China, South Africa and the African Group. Especially after the adoption of the WIPO Development Agenda and the activism of these countries and certain NGOs on WIPO, this organization is no longer an adequate locus for an enforcement agenda.

Henceforth, the negotiations of preferential trade agreements and plurilateral agreements would lead to a fragmentation of the multilateral system, becoming standard for other preferential and multilateral negotiations. In this sense, this way of conducting the negotiations to re-build IPRs directly conflicts with the overwhelming trend in multilateral institutions toward protection of TRIPS flexibilities for developing countries to promote important public policies, as the access to affordable medications\textsuperscript{32}, access to knowledge for educational proposes, etc. (Flynn, 2013: 120). So, we can say that the general thrust of the maximalist agenda and the fragmentation of the norm-setting process conflicts with the Development Agenda being implemented at WIPO, which has a much stronger focus on the harmonization of limitations and flexibilities in international intellectual property law.

Therefore, there were concerns related with the difficulties that this strategy would impose over some demands and agendas. Beyond, emptying and weakening the multilateral system, the US forum shifting strategy could leave to the impairment and decrease the scope of some developing countries demands, also undermining the credibility of multilateralism in the field of IP law and its main institutions. The consequences, in this sense, would be the threatening of flexibilities which would deeply restrict the policy space for developing countries. The maintenance of these flexibilities is exactly what Brazil and the Development Agenda Group (DAG) want with the Development Agenda, as it was clarified by a Brazilian representative during a meeting with members of the French government in 2007, but also in other documents and declarations:

It was clarified to the French diplomats, after consultation with the Inter-ministerial Group of Intellectual Property (GIPI) and the CNCP, that Brazilian Government's preliminary understanding is that: a) the WTO TRIPS Agreement already includes heavy commitments of enforcement',

which penalize particularly developing countries, b) the TRIPS Agreement, on the other hand, has some safeguards and flexibilities that should be preserved, and that would be threatened in the negotiations of ACTA( ...), c) the TRIPS Agreement is sufficient for the treatment of piracy and counterfeiting problems and currently does not justify the adoption of new commitments in this area. Thus, Brazil would not be considering, for now, engaging in the exercise of ACTA.\(^{33}\)

The maximalist agenda also poses risks for the fragile South-South collaboration strategies and the coalition of developing countries that supports the demands for maintenance of the flexibilities of the international IP regime and specific demands defended by Brazil internationally. On the one hand, as mentioned, by emptying the instances where these countries are advancing their demands and, on the other hand, by attracting some of these countries to the orbit of action of developed economies. According to the European Commission Trade Office: “[t]he ultimate objective is that large emerging economies, where IPR enforcement could be improved, such as China or Russia, will sign up to the global pact.” (Rens, 2010)

The ACTA and TPP cases are emblematic in this sense. The first was negotiated as an agreement that supposedly would not strongly alter legislations of the main partners. In the US, the attempt of the USTR of negotiating ACTA as an Executive Agreement (Flynn, 2011) and in the European Union the notion that it would be completely compatible with the Acquis Communautaire (Geiger, 2012).

Therefore, why negotiate an agreement of this nature and employ such efforts for that? One answer would be, as point by Geiger (2012), that the Agreement was addressed to non-signatory emerging countries, who will later be invited to “join the club” by ratifying the text or by signing bilateral agreements. A ‘country club’ negotiation, as put by Yu, intends the inclusion of peripheral countries, “more affected” by the rules, to adopt such standards or sign a determined agreement. Specific policies can be adopted for that, external to the logic of the theme in negotiation – aids, rescues, cooperation; or coercion. Namely, these agreements would be a ‘kickoff’ and not a final agreement. A ‘live agreement’ that allows reforms, amendments, advances, and attraction.

The absence of countries like China, India and Brazil in the negotiations of an agreement on counterfeiting and piracy makes it practically inefficient and almost


\(^{35}\) In these sense, the European Parliament adopted an specific resolution - European Parliament Resolution of November 24, 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), P7_TA(2010)0432
irrational. Attracting them to such an agreement after the negotiations were finished is unlikely (Yu, 2013). However, this was a legitimate and latent concern for Brazil, because any approximation of one of the largest economies in the developing world within the “club” would represent a significant weakening of the agenda pro-flexibilities supported internationally by those developing countries (Drahos, 2002; Latif, 2005). In this sense, concerns with the Chinese perception gained prominence for the Brazilian government, and there was also some concern about the behavior of countries that comprise two major Brazilian coalitions – IBSA and BRIC.

