

Bilateralism in Intellectual Property

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SUMMARY

This paper examines the way in which bilateral trade negotiations (Bilateral Investment Treaties and Bilateral Intellectual Property Agreements) are being used by the USA and others to build more extensive protection for intellectual property than that set out in the WTO TRIPS Agreement. It uses examples of recent US/EU negotiations with countries such as Nicaragua, Jordan, and Mexico to illustrate how developing countries are being drawn into a highly complex multilateral/bilateral web of intellectual property standards over which they have little control.

In some cases, these bilateral negotiations are forcing developing countries into TRIPS-compliance ahead of the timetable agreed in 1995. In other cases, they are being used to intervene in the detailed regulation of a developing country's economy. Finally, the paper shows how the Most Favoured Nation principle within TRIPS combines with these bilateral agreements to spread and set new minimum standards of intellectual property faster than would have otherwise happened.

The paper ends with a reminder of the benefits of multilateralism in trade and the dangers of bilateralism. It proposes that developing countries develop a veto coalition against further ratcheting up of IP standards, and that the TRIPS Council shift its purpose from a body which secures a platform for IP regulation to one that polices a ceiling.

1. The Promise of Multilateralism in Intellectual Property Standard-Setting

During the period that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was being negotiated (1986-1993) there were suggestions that if developing countries agreed to TRIPS the US would ease off negotiating intellectual property standards bilaterally. The following statement in 1989 from the Director for Intellectual Property at the Office of the United States Trade Representative (USTR) makes the point:

What happens if we fail [to obtain TRIPS]? I think there are a number of consequences to failure. First, will be an increase in bilateralism. For those of you who think bilateralism is a bad thing, a bad thing will come about.²

It was always clear at all stages of the TRIPS negotiations that the principal players (US, EC and Japan) saw TRIPS as setting only minimum obligations. Nevertheless developing countries might reasonably have expected the World Trade Organization (WTO) or World Intellectual Property Organization in some cases to become the principal fora for the negotiation of new intellectual property standards.

TRIPS was concluded as part of the text of Final Act of Uruguay Round negotiations (the Round was concluded on December 15 1993 and the Final Act signed on 15 April 1994) and came into operation on 1 January 1995. There has been no apparent decline in US bilateral activity on intellectual property since the signing of TRIPS. Table 1 at the end of this paper shows that the level of bilateral activity by the US has increased. This is consistent with a broader trend identified by John Jackson in US trade policy in which the US has moved away from its earlier support for multilateralism and MFN (most-favoured-nation) to “a more ‘pragmatic’ – some might say ‘ad hoc’ approach – of dealing with trading partners on a bilateral basis and ‘rewarding friends’”.³

2. The role of section 301 in bilateralism

Section 301 is the section of the US Trade Act which is used by the USTR to address foreign unfair trading practices, including unfair practices on intellectual property rights. A 301 investigation may culminate in a bilateral agreement between the US and the target state, or failing that, the imposition of trade sanctions by the US (the latter is a rare occurrence). US 301 bilateralism has increased since the 1980s. Many more countries are the subject of 301 surveillance and the section has been amended to increase the number of reviews that take place (so-called out-of-cycle reviews). The USTR announced in the 2000 Special 301 Report that the adequacy of intellectual property protection in more than 70 countries had been reviewed. In 1994 the USTR announced that Section 301 “should be an even more effective tool as a result of the Uruguay Round agreements”.⁴

² Emory Simon, ‘Remarks of Mr Emory Simon’, Symposium: Trade-Related Aspects Of Intellectual Property, 22 (1989), *Vanderbilt Journal of Transnational Law*, 370.

³ J. Jackson, *The World Trading System*, The MIT Press, Cambridge, Mass., London, 1997, 173.

⁴ See USTR, 1994 Annual Report, Section 301, <http://www.ustr.gov/reports>.

Not all trade negotiations that the USTR carries out with other countries involve the process under 301. Nevertheless section 301 is a constant presence whether in the foreground or background in US bilateralism on intellectual property.

Section 301 might produce a ‘TRIPS plus’ (defined in the next Section) consequence without there being a formal agreement between the US and the relevant developing country. The developing country may simply decide to adopt a ‘TRIPS plus’ measure in order to avoid further action by the US under the 301 process. On the effectiveness of section 301 it is worth noting the following remark by a USTR official:

One fascinating aspect of the Special 301 process occurs just before we make our annual determinations, when there is often a flurry of activity in those countries desiring not to be listed or to be moved to a lower list. IP laws are suddenly passed or amended, and enforcement activities increase significantly.⁵

3. Definition of ‘TRIPS plus’

The term ‘TRIPS plus’ is used to cover two different types of consequences in this paper. TRIPS confers on its Members a discretion to implement “more extensive protection” than is conferred by TRIPS standards (see Article 1.1). TRIPS also allows members to qualify the operation of some standards, to choose amongst standards or to choose when to adopt standards (‘option-creating standards’). So, for example, Article 27.3 allows Members to qualify the standard of patentability in Article 27.1 by excluding some subject-matter from patentability and Article 27.3(b) gives Members a choice as to how to protect plant varieties. The transitional provisions in Articles 65 and 66 create entitlements for developing countries, former centrally planned economies and least-developed country members as to the timing of the adoption of TRIPS standards.

