

Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection

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INTRODUCTION

ALMOST A DECADE AGO, the *Agreement on Trade Related Aspects of Intellectual Property Rights*¹ (TRIPS Agreement) was the pennant of the Uruguay Round trade agreements,² and regarded by most commentators as the most significant development in international intellectual property, certainly of the twentieth century.³ Much like its notable predecessors,⁴ the TRIPS Agreement was an ineluctable consequence of increased global economic interdependence.⁵ The

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1. *Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 81 (1994), <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> [TRIPS Agreement].
 2. See *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakesh, Morocco, 15 April 1994, reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 2-3* (GATT Secretariat, 1994), <http://www.wto.org/english/docs_e/legal_e/13-mprot_e.htm>.
 3. See J.H. Reichman, "Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate" (1996) 29 Vand. J. Transnat'l L. 363, at 366-67 [Reichman, "Compliance with TRIPS"], who contends: "The TRIPS Agreement is the most ambitious international intellectual property convention ever attempted. The breadth of subject matters comprising the 'intellectual property' to which specific minimum standards apply is unprecedented, as is the obligation of all WTO member states to guarantee that detailed 'enforcement procedures as specified in [Part III of this Agreement] are available under their national laws.' In addition, each member state pledges its willingness to incur liability in the form of cross-collateral trade sanctions for the nullification and impairment of benefits owed other member states under the Uruguay Round's package deal" [footnotes omitted].
 4. See *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised 24 July 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, <<http://www.wipo.org/treaties/ip/berne/index.html>> [Berne Convention]; *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference 14 July 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303, <<http://www.wipo.org/clea/docs/en/wo/wo020en.htm>> [Paris Convention].
 5. See e.g. Frederick M. Abbott, "Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework" (1989) 22 Vand. J. Transnat'l L. 689 [Abbott, "First World Assets"]; Marshall Leaffer, "Protecting United States Intellectual Property Abroad: Toward a New Multilateralism" (1991) 76 Iowa L. Rev. 273 [Leaffer, "Protecting U.S. Intellectual Property Abroad"]; J.H. Reichman, "From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement" (1997) 29 N.Y.U.J. Int'l L. & Pol. 11 [Reichman, "Free Riders"]; J.H. Reichman, "Universal Minimum Standards of Intellectual Property Protection under The TRIPS Component of the WTO Agreement" in Carlos M. Correa & Abdulqawi A. Yusuf, eds., *Intellectual Property and International Trade: The TRIPS Agreement* (London: Kluwer Law International, 1998) 21 [Reichman, "Universal Minimum Standards"].

acclaimed characteristics of the TRIPS Agreement offered solutions to developed countries adjusting to the challenges of the post-industrial age. Specifically, the vulnerability of information products to non-compensated appropriation required a firm global baseline against which investors and innovators could restructure the sources of competitive gain without compromising traditional guarantees of free trade.⁶ This was particularly true for the United States, and other developed countries, whose declining capacity to rival manufacturing centres in newly developing economies of Asia led to a greater emphasis on innovation and information products as a source of comparative advantage.⁷ The TRIPS Agreement, with its mandatory minimum standards of intellectual property protection, supplied this baseline, and the Dispute Settlement Understanding (DSU)⁸ provided legal sanction to secure the benefits of the negotiated provisions.

Conventional narratives of the TRIPS Agreement have identified the limited success of bilateralism,⁹ the institutional weakness of the World Intellectual Property Organization (WIPO),¹⁰ and the promise of negotiated trade-offs between intellectual property and market access¹¹ as important reasons behind the strategy and success of the TRIPS negotiations. Yet, despite the institutional significance of the WTO system generally, and the TRIPS Agreement specifically,¹² both the United States and the EU have pursued an ongoing explicit strategy of bilateral and regional trade agreements that incorporate substantive