3.2. South-South Collaboration Strategies for a flexibilities agenda

The collaboration among developing countries must be understood as a fundamental element to avoid the deepening of the maximalist agenda lead by the US. Besides, as a fundamental instrument to make another agenda move forward. This second agenda focuses on the maintenance and deepening of the flexibilities of the multilateral regime of IP and of the policy space for the adequacy of national legislations – besides strengthening multilateralism.

Therefore, these South-South collaboration policies and the maintenance of the vitality of the multilateral discussions have the purpose of allowing the advance of understanding and norms on the exceptions and limitations of rights. In this aspect, the implementation and tranversalization of the WIPO Development Agenda and other demands in other international organizations would be fundamental.

To the extent that we know that the construction of international norms for the protection of IPRs impacts the national systems of protection and therefore affect vital public policies to the interests and needs of the countries, the process of reconstruction of the IPRs is absolutely important for the strategies of economic development for developing countries. In this sense, the Development Agenda, while not advancing in deeper criticism that must be made to the IP international system, encompasses some of these basic needs of developing countries (Musungu, 2005; Muzaka, 2012). It is an attempt to standardize international patterns beyond TRIPS but in a contradictory way of the US demands – strengthening flexibilities.

These flexibilities are important for countries to maintain the capacity to adequate their national systems of protection and implement some public policies appropriate to specific public demands. Countries such as India, China, and South Africa, have

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36 The proposal of the establishment of the ACTA Committee whose functions are to examine “matters concerning the development of the Agreement”, to decide upon “the terms of accession to this Agreement of any member of the WTO” and to invite “those signatories not parties to this Agreement to participate in the Committee’s deliberations on those rules and procedures”, likewise reinforces the view that the prime addressees are third countries

37 Da SERE para Brasemb Pequim Em 19/09/2008
implemented or reformed their legislations over the last few years, allowing the use of flexibilities permitted by multilateral rules. And, as said, Brazil is working on a project to reform its legislation using some theses countries experience of using TRIPS flexibilities to foster economic development and some specific public policies. Henceforth, this recent political scenario and some developing countries’ interpretations of the role of IP in development created an environment in which this kind of international reaction became required, possible and prominent:

In fact, in the rapidly shifting geopolitical and economic power dynamics in the wake of the 2008 financial crisis, it is clear that some bottom-up innovation is beginning to have an impact on the system as a whole. Brazil, China, and India most likely will write the next chapters in the intellectual property policy saga (Sell, 2011: 449).

Therefore, to go further with this agenda for flexibilities it’s important for developing countries to work outside and inside multilateralism. On the one hand, trying to strengthen cooperation with key partners – the IBSA and BRIC countries, especially (Dreyfuss, 2009); on the other, through the construction of new international rules – especially in the WTO and WIPO. Those two dimensions of collaboration policies among developing countries gets closer to a third dimension – the construction of national legislations adequate to international rules, while preserving public interest and establishing means to effectively use existing flexibilities.

In the joint declarations of countries that form IBSA and BRICs the concern with the proliferation of TRIPS-plus norms negotiated outside the multilateral instances is clear. As it is clear the need to move forward and strengthen exceptions and limitations to rights in international rules of protection to IPRs.

Thus, Brazil has mobilized efforts to strengthen IBSA countries' commitment to its trilateral cooperation on intellectual property and strengthen the criticism to the maximalist agenda38. In the joint statement of April 15th of 2010, IBSA countries were "against attempts to development of new international standards for enforcement of intellectual property outside the appropriate institutions, WTO and WIPO, which may give rise to abuses in the protection of rights, the construction of barriers to free trade and the weakening of basic civil rights".

Earlier, in 2009, in a joint meeting, it was agreed that India, Brazil and South Africa would discuss ideas to produce a strategy against the ACTA initiative and countries would produce a statement that would take it into account39. It is interesting to note that

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39 Realização de reunião IBAS – dando prosseguimento a reunião/contato com esses representantes e think tanks em genebra à margem da 5ª sessão do ACE/WIPO – para discutir estratégias para a
in all IBSA joint statements, IPRs has been highlighted, especially with regard to the need of building a mechanism for protection of biodiversity and traditional knowledge; effective implementation of the Development Agenda, and "the important role played by exceptions, exclusions, and limitations in bringing the necessary balance between IPRs and public interest". In this particular aspect, these countries attacked TRIPS-plus proposals:

The Leaders warned against attempts at developing new international rules on enforcement of intellectual property rights outside the multilateral fora that may give free rein to systematic abuses in the protection of rights, the building of barriers against free trade and undermining fundamental civil rights.