A bilateral agreement that

- (a) requires a Member to implement a more extensive standard; or
- (b) which eliminates an option for a Member under a TRIPS standard,

is for the purposes of this paper a TRIPS plus standard. Bilateral treaties also set standards on issues that TRIPS does not deal with (eg. whether reproduction in copyright law includes temporary copies) and which are therefore not strictly TRIPS plus.

4. Background - the ‘old bilateralism’

US bilateralism on intellectual property was largely a response to its failure to obtain an agreement on trade in counterfeit goods at the end of the Tokyo Round (1979) and the resistance of developing countries in the first half of the 1980s to including

⁵ ‘Technological Progress And American Rights: Trade Policy And Intellectual Property Protection’, Testimony of Ambassador Richard W. Fisher, Deputy U.S. Trade Representative, Subcommittee on International Economic Policy and Trade House Committee on International Relations, Washington DC, October 13th, 1999, 3.

intellectual property as a negotiating item in a new GATT round. Led by India and Brazil, ten developing countries at first opposed the US proposal to make a code on intellectual property a negotiating item (the remaining countries were Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia).⁶ Breaking the resistance of these 'hard liners' was fundamental to achieving the outcome the US wanted. During the 1980s the US reformed its Trade Act of 1974 to create a linkage with intellectual property. The principal enforcement tool of US trade policy, section 301 was amended to make it clear that it could be used to obtain protection for US intellectual property; a mechanism known as 'Special 301' was created requiring the USTR to identify countries denying adequate and effective protection for intellectual property rights and the administration of the Generalised System of Preferences program (giving developing countries duty free trading privileges in the US market) was linked to the adequate protection of US IPRs. At the same time as it reformed its trade law in the 1980s to accommodate intellectual property the US linked its Bilateral Investment Treaty (BIT) program to the goal of adequate and effective protection for intellectual property.⁷

5. TRIPS plus models

In bilateral trade negotiations between states involving a strong and weak state, generally speaking the strong state comes along with a prepared draft text which acts as a starting point for the negotiations. Bilateral negotiations are complex and lengthy affairs, features which make them costly even for strong states. In order to lower the transaction costs of bilateralism the US has developed models or prototypes of the kind of bilateral treaties it wishes to have with other countries. Once a model treaty is ratified by the Senate, US trade negotiators know that if they stick to its terms in other negotiations there is a good chance the treaties flowing from these negotiations will also be approved. For the US there are very strong incentives for a standardization of bilateral treaty standards. So, for example, the BIT which the US signed with Nicaragua in 1995 was based on the prototype that the US had developed for such treaties in 1994. Similarly the Free Trade Agreement that the US has negotiated with Jordan will serve as a model for other FTAs being negotiated with Chile and Singapore. The following two sections offer a brief analysis of the intellectual property provisions of the Jordan FTA and the Nicaraguan BIT.

6. The Nicaraguan BIT

The Nicaraguan BIT is part of the US Bilateral Investment Treaty Program. This program continues the same set of policy objectives that lay behind the draft Multilateral Agreement on Investment (MAI). Broadly speaking, the belief is that foreign investment and trade flows are intimately related and that liberalising the rules

⁶ A. Jane Bradley, 'Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations', 23 (1987) *Stanford Journal of International Law*, 57, 81, fn. 72.

⁷ The model BIT program that the US developed in the 1980s protected intellectual property as an investment activity. By 1987 the US had signed a BIT with eleven developing countries and was negotiating with seven others. See F. Abbott, 'Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework', Symposium: Trade-Related Aspects Of Intellectual Property, 22 (1989), *Vanderbilt Journal of Transnational Law*, 689, 712, fn12.

on investment will also enhance trade. Adequate and effective protection for intellectual property is an explicit goal of the US BIT Program.

The Nicaraguan BIT like other BITs does not set specific standards of intellectual property. Instead it protects the rights of investors who use intellectual property as a mode of investment. The BIT accomplishes this by including intellectual property in its definition of investment (much like the draft MAI did). Intellectual property is defined widely to include copyright, patents, rights in plant varieties, designs, semiconductor chips, trade secrets, trade and service marks and trade names. The licensing of intellectual property also falls within the meaning of investment since the definition of investment includes “rights conferred pursuant to law, such as licenses and permits” (see Article 1.1(d)(vi)).