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6. For an extensive discussion of this point, see Reichman, "Free Riders," *supra* note 5.
 7. This point is well established in the TRIPS literature. See e.g. Reichman, "Universal Minimum Standards," *supra* note 5 at 346; Reichman, "Free Riders," *supra* note 5; Abbott, "First World Assets," *supra* note 5; Ruth L. Gana, "Prospects for Developing Countries Under the TRIPS Agreement" (1996) 29 *Vand. J. Transnat'l L.* 735 at 741 [Gana, "Prospects for Developing Countries"].
 8. See *Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 33 I.L.M. 1125 at 1226 (1994), <http://www.wto.org/english/docs_e/legal_e/legal_e.htm> [DSU].
 9. Leaffer, "Protecting U.S. Intellectual Property Abroad," *supra* note 5 at 278 (referring to weaknesses of bilateral approach).
 10. Ralph Oman, "Intellectual Property after the Uruguay Round" (1994) 42 *J. C'right Soc'y U.S.A.* 18 at 19–20 (describing U.S. dissatisfaction with WIPO); Stevan M. Pepa, "International Trade and Emerging Genetic Regulatory Regimes" (1998) 29 *Law & Pol'y Int'l Bus.* 415 at 429 (noting that Western countries viewed existing pre-TRIPS agreements establishing WIPO as inadequate).
 11. See David Hartidge & Arvind Subramanian, "Intellectual Property Rights: The Issues in GATT" (1989) 22 *Vand. J. Transnat'l L.* 893 at 895–96; Freidl Weiss, "TRIPS in Search of an Itinerary: Trade-Related Intellectual Property Rights and the Uruguay Round Negotiations" in Giorgio Sacerdoti, ed., *Liberalization of Services and Intellectual Property in the Uruguay Round of GATT* (Fribourg, Switzerland: Fribourg University Press, 1990) 87 at 109.
 12. Despite the proliferation of regional and bilateral intellectual property agreements, the TRIPS Agreement remains the premier international intellectual property treaty. Post-TRIPS agreements such as the WIPO Internet Treaties build on the minimum levels of protection established by TRIPS. Although the links between the WIPO treaties and TRIPS are imprecise, there is no question that under general principles of international law, interpretations of TRIPS obligations can be affected by these later treaties. See e.g. Ruth Okediji, "Toward an International Fair Use Doctrine" (2000) 39 *Colum. J. Transnat'l L.* 75 at 153–54 [Okediji, "International Fair Use"] (suggesting an interpretive approach that would weaken the influence of the WIPO treaties on interpretation of the *Berne Convention*, and consequently the TRIPS Agreement); Neil Netanel, "The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement" (1997) 37 *Va. J. Int'l L.* 441 at 465–66 (arguing that the WIPO Copyright Treaty can be used to clarify the meaning of the *Berne Convention* as incorporated in the TRIPS Agreement).

regimes of intellectual property protection.¹³ The literature reviewing this return to bilateralism has stressed the use of bilateral and regional agreements to expand global intellectual property rights, particularly at the expense of developing countries whose interests in market access are often of more immediate political and economic relevance to their domestic constituents.¹⁴ These narratives generally cast post-TRIPS agreements as illicit exercises of power by the United States and, more limitedly, the EU, to undermine and in some cases completely eliminate policy options and sovereign discretion granted by the TRIPS Agreement.¹⁵ Thus, rather than signal an end to the aggressive unilateralism that characterized pre-Uruguay Round intellectual property strategies, the new bilateralism is rightly viewed as a means to roll back both substantive and strategic gains of the TRIPS Agreement for developing countries.¹⁶

Implicit in the proliferation and success of post-TRIPS bilateralism in securing stronger protection for intellectual property owners is the possibility that the TRIPS Agreement may be *less* the *tour de force* that scholars have assumed, and may represent instead an instrumentalist “pause” in what has been an enduring feature of international relations, particularly for the United States. Contrary to some perceptions, bilateralism has been an entrenched tool of foreign relations, specifically with regard to advancing developed country interests in developing countries. Even ostensibly benign activity in developing countries, such as aid assistance through international financial institutions, has resulted in economic gain for the developed world, mainly through what Antony Anghie best describes as a reproduction of power and an intensification of inequalities.¹⁷