Similarly, BRICs countries have also been a source of joint action in an attempt to limit the expansion of TRIPS-plus standards that affect the freedom of the States and the already limited balance of rights and exception in TRIPS. In 2011 a meeting of Health Ministers of BRIC countries was held in Beijing and one of the central themes of the meeting was the needed to ensure that new international rules will not minimize TRIPS flexibilities and that BRICs countries should remain resistant to TRIPS-plus rules. That meeting resulted in the Beijing Declaration, which was emphatic in stating that

We are determined to ensure that bilateral and regional trade agreements do not undermine TRIPS flexibilities. We support the TRIPS safeguards and are committed to work together with other developing countries to preserve and promote, to the full, the provisions contained in the Doha Declaration on TRIPS and Public Health and of the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property.

Indian Health Minister, according to the Brazilian representative at the meeting, "suggested that members of the BRICS have to coordinate themselves to face the coercive instruments relating to IPRs such as ACTA and other international agreements with TRIPS-plus character."

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40 V IBSA Joint Summit


42 De Brasemb Pequim para Exteriores em 18/07/2011 (AFFF)
In turn, in 2010, the governments of Brazil and China established a "Joint Action Plan for 2010-2014", which established a specific working group on IPRs. This WG had as one of its objectives promoting cooperation in relevant multilateral forums. At the third meeting of the Working Group on Intellectual Property, as described by the Brazilian diplomatic representative, there was a significant advance in approximations of the positions of the two governments on sensitive issues, including the enforcement of IPRs.

"Noteworthy the unexpected proposal from the Chinese, under the agenda item on coordination in international institutions, to establish, within the BRICS, an IP Working Group to discuss “enforcement” of rights. With this proposal, China appears to be seeking to foster joint action of the group in multilateral institutions, which would help limit US, EU, Japan permanent pressures for stricter rules to combat piracy and counterfeiting”.

"The Chinese were quite emphatic about the importance of maintaining the balance achieved in the TRIPS Agreement on “enforcement”. They expressed concern about the proliferation of negotiations in other fora besides the WTO and WIPO, as the Anti-Counterfeiting Trade Agreement (ACTA) and in the World Customs Organization (WCO). As already mentioned, they proposed the development of closer cooperation between emerging countries in this matter, particularly within the BRICS, through the creation of working group on intellectual property. They suggested, namely, the inclusion of the issue in high-level meetings of the group of emerging countries”

And during the TRIPS Council meetings of 2010, China, India, South Africa, Brazil, and the African Group made several critics to the U.S. maximalist agenda and the forum shifting strategy, arguing that ACTA and other preferential agreements conflict with TRIPS, threatens the weak balance provided by this agreement and, more importantly, theses negotiations could bypass the existing multilateral processes occurring in WTO and WIPO. As noted with concern by Brazil at the October TRIPS Council session, ACTA contains the necessary ingredients that may over time convert it into “a truly international organization dealing with the enforcement of IP rights, a development whose impact on WIPO and the WTO, especially on capacity-building and technical assistance, are unpredictable at this stage.” The consequences, was argued, would be the undermining of flexibilities and the government policy space to allocate resources and work on specific public policies with the scale up of minimum standards level, causing legal uncertainty.

43 Da SERE para Brasemb Pequim Em 06/06/2011
As pointed by a Brazilian representative, Brazil favors multilateralism and multilateral solutions. "In intellectual property matters, multilateral fora that have the legitimate credentials are the WTO and WIPO, whose deliberations are not only open to more than 140 member countries, but are also conducted in as transparent a way as possible, including (participation of) representatives from civil society and NGOs."

So, we have to highlight this important element of the IBSA and BRICs statements and actions: the strengthening of the coordinated action of these countries, either within the trilateral cooperation, but especially in the coordination of positions in multilateral institutions, having the Development Agenda as one important objective for IBSA countries.

The leaders agreed on the need for establishing trilateral cooperation in the field of IPRs with the aim of promoting a balanced international intellectual property regime and to make a meaningful contribution to the economic and social progress of developing countries, ensuring access to knowledge, health care and culture44 (...) The leaders noted with appreciation that IBSA countries were already co-coordinating their positions on a number of issues within the framework of the Development Agenda Group (DAG)45.

Similarly, in a Ministers of Commerce and Industry meeting of the BRICS countries, during the Fifth BRICS summit, in Durban, South Africa, some elements of the cooperation among those countries were also ranked. Amidst them, the necessity of continuing working in a joint way in the multilateral arena, highlighting the negotiations on the WTO and WIPO, but also other fora where their positions can be more well received. In the document produced by the meeting, the need to increase cooperation in IPRs was given great emphasis46.