Typically a BIT creates MFN obligations and national treatment obligations for the parties to the treaty. These principles are not of much use to US investors if the developing country in question does not have intellectual property laws, has low standard laws or is taking advantage of the transitional provisions under TRIPS. MFN and national treatment in bilateral treaties have the effect of equalising treatment but not of raising standards within a country. It is for this reason that “prospective BIT partners are generally expected, at the time the BIT is signed, to make a commitment to implement ... TRIPS agreement obligations within a reasonable time.”⁸ If this expectation is not met the US is ready to use its 301 process to secure the necessary commitment (on this as a negotiating strategy see Section 7).

Since BITs do not usually contain intellectual property standards, but rather depend on standards set in other agreements, their TRIPS plus effects are difficult to evaluate. Adding to this is the fact that investment is defined broadly, the definition of investment in these treaties being only illustrative rather than exhaustive. An example of an intellectual property investment-related activity not counting as investment for the purposes of a BIT would be the simple case of the sale of an intellectual property-related good across a border involving no other activity. However, most other uses of intellectual property by intellectual property owners in foreign territories would appear to be caught by the provisions of a standard BIT. As section 7 of this paper shows the US is using BITs as a carrot to get developing countries to sign bilateral intellectual property agreements (BIPs). This does not of itself make a BIP a TRIPS plus agreement.

The wide-ranging terms in which BITs are drafted are likely to give international investors grounds for arguments, which if successful, may well be TRIPS plus in their effects. For example, a US company may grant an exclusive licence to a company in a developing country to import its intellectual property related products (or it may set up a subsidiary for the same purpose). The purpose of the licensing arrangement may be to give the local company an incentive to support and market the relevant goods. Assuming the developing country government has signed a standard BIT the licensing arrangement would be a covered investment for the purposes of that BIT (see the

⁸ See U.S. Bilateral Investment Treaty Program, Fact Sheet, Released by the Office of Investment Affairs, Bureau of Economic and Business Affairs, November 1, 2000 available at <http://www.state.gov/www/issues/economic/7treaty.html>.

definition of “covered investment” in Article 1.1(e) in the Nicaraguan BIT). If the developing country passes a measure that undermines this contractual arrangement (eg the issue of a compulsory licence) then the US company would be able to argue a breach of some of the provisions of the standard BIT (eg. the obligation not “to impair by unreasonable and discriminatory measures the management, conduct, operation ... of covered investments” - see Article II.3(b) of the Nicaraguan BIT).

The outcome of such a dispute would be affected by a variety of factors including the kind of exhaustion regime the developing country ran and its membership of treaties other than TRIPS. The general point though is that because the BIT protects the contractual exploitation of intellectual property rights as a covered investment there may be circumstances where it produces a TRIPS plus effect.

It is also worth noting that the standard BIT limits the capacity of governments to impose performance requirements on investment activity. (For example, the Nicaraguan BIT does not allow for the imposition of a condition to transfer technology, a production process or other proprietary knowledge except to remedy a violation of competition law - See Article VI.1(e)) In the context of intellectual property rights it means that governments have less capacity to impose restrictions on the way that foreign companies choose to exploit their technology. An UNCTAD report observed that since TRIPS expanded the licensing possibilities for foreign companies in developing countries it could result in “reduced inward technology flows at higher prices”.⁹ The restrictions on performance requirements in BITs may have the same effect. These restrictions may in fact be stronger in effect than the ones in TRIPS since BITs do not contain the kind of clauses providing for exceptions to exclusive rights to be found in TRIPS (eg. Article 30 of TRIPS).

7. BITs and BIPs - The Negotiating Links

The case of Nicaragua is instructive on the interaction between BIT negotiations, the 301 process and TRIPS in the US context. Consider the following factual sequence of events:

1. July 1995 the US and Nicaragua sign a BIT. The BIT is made conditional upon Nicaragua signing a BIP providing adequate and effective protection for US intellectual property rights. Nicaragua is a developing country for WTO purposes and so is not obliged to implement TRIPS until 1 January 2000.
2. Nicaragua and the US enter into negotiations over intellectual property rights. 1996 the USTR reports that negotiations on a BIP are still proceeding.
3. April 1997 the USTR adds Nicaragua to the Special 301 Other Observations list.
4. January 1998 US and Nicaragua sign a Bilateral Intellectual Property Rights Agreement. The Agreement must be implemented by July 1999, ahead of the expiry of Nicaragua’s TRIPS deadline. The Agreement contains TRIPS plus

⁹ UNCTAD, *The TRIPS Agreement and Developing Countries*, UN, New York and Geneva, 1997, 18.

features (for example, the obligation to join the International Union for the Protection of New Varieties of Plants (UPOV)).

In this particular negotiating sequence the BIT (which Nicaragua probably wanted) was linked to an intellectual property agreement (which Nicaragua probably did not want - certainly not its TRIPS plus features). The 301 process was wheeled in presumably to speed up the negotiating cycle on the BIP which had been proceeding too slowly for the US.