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13. See generally Peter Drahos, “BITs and BIPs: Bilateralism in Intellectual Property” (2001) 4 J. of World Intell. Prop. 791 [Drahos, “BITs and BIPs”]. The unabated deployment of bilateral and regional trade agreements to implement expansive intellectual property rights is increasingly noted in the literature. See e.g. Margo A. Bagley, “Legal Movements in Intellectual Property: Trips, Unilateral Action, Bilateral Agreements, and HIV/AIDS” (2003) 17 Emory Int’l L. Rev. 781 at 791 (noting U.S. and EU member states’ continued pressure for increased IP protection through bilateral treaties with developing countries); David Vivas-Eugui, *Regional and Bilateral Agreements in A TRIPS-plus World: The Free Trade Area of the Americas (FTAA)* (Geneva: Quakers United Nations Office, 2003), <[http://www.geneva.quono.info/pdf/FTAA\(A4\).pdf](http://www.geneva.quono.info/pdf/FTAA(A4).pdf)>; Rosemary J. Coombe, “Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property” (2003) 52 DePaul L. Rev. 1171 at 1177 (describing the “growing tendency” of U.S. and Europe to press developing countries to accede to bilateral treaties with higher IP protection); Susan K. Sell, “Trade Issues and HIV/AIDS” (2003) 17 Emory Int’l L. Rev. 933 at 943 (noting the industry push for greater patent protection through bilateral and regional TRIPS-plus agreements); Alexander A. Caviedes, “International Copyright Law: Should the European Union Dictate its Development?” (1998) 16 B.U. Int’l L.J. 165 at 182 (criticizing the role of bilateral agreements in creating IP rules, especially in regard to weak or dependent countries).
 14. See Frederick M. Abbott, “The WTO TRIPS Agreement and Global Economic Development” (1996) 72 Chicago-Kent L. Rev. 385 at 387–88 which provides a list of bargaining tools used during the Uruguay Round negotiations.
 15. See Drahos, “BITs and BIPs,” *supra* note 13. See also Reichman, *supra* note 5; J.H. Reichman & David Lange, “Bargaining Around the TRIPs Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions” (1998) 9 Duke J. Comp. & Int’l L. 11 at 24–28; Paul Edward Geller, “Legal Transplants in International Copyright: Some Problems of Method” (1994) 13 UCLA Pac. Basin L.J. 199 at 216; Ruth Okediji, “International Fair Use,” *supra* note 12. These articles are part of a body of literature noting or discussing policy or “wiggle” room to interpret unharmonized areas in the TRIPS Agreement.)
 16. *Ibid.*
 17. This issue is far beyond the scope of this paper, but it is an important point to note nonetheless. For an interesting account of the role of financial institutions in sustaining underdevelopment, see Antony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions and the Third World” (2000) 32 N.Y.U.J. Int’l L. & Pol. 243, <<http://www.nyu.edu/pubs/jilp/main/issues/32/pdf/32d.pdf>>. See also generally Antony Anghie, “Civilization and Commerce: The Concept of Governance in Historical Perspective” (2000) 45 Vill. L. Rev. 887.

In this article, I briefly present an account of bilateralism in international economic relations—encompassing intellectual property regulation—that suggests that the TRIPS Agreement should never have been understood as a crowning point of international intellectual property regulation. I explore the implications of this possible reformulation of the theory and place of the TRIPS Agreement in international intellectual property law and policy. I argue that the new bilateralism, while similar in form, serves a different agenda from the old bilateralism which relied principally on commercial agreements as a means to stabilize, formalize and advance interests ostensibly mutual to the contracting parties. Notwithstanding this different function, and in spite of the deployment of coercive measures enforced through unilateral trade policy, I seek to consider what, if any, real prospects for gain may exist for developing countries under the new bilateralism.