Some months later, Brazil, Russia, India, China, and South Africa signed an agreement of cooperation specifically in IPRs. The agreement, called BRICS Intellectual Property Offices Cooperation Roadmap, was approved in May 2013, in a conference in Magaliesburg, South Africa, and signed in a parallel event to WIPO Annual General Assemblies, in September 2013. The agreement sets seven lines of action with emphasis on the commitment in increasing the collaboration in international fora. It is important to highlight that this document is the result of a process of advance in the agenda of cooperation among BRICS countries that in 2012, during the Durban conference, had established the need for cooperation innovation and other topics related to IP47.

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44 III IBSA Joint Summit
45 V IBSA Joint Summit
46 Innovation, IPR Cooperation Among Top Priorities For BRICS. By William New, Intellectual Property Watch on 26/03/2013
More recently, an event called “Access to medicines: challenges and opportunities for developing countries” occurred. The event took place in parallel to the opening of the World Health Assembly in May 2014. This event pointed at two fundamental issues: the need for BRICS countries to strengthen a leading role in cooperation to deal with the low accessibility to medicines at reasonable prices for peripheral countries theme. Also, to reaffirm the need for an international regime of protection of IPRs that guarantees the necessary flexibilities for countries to use instruments such as local production, compulsory license, parallel import, and other mechanisms to pressure down prices of medicines. That is, that allows countries to adequate their legislations to adequately use flexibilities present in TRIPS.

Hence, we get to a second and important dimension of the process of South-South cooperation in IPRs. The strategy of mainstreaming the WIPO Development Agenda – mainstreaming the principles that organize and give meaning to it. This policy is profoundly connected to the strengthening of joint perceptions among the great developing countries and clearly supported by coalitions of developing countries.

In a letter from the Brazilian delegation in Geneva to the Ministry of Foreign Affairs, the origin of the Brazilian strategy of “transversalization” of the principles of the WIPO Development Agenda is clear.

"Our proposal is broad and horizontal and approaches the WIPO work in all its dimensions. Its general relevance is, therefore, certainly not limited to any specific subsidiary organ inside WIPO. All of WIPO’s organs and activities must clearly integrate the ‘development’ dimension of its work."

This strategy of mainstreaming the principles of the Development Agenda within WIPO would be based in instilling the principles of flexibility, exception, and limitations of rights in all WIPO institutions and fora. Immediately after the adoption of the agenda and its 45 recommendations, the Brazilian government began a strategy of strengthening a coalition to support it, the Development Agenda Group (DAG), and began to support the introduction of discussions that took the spirit of the Agenda to other WIPO institutions.

Brazil and some developing countries have been dedicated to the defense of international rules that provide the possibility of greater flexibilities, exceptions, and limitations to patents and copyrights, but also for enforcement of IPRs. In the Standing Committee of Patent (SCP), Standing Committee of Copyright (SCCR) and Advisory Committing of Enforcement (ACE) Brazil has presented or supported important proposals with this purpose.

In 2010, Brazilian government presented a proposal to SCP work on a study of flexibilities on patent rights, with a clear idea of crossing the issues that SCP was dealing with the Development Agenda. The main objective of this proposal is “the elaboration of an exceptions and limitations manual, in a non-exhaustive manner, to serve as a reference to WIPO Members”. (LATIF, 2011). In that same document, Brazil shows its experience in the use of compulsory license for a drug used in the national policy combating HIV/AIDS. In the next year, the African Group and the Development Agenda Group (DAG) made a submission to SCP demanding the adoption of a work program on patents and public health, while keeping the spirit of ensuring greater exceptions and limitations to patent rights, especially for Public Health.

In February of 2014, during the SCP session, it was agreed that the Committee continue work on exceptions and limitations to patent rights, quality of patents, patents and health, because, as argued by a Brazilian representative, the use of exceptions and limitations by members to improve their IP protection system is a core value of the WIPO Development Agenda, providing access to essential medicines at affordable prices is a goal shared by all countries and is a necessary step to achieve the United Nations Millennium Development Goals.