8. The US Jordan FTA¹⁰

The Jordan FTA is another example of a model agreement. It is a wide-ranging agreement containing provisions on trade in goods, in services, intellectual property rights, environment and labour, electronic commerce and government procurement. In contrast to the somewhat soft provisions on environment and labour (eg. each Party “shall strive to ensure” that its labour standards are consistent with international norms (Article 6.3)) the provisions on intellectual property are long and detailed. The TRIPS plus features of the Jordan FTA include the following:

- the requirement that each Party give effect to UPOV and that in the case of Jordan it ratify UPOV within 12 months;
- the grant to authors, performers and phonogram producers of an exclusive importation right;
- the regulation of the government use of computer software;
- narrowing the grounds of exclusion from patentability (basically, the grounds of exclusion in Article 27.3(b) of TRIPS are omitted);
- a redrafted compulsory licensing provision which confines the use of compulsory licences to specified cases rather than as in the case of TRIPS, placing conditions on the use of compulsory licences. (The specified cases are for remedying an anti-competitive practice, use in public non-commercial contexts, national emergencies and other cases of extreme urgency, and the failure to meet working requirements.); and
- an obligation to provide for an extension of patent term to compensate patent owners for regulatory delays in being able to exploit the patent.

There are other important aspects to this agreement that make it TRIPS plus or that take the evolution of intellectual property rights beyond TRIPS. As a general point it is abundantly clear that the US has constructed a model agreement that meets the problems it perceives with TRIPS or that resolves some of the ambiguities of TRIPS. So, for example, Article 39.3 of TRIPS, which obliges a Member to protect data submitted as part of the process of getting regulatory approval for the marketing of

¹⁰ Agreement between the USA and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, signed by both parties in October, 2000.

pharmaceutical or agricultural products involving “new chemical entities”, leaves open the question of what is meant by a new chemical entity, whereas the Jordan FTA stipulates that new chemical entity includes “protection for new uses for old chemical entities for a period of three years”.

The Jordan FTA also contains a Memorandum of Understanding On Issues Related to the Protection of Intellectual Property Rights (MOU). This MOU contains further prescriptions and standards on intellectual property which Jordan has to meet. For example, Jordan’s exclusion of mathematical methods from patentability has to be clarified by it to avoid the exclusion of business methods and computer-related inventions. Normally this kind of task would fall to the judiciary of a country. Similarly the MOU stipulates the level of criminal penalties for certain kinds of infringement. Generally the level of criminal penalties in a state is a matter of domestic policy and culture.

Another key feature of the Jordan FTA is the creation of a Joint Committee “to supervise the proper implementation” of the Agreement (see Article 15.1). The Joint Committee would appear to come close to exercising a law-creating function. Its functions include considering and adopting amendments to the Agreement and developing guidelines and rules for its proper implementation. Heading the Joint Committee is the USTR and Jordan’s Minister for Trade. Obviously there are some hard questions to ask about the role of such a committee, not least of all how it squares with the promotion of the ideal of democratic law-making.

9. The Global IP Ratchet

Bilateral intellectual property and investment agreements are part of a ratcheting process that is seeing intellectual property norms globalise at a remarkable rate. The two actors responsible for this process are the US and the EU. In short form this ratcheting process is dependent upon -

- (a) a process of forum shifting¹¹ - a strategy in which the US and EU shift the standard-setting agenda from fora in which they are encountering difficulties to those fora where they are likely to succeed (eg from WIPO to the WTO to BIPs);
- (b) co-ordinated bilateral and multilateral IP strategies; and
- (c) the entrenchment in international agreements of a principle of minimum standards.

The principle of minimum standards plays a vital role in this strategy. Each bilateral or multilateral agreement dealing with intellectual property contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favourable treatment (See, for example, Article 1702 of NAFTA, Article 1.1 of TRIPS, Article 4.1 of the Jordan FTA and Article XI

¹¹ For a detailed explanation of this strategy and some examples see John Braithwaite and Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000, ch.24.

of the Nicaraguan BIT). This means that each subsequent bilateral or multilateral agreement can establish a higher standard.

Bilateral agreements are also being drafted in ways to ensure that developing countries are integrated into multilateral IP regimes with maximum speed. Developing countries are being obliged to comply with multilateral standards in conventions to which they are not a party, to ratify multilateral treaties or both. So, for example, the Jordan FTA requires Jordan to give effect to Articles 1 - 14 of the WIPO Copyright Treaty and to ratify UPOV (see Article 4.1 and 4.29 respectively).

The global ratchet for IP consists of waves of bilaterals (beginning in the 1980s) followed by occasional multilateral standard-setting (eg TRIPS, the WIPO Copyright Treaty). Each wave of bilaterals or multilateral treaty never derogates from existing standards and very often sets new ones. A detailed comparison of the provisions of all of the multilateral and bilateral treaties on intellectual property is beyond the scope of this paper. An example of the global ratchet in action can be seen by comparing the intellectual property provisions of NAFTA with TRIPS and then subsequent bilaterals.