My arguments are not intended to refute criticisms of the “TRIPS-plus” systems being implemented through new bilateral and regional agreements. Undoubtedly, post-TRIPS trade agreements with intellectual property components have detrimental implications for sovereign discretion and pose attendant challenges for development concerns. Instead, by offering an alternative perspective of the new bilateralism as informed by the first generation of bilateral trade agreements, many of which addressed intellectual property rights, I hope to explore some ways that developing countries might better understand and prepare for what is clearly an agenda that will affect development strategies in the information age. This historically contextual narrative provides some different insights into the utility of the TRIPS Agreement in international intellectual property law. Further, it is important to understand the new bilateralism, both its structure and its pervasiveness, as a significant expression of the enduring project of the post-colonial assimilation of developing countries and peoples into an international legal order that privileges private capital, particularly through the agency of transnational corporations. Technology-impelled globalization,¹⁸ which has transformed productive capacities, global supply chains, and modes of industrial organization, relies heavily on the new rules of intellectual property to sustain the market power and influence of transnational actors in the development of international legal rules. I conclude that the so-called new bilateralism is actually more consistent with historical uses of the foreign relations/treaty power of the United States, as well as the general framework of international law, in its dealings with developing countries since the independence era. Consequently, it is probably the TRIPS Agreement that is the aberration in international intellectual property law, and not the recent spates of bilateral and regional agreements.

In part 1, I discuss the historical use of trade agreements and how intellectual property protection has been characteristically part of commercial treaties negotiated by the United States. For my purposes, the “old bilateralism” refers to the commercial treaties negotiated by the United States shortly after independence and utilized extensively through the mid-twentieth century. These

18. See generally Thomas Freidman, *The Lexus and the Olive Tree* (New York: Farrar, Straus, Giroux, 1999). See also Ruth Gana Okediji, “Copyright and Public Welfare in Global Perspective” (1999) 7 *Ind. J. Global Legal Stud.* 117 [Okediji, “Global Perspective”].

were typically in the form of Friendship, Commerce and Navigation (FCN) treaties. In the late 1970s and throughout the 1980s, many FCN treaties relations evolved into, were replaced by, or were supplemented with bilateral investment treaties (BITs) with broader scope and substantive content than the first generation FCN agreements. The BITs typically incorporated intellectual property provisions, although specific intellectual property agreements were also negotiated bilaterally with some countries. In part 2, I explore the structure of the post-TRIPS bilateral and regional trade agreements, the “new bilateralism,” and discuss how these bilateral agreements suggest a new form, but serve a function that is historically consistent with foreign trade policies. In part 3, I draw some conclusions from this comparison and consider the role of the TRIPS Agreement, given the intricate network of intellectual property bilateralism. I end by offering projections about the challenges of global intellectual property protection for developing countries and also some possible strategies.

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1. THE OLD BILATERALISM

IT WOULD NOT BE AN EXAGGERATION to posit that, but for trading interests, early bilateral efforts to protect intellectual property rights would not have become a widespread and staple feature of international relations.¹⁹ Indeed, there is a rich lineage of rudimentary “trade related” intellectual property policy dating back to the earliest grants of proprietary privileges for innovative and creative works. In England, the earliest patent grants were subject to revocation if the inventions were not used or the skills were not communicated to domestic workers in the relevant discipline.²⁰ The purpose of this requirement was to enhance domestic production and the capacity to export goods. During the 14th and 15th centuries in Venice and France, inventors received financial aid whenever the state determined that new inventions would successfully establish a new trade or commerce.²¹ Early exclusive grants were for commercial activities such as mining, smelting and buildings.²² Gradually, these exclusive rights were co-opted by commercial guilds who extended them to the subjects of their manufacture. Thus, in 1432, silk manufacturers in Genoa extended exclusive rights to “patterns or figures designed” by guild members.²³ In 1474, the Florentine woolen guild extended exclusive rights to “designs and patterns for figured serge.”²⁴ The focus of these early privileges was their economic value, but isolated property

19. See W. S. Culbertson, “Commercial Treaties” (1930) 2 *Encyc. Soc. Sci.* 24 at 24–26; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987).

20. Christine MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660–1800* (Cambridge: Cambridge University Press, 1988) at 12.

21. Frank D. Prager, “A History of Intellectual Property From 1545 to 1787” (1944) 26 *J. Pat. Off. Soc’y* 711 at 714 [Prager, “History”]. Venice was also one of the states that first formalized arrangements for trade with other states.

22. Frank D. Prager, “The Early Growth and Influence of Intellectual Property” (1952) 34 *J. Pat. Off. Soc’y* 106 at 123–126, 135–136 [Prager, “Early Growth”].

23. *Ibid.* at 126–128.