In the SCCR, Brazilian government’s position is the same. Brazil has bet on a specific demand and became a strong supporter of another one. Both demands walk in the same direction – the flexibility of rules on a development-oriented direction. One of them brings the discussions of a legal instrument to guarantee access to education and culture for the visually impaired. In this particular aspect Brazil nurtures an expectation of linking discussions of IPRs and human rights principles. On the same committee, Brazilian government supports an even more comprehensive demand to conduct a

49“Proposal Submitted by the Delegation of South Africa on Behalf of the African Group and the Development Agenda Group”, SCP/16/7

50 At WIPO, Differences Remain On Global Priorities In Patent Law. By Catherine Saez, Intellectual Property Watch on 28/09/2013 @ 3:47 pm

proposal of a treaty on exceptions and limitations for research and educational purposes. The general idea of the treaty would establish legal standards that would allow states to impose limitations to copyright.

A major concern of the Brazilian government, in this sense, rightly referred to enforcement of IP rights and how WIPO and ACE have an extremely tendentious way of dealing with the issue. Brazil was extremely worried about WIPO’s privatizing view and warned the need to direct the actions of the committee in the sense of what was approved with the Development Agenda. This completely unbalanced position of ACE Secretariat on enforcement is contrasted with Brazilian demands. In 2009 Brazil had proposed a working document for the ACE\textsuperscript{52}, which reflected the fundamental interests of the country on the issue\textsuperscript{53}. In this sense, it has demanded the use and practice of the concept of "respect of intellectual property rights", which implies a richer approach to address the issues of "enforcement" of rights and not just the application of penalties for the misuse of the property\textsuperscript{54}.

The implementation of the “transversalization” of the WIPO Development Agenda necessarily pervades the strengthening of the specific coalition that intends its implementation, as well as sparse policies of collaboration among non developed countries to move forward in specific propositions to the strengthening of exceptions and limitations of rights. It is also important for these countries to strengthen the relationship with international organizations that could be more 'in tune' with the agenda of flexibility, exceptions, and limitations to IPRs. This is important because

\textquote{soft and hard law developed in non-WTO venues via developing countries’ strategic forum shifting has enhanced their bargaining power within the WTO and WIPO. Developing countries and their NGO supporters deliberately promoted issue migration, on health from the WHO to the WTO, and on human rights and indigenous people to WIPO (…) Seen from this perspective, even the soft law intellectual property standards generated in the biodiversity . . . public health, and human rights regimes have hard-edged consequences. They act as progenitors of proposals to revise legally binding rules within the WTO and WIPO (…). (Sell, 2011)}

\textsuperscript{52} Future work proposal by Brazil (WIPO/ACE/5/1). \texttt{http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_11-annex2.pdf()}

\textsuperscript{53} De DELBRASOMC para Exteriores em 27/11/2009 (MVA)

\textsuperscript{54} Da SERE para DELBRASOMC Em 14/09/2010
4. FINAL REMARKS

Historically, developing countries have little relevance in the formation of international norms of intellectual property. There was an absolute predominance of technologically developed countries and their companies in its conformation. Today, an increase in the capacity of action of developing countries can be perceived, especially in the resistance and adherence to norms that do not reflect their interests. However, only the capacity and the possibility of action do not help to understand and explain the possibility of maintenance of a joint agenda for the maintenance of flexibilities of IPRs rules. They act that way because they need policy space to adjust their legislations, institutions, and public policies.

So, the reactions of Brazil, China and India are indeed no surprise. In today’s age, these increasingly powerful developing countries are unlikely to buy into a system they did not help to shape. With their now considerable increase in economic power and geopolitical leverage, those days where a system could be created in developed countries and then shoved down their throats are long gone. Accordingly, these large developing countries have increased their ability and capacity to fight and limit the scope of TRIPS-plus rules and even advance demands for flexibility and freedom that allow countries to choose the most appropriate public policies. Peter Drahos advocates the creation of a counter-QUAD coalition or a 'counter-hamonization' alliance as suggests Peter Yu. What we can say is that BRICS countries can collectively advance their demands and limit the ability of action of developed countries in the construction of TRIPS-plus rules with multilateral comprehensiveness.

But only strengthening the South-South collaboration the instruments for building an IP system minimally responsive to its interests of development will be viable. It is important to strengthen the ability of maintaining a degree of autonomy to adapt national laws to address the TRIPS flexibilities without submitting to the developed countries pressures (Dreyfuss, 2009). Likewise, the creation of specific international standards targeted to the interests of developing countries demand a capacity for organization and collaboration of these countries.

In this sense the WIPO Development Agenda (DA) is an important achievement and instrumental in fostering some changes in intellectual property rules. Some of the 45 recommendations are important soft norms that go in the direction of important demands of developing countries’ development objectives (Latif, 2011: 45).
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