10. NAFTA, TRIPS and BIPs

NAFTA preceded TRIPS and to a large extent served as a model for the US in the TRIPS negotiations. Whilst the two agreements set similar standards NAFTA would, from the perspective of an intellectual property rights holder, be regarded as setting stronger standards. For example, NAFTA when compared to TRIPS -

- requires the parties to give effect to UPOV;
- does not contain the kind of objectives clause and principles statement to be found in Articles 7 and 8 of TRIPS;
- does not contain the kind of transition periods to be found in TRIPS;
- contains a more extensive application of the national treatment principle;
- contains more extensive standards of copyright protection;
- contains a compulsory licensing provision that is more restrictive when it comes to issuing licences for patents that require authorisation to use a prior patent (dependent patents of this kind are not uncommon in biotechnology).

Bilateral trade negotiations are being used by the US to build more extensive protection for IP on the platform created by NAFTA and TRIPS. By way of example the Jordan FTA -

- narrows what each party may exclude from patentability (NAFTA and TRIPS expressly allow for the exclusion of plants and animals and essentially biological processes for their production - see Article 1709.3 and Article 27.3(b) respectively - while the Jordan FTA contains no such provision); and
- limits the use of compulsory licences to specific grounds rather than imposing, as NAFTA and TRIPS do, conditions on the use of such licences.

More importantly, the Jordan FTA illustrates how the US is using BIPs to intervene in a detailed way in the regulation of a developing country's economy. So, for example,

under the MOU accompanying the FTA Jordan is obliged to drop the current condition in its law that the importation of products to satisfy use requirements must be in “large quantities at reasonable prices”. Likewise the interpretation of what is meant by the exclusion of mathematical methods in Jordanian Patent law would appear to be settled by the MOU rather than the Jordanian judiciary. The scope of this exclusion has implications for the patenting of business methods and software inventions, areas in which US corporations patent heavily.

Finally, the Jordan FTA is an example of the way in which developing countries are being further drawn into a web of intellectual property treaties. The Jordan FTA obliges Jordan to ratify the so-called WIPO “internet treaties” within 6 months of the FTA coming into operation. These treaties are of huge significance to US copyright-based industries such as software, film and sound-recording. The WIPO treaties require a certain number of ratifications before they come into operation. The probable sequence of evolution will be a series of BIPs that bring the WIPO treaties into force, followed by further pressure on developing countries to join these treaties. Eventually if all WTO members have ratified the treaties they will be folded into TRIPS (see Article 71.2 of TRIPS).

For the time being at least there appears to be no end in sight to the use being made of this global IP ratchet. The current negotiations of the Free Trade Area of the Americas (FTAA) have produced a long draft text on intellectual property rights. The draft text is far from final form and contains a lot of bracketed text indicating that the relevant clause or phrase is the subject of negotiation. Robert Wiessman in a recent submission to the USTR has drawn attention to some of the TRIPS plus language contained in draft text relating to medicines and compulsory licensing.¹² The Electronic Frontier Foundation has also argued that draft language in the FTAA exceeds even the standards to be found in the US Digital Copyright Millennium Act on anti-circumvention and should be opposed because of its impacts on free speech and scientific communication.¹³

11. Other Trade Levers in the Global IP Ratchet

In 1983 the US enacted the Caribbean Basin Initiative (CBI) which gave Caribbean states the benefit of certain preferential trading arrangements in the US market. Amongst other things Caribbean states had to meet a criterion relating to the adequate and effective protection of intellectual property rights or run the risk of losing preferential treatment. Since then preferential trading arrangements have routinely included such a criterion. A more recent example is to be found in the US African Growth and Opportunity Act (2000) that requires the President to take into account when deciding whether to designate for eligibility for preferential treatment a sub-Saharan country its record on the protection of intellectual property. Interestingly the same provision requires the President to consider whether the country has “economic policies to reduce poverty” and “increase the availability of health care” (see USC 19 3703). Discussions in the US Congress and the Bill introduced by Senators Dianne

¹² Robert Weissman, Co-Director, Essential Action, submission to USTR on negotiating objectives for the proposed FTAA, 22 August, 2001.

¹³ See EFF Action Alert, <http://www.eff.org>.

Feinstein and Russ Feingold on March 6 2001 relating to the HIV/AIDS-related public health crisis in sub-Saharan Africa suggest that at very least some members of Congress think it unlikely that sub-Saharan African states can meet US standards of intellectual property protection and at the same time increase the availability of health care for their citizens.

These preferential trading arrangements are not of themselves TRIPS plus but can be used to exert pressure on a country to comply with US standards of intellectual property protection which may well be TRIPS plus or beyond TRIPS.

Preferential trading status brings considerable benefit to small developing country economies. For example, in 1997 Nicaragua received \$135 million in preferential trade benefits and \$68 million in the first eleven months of 1998 under the CBI. Earlier, in 1995, the International Intellectual Property Alliance filed a petition in 1995 with the USTR asking that Nicaragua lose its preferential status under the CBI because of its failures on copyright standards.¹⁴ The petition was not accepted. Nevertheless the fact that a highly influential Washington-based trade intellectual property lobbying organisation was pushing for Nicaragua's loss of CBI status might well have been communicated by US negotiators to Nicaragua and helped those Nicaraguan negotiators decide to agree to a BIP at the end of 1997.

Preferential trading arrangements, in short create dependencies by weak states on the strong states that may be subsequently exploited by negotiators from the strong states.

12. The effect of MFN in TRIPS in the Global IP Ratchet

The MFN principle has been the key principle governing trade relations amongst states, especially in the context of the GATT. TRIPS contains a version of the principle in Article 4. Under its terms a Member of TRIPS which grants any 'advantage, favour, privilege or immunity' to the nationals of any other country (ie not necessarily a member of TRIPS) must accord the same to the nationals of other members of TRIPS. The operation of the principle is qualified (for example, it does not apply to international agreements (like a BIP) which entered into force prior to the entry into force of the WTO agreement (unless such an agreement amounted to an arbitrary or unjustifiable discrimination against nationals of other Members)).

Other parts of the WTO regime also contain versions of the MFN principle which are also qualified in various ways. One major qualification is to be found in Article XXIV of the GATT. It creates an exception for free trade agreements and customs unions but only for trade in goods.

The broad effect of the MFN principle is to equalise the granting of favours and advantages as amongst the members of a group of trading nations which are subject to the principle. In the case of TRIPS, the MFN principle has been drafted in a way that makes it operate in a relatively unqualified way. There is, for example, no equivalent of Article XXIV. Whenever developing countries which are WTO members enter

¹⁴ The history of this is available at the International Intellectual Property Alliance's website, <http://www.iipa.com>.

into an international agreement whether bilateral or other which grants TRIPS plus favours to another nation, it follows that the MFN principle will oblige those developing countries to extend those favours to all WTO members (subject to the qualifications mentioned in Article 4).

This means that the MFN principle in TRIPS when combined with bilateral agreements will work in favour of the two leading exporters of intellectual property in the world, the US and the EU. Whenever the US negotiates an agreement with a WTO developing country member the MFN principle will see the EU gain the benefit of standards that the US obtains. The same is true for the US when the EU obtains gains in a bilateral agreement dealing with intellectual property. It is also true that if the EU and the US between them negotiate enough bilateral agreements containing TRIPS plus standards, those standards will become for practical purposes the new minimum standards from which any future WTO trade round will have to proceed.

The key point is that the MFN principle in TRIPS when combined with bilateralism on intellectual property will have the effect of spreading and setting new minimum standards of intellectual property faster than would have happened otherwise.

13. European Bilateralism

The analysis in this paper has primarily focussed on US bilateralism. A recent survey by the NGO GRAIN has also revealed that the European Community is making extensive use of BIPs and BITs.¹⁵ The European Community possesses an equivalent of the 301 process although it tends to be more circumspect in its use. In part this has to do with the difficulty of obtaining consensus on its use. The drafting of the agreements is, as one would expect, different to US BIPs. Nevertheless it is clear that both the US and the EC are united on an agenda of globalising intellectual property protection through bilateral and multilateral means.

The EC Mexico FTA provides an example of EC bilateralism on intellectual property. Article 12 of the Agreement commits both parties to providing adequate and effective protection to “the highest international standards”. Naturally this raises the question of what is meant by highest international standards. The answer in part is provided by the FTA itself for it contains a “Unilateral Declaration By The Community And Its Member States On The Intellectual Property Conventions Referred To In Article 12”. The list includes UPOV (a TRIPS plus measure). More important though is the institutional framework that has been set up to deal with intellectual property, amongst other things (see Article 45 which establishes a Joint Council). It is clear from this framework that the meaning of “highest standard” is not confined to the standards prevailing at the time of the FTA, but may well include other subsequent standards that emerge, especially if the failure to adhere to those standards gives rise to difficulties in the protection of intellectual property.

¹⁵ See GRAIN in co-operation with SANFEC, ““TRIPS-plus” through the back door: how bilateral treaties impose much stronger rules for IPRS than the WTO’, July 2001, available from <http://www.grain.org>.

14. Development implications

Evaluating the development implications of the global IP ratchet and the web of intellectual properties it is spreading is a massive empirical exercise well beyond the scope of this paper. One doubts that it will ever be undertaken. However, it is clear that simply evaluating the effects of TRIPS standards on the development prospects of developing countries is likely to give a misleading picture. Developing countries are being led into a highly complex multilateral/bilateral web of intellectual property standards that are progressively eroding, not just their ability to set domestic standards, but also their ability to interpret their application through domestic administrative and judicial mechanisms. Some economists have argued that countries ought to be able to have IPR standards that match their competitive standards.¹⁶ This seems right. In fact if the theory of comparative advantage applies to information-related goods as it does to ordinary goods it would follow that there would be considerable dangers to the comparative advantage of individual countries in locking into one set of universally applicable standards. Certainly the kind of highly interventionist detailed norm-setting taking place by means of BIPs is hard to reconcile with a theory of free trade and comparative advantage.

The UNCTAD study referred to earlier pointed out that TRIPS could have certain negative impacts on developing countries including higher prices for technologies under IPR protection and restrictions on the diffusion of technologies. The current crop of bilateral agreements does nothing to reduce the possibility of these negative impacts and may well increase them. For example, the Jordan FTA provision on compulsory licensing is more restrictive than the equivalent provision in TRIPS or NAFTA. In the case of TRIPS there is nothing to stop a health authority from acting in anticipation of a situation of extreme urgency when it comes to compulsory licensing, whereas the Jordan FTA confines the use of compulsory licences to specified circumstances (situations of national emergency or extreme urgency). The recommendation that developing countries strive to strike a balance between the needs of innovators on the one side and the needs of consumers and follow-on innovators on the other is made more difficult by the highly prescriptive standards to be found in BIPs.

Finally, these BIPs will impose further trade losses in the short term on developing countries. Keith Maskus has already provided evidence that importers of intellectual property (all developing countries) will experience increased costs as a result of TRIPS.¹⁷ The main beneficiary he points out in terms of static rent transfers would be the US “with a net inflow of some \$5.8 billion per year.”¹⁸ The global IP ratchet

¹⁶ See M. Trebilcock and R. Howse, *The Regulation of International Trade*, 1995, cited in O. Lippert, ‘One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights through the Free Trade Area of the Americas’ 9 (1998), *Fordham Intellectual Property, Media & Entertainment Law Journal*, 241, 267.

¹⁷ See K.E. Maskus, ‘Intellectual Property Rights and Economic Development’, 32 (2000) *Case Western Journal of International Law*, 471.

¹⁸ K.E. Maskus, ‘Intellectual Property Rights and Economic Development’, 32 (2000) *Case Western Journal of International Law*, 471, 493.

described in Section 9 will continue to exacerbate these losses for economies which cannot be said to be in a position to absorb them. A simple example of these further trade losses is the provision in the Jordan FTA that obliges Jordan to recognise temporary reproduction as part of the reproduction right in copyright. This was a controversial matter in the negotiations over the WIPO Copyright Treaty and the Treaty itself does not determine the issue. The effect of such a provision is that every reproduction in a networked environment could be the subject of licensing (and therefore royalties) by the copyright owner.

15. Perpetual negotiation and negotiating fatigue

One of the important features of the WTO regime, including TRIPS, is that it commits states to a process of constant review and negotiation. Aside from these negotiations within the WTO, developing countries have been facing, beginning in the 1980s, increasing waves of bilateral negotiations from both the US and EU on intellectual property. The nature of the standards to be found in BIPs suggest that developing countries are having very little success, if any, in halting the spread and strengthening of intellectual property norms. Even if developing countries possess the relevant IP expertise they have little real bargaining power in a negotiation in which they are seeking access to the US or European market (especially if they wish to become members of the European Community or NAFTA). Almost certainly developing country negotiators are acquiescing to the IP norms in BIPs as part of the ‘standard deal’ they have to accept as the price for gaining entry to the lucrative markets of Europe and the US.

Some sense of the trade offs that developing countries are making in FTAs for access to US and EC markets can be seen from the FTA between the EC and Mexico. After the US, the EC is Mexico’s most important trading partner. In its Communication to the Council and European Parliament the Commission described the agreement as setting the protection of intellectual property to the “highest international standards” (discussed in Section 13 of this paper).¹⁹ In the agriculture sector the Commission reported that the EC would get full access for certain key exports such as wines spirits and olive oil while Mexico would get “partial liberalisation of certain products ... such as concentrated orange juice, avocados and cut-flowers”. There were also gains for the EC in the trade in services and the automotive sector. A tariff liberalisation package was agreed. The EC has a trade surplus with Mexico in excess of 3 billion euros.

The impact of this agreement will be known in time. It is worth observing that it is very likely that, of the trade in industrial products between the two countries (92.8% of total bilateral trade), Mexico will import and pay for a much greater percentage of intellectual property-related goods than it exports.

¹⁹ See Communication from the Commission to the Council and the European Parliament accompanying the final text of the draft decisions by the EC-Mexico Joint Council, COM (2000) 9.

16. Dealing with Bilateralism

It is clear that multilateralism on IP in the form of TRIPS has not worked to stabilise intellectual property standards. The US and EU continue to push bilaterally for TRIPS plus standards and standards beyond TRIPS. This strong commitment to bilateralism comes at a time when trade rules cover a much broader range of subjects than ever before and as a result have become intertwined with non-trade issues such as human rights (the right to health especially) and environmental protection. Trade rules which reach so deeply into subjects which are normally the province of state political and constitutional orders should themselves be the subject of a democratically credible multilateralism. The benefits of multilateralism in trade and the dangers of bilateralism have long been recognised.²⁰ In the case of bilateralism on intellectual property this author and John Braithwaite have elsewhere made the following suggestion:

[D]eveloping countries should consider forming a veto coalition against further ratcheting up of intellectual property standards. The alliance between NGOs and developing countries on the access to medicines issue and the fact that this alliance has managed to obtain Special Sessions of the TRIPS Council on this issue suggests that this coalition is a realistic possibility. The position of such a veto coalition should be converting the Council on TRIPS from a body that secures a platform to one that polices a ceiling. This bold new agenda for the Council on TRIPS would be standstill and rollback of intellectual property standards in the interests of reducing distortions and increasing competition in the world economy. If developing countries cannot forge a unified veto coalition against further ratcheting up of intellectual property standards, they can be assured that they will be picked off one by one by the growing wave of US bilaterals on both intellectual property and investment more broadly.²¹

Clearly the formation of such a veto coalition presents a huge challenge to current networks of transnational activism. It would require the leadership of visionary NGOs. Developing countries would have to begin to co-ordinate their bilateral and multilateral strategies much more closely than they have to date.

²⁰ J. Jackson, *The World Trading System*, The MIT Press, Cambridge, Mass., London, 1997, 158.

²¹ See Peter Drahos and John Braithwaite, *Information Feudalism*, forthcoming 2002, chapter 12.

Table 1.

US BILATERALISM ON INTELLECTUAL PROPERTY

	BIP°	BIT	301°°	WTO Status**
Albania	1992	1998		M
Argentina		1994	✓	M
Armenia	1992	1996	✓	O
Azerbaijan	1995	1997*	✓	O
Bahrain		1999*	✓	M
Bangladesh		1989	✓	M (LDC)
Belarus	1993	1994*	✓	O
Bolivia		1998*	✓	M
Bulgaria	1991,1994	1994	✓	M
Cambodia	1996			A
Cameroon		1989		M
China	1992, 1995, 1996		✓	M
Congo (formerly Zaire)		1989		M
Republic of Congo		1994		M (LDC)
Croatia	1998	1996*		M
Czech Republic	1990	1992	✓	M
Egypt		1992	✓	M
El Salvador		1999*	✓	M
Ecuador	1993	1997	✓	M
Estonia	1994*	1997	✓	M
Georgia	1993	1997		M
Grenada		1989		M
Honduras		1995*	✓	M
Hungary	1993		✓	M
India	1993		✓	M
Jamaica	1994	1997	✓	M
Jordan	2000*	1997*	✓	M
Kazakhstan	1992	1994	✓	O
Korea	1986, 1990	1989	✓	M
Kyrgyzstan	1992	1994		M
Laos	1997*			A
Latvia	1995	1996	✓	M
Lithuania	1994*	1998*	✓	M
Moldova	1992	1994	✓	M
Mongolia	1991	1997		M
Morocco		1991		M
Nicaragua	1997	1995*	✓	M

Panama	1994	1991	✓	M
Paraguay	1998		✓	M
Peru	1997		✓	M
Philippines	1993		✓	M
Poland		1994	✓	M
Romania	1992	1994	✓	M
Russia	1992	1992*	✓	O
Senegal		1990		M
Singapore	1987		✓	M
Slovakia		1992		M
Sri Lanka	1993	1991		M
Surinam	1993			M
Taiwan	1992, 1993		✓	
Tajikstan	1993		✓	
Thailand	1991		✓	M
Trinidad and Tobago	1994	1996		M
Tunisia		1993	✓	M
Turkey		1990	✓	M
Turkmenistan	1993		✓	
Ukraine	1992	1996	✓	O
Uzbekistan	1994	1994*	✓	O
Vietnam	1997		✓	O

Notes

This Table was compiled from information available on the USTR and WTO websites which were last visited on 29 August 2001.

◦ BIP includes both agreements specifically on intellectual property rights and trade agreements containing provisions on intellectual property rights. The information here may be incomplete.

◦◦ A country ticked in this column has had a 301 action brought against it or been listed, reviewed or observed under the 301 process. The information here may be incomplete.

* Signed in this year but had not yet entered into force as at the beginning of 2000.

** The countries listed in this column are developing countries Members of the WTO, WTO Members undergoing a transformation from centrally planned economies to free-enterprise economies or least-developed country Members and therefore entitled to the benefits of the transitional provisions in Articles 65 and 66 of TRIPS.

M = Member

M (LDC) = Least-Developed Country Member

A = LDC in the process of accession to the WTO

O = Observer government which must start accession negotiations within 5 years of becoming an observer.