24. *Ibid.*

rights were granted by Italian states to inventors of corn mills who were rewarded with financial credits and land on which to locate their mills.²⁵ Similarly, post-revolutionary French law permitted forfeiture of patents once the patented object was imported into France for the purpose of encouraging manufacturing plants in France.²⁶ These national strategies were part of a broader policy to stimulate competition and enhance the prospects for foreign capital accumulation through increased international trade.²⁷ As political boundaries shifted, and intra-European trade flows increased, the impetus for other states to award proprietary interests grew, particularly as skilled labour became a paramount instrument of mercantilist and industrial policy.²⁸

As a parallel development, though at times serving as a progenitor, the right to trade in foreign markets on equal terms as citizens also evolved to facilitate stable economic relations between states.²⁹ Just as the state dispensed monopoly privileges in the form of proprietary interests in innovation,³⁰ permission to trade was also given on an *ad hoc*, personal basis, through royal letters, charters and special laws.³¹ Eventually, the two principal cornerstones of modern trade agreements, namely national treatment and most favoured nation (MFN) clauses, became common features of the earliest commercial treaties, many of which required protection for foreigners' property interests, including elements of intellectual property rights. Prior to the evolution of the national treatment and MFN clauses in trade agreements, the proprietary privileges accorded innovators were utilized to effectuate, or in some cases reinforce, discriminatory treatment against foreigners in a deliberate effort to protect domestic manufacturers and markets. As one commentator summarized, the "state-regulated manufacturers and commerce were envisaged to this end... [T]he system consisted mainly in grafting state control upon the existing guild organization."³² Ultimately, increased growth in commerce between European states gave rise to corresponding social, political and legal structures to foster the free trade ideal,³³

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25. This was the case even though similar mills already had been invented. Italian craftsmen also sought protection against local competition and guild restrictions. See MacLeod, *supra* note 20 at 11–12. See also Prager, "Early Growth," *supra* note 22 at 130–131.
 26. See Heinrich Kronstein & Irene Till, "A Reevaluation of the International Patent Convention" (1947) 12 *Law & Contemp. Probs.* 765.
 27. See generally Emerson Stringham, ed., *Patents and Gebrauchsmuster in International Law* 36 (Madison: Pacot Publications, 1935) discussing the 1842 German Zollverein Treaty which recognized exclusive national rights for patentees, but did not extend such rights to preclude importation of the patented product or sanction of those who might trade in such imported patented goods.
 28. MacLeod, *supra* note 20 at 11–12.
 29. Culbertson, *supra* note 19 at 25.
 30. MacLeod, *supra* note 20.
 31. Culbertson, *supra* note 19 at 25.
 32. Prager, "History," *supra* note 21 at 721. See also Carlo M. Cipolla, *Before the Industrial Revolution: European Economy and Society 1000–1700*, 2d ed. (New York: Norton, 1980).
 33. The importance of export oriented growth was heavily influenced by Italy where new enterprises, such as guilds, were important to the national interest in industrial and economic growth. See Armando Sapori, *The Italian Merchant in the Middle Ages*, trans. by Patricia A. Kennen (New York: Norton, 1979). The role of guilds in the development of patents and trademarks has been well documented. See e.g. Amir H. Khoury, "Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks" (2003) 43 *IDEA* 151 at 157 (trademarks); Edward S. Rogers, "Some Historical Matter Concerning Trade-Marks" (1910) 9 *Mich. L. Rev.* 29 at 36–37 (trademarks); Ramon A. Klitzke, "Historical Background of the English Patent Law" (1959) 41 *J. Pat. Off. Soc'y* 615 at 618–23 (patents).

which in turn led to a disavowing by most states of discriminatory commercial practices, including in the subject of intellectual property protection.

From the Middle Ages throughout the industrial era, the various economic and political interests associated with free trade and the growth of commercial enterprise explicitly affected the regulation of intellectual property rights between countries. The legalization of forms of proprietary interests for creative works had, as early as 1883, resulted in an international framework of mutual recognition and protection for industrial property (patents and trademarks),³⁴ and discussions for an international agreement for copyright were underway.³⁵ The invitation to the seminal 1872 Conference for International Patent Protection set forth compelling reasons for an international accord on industrial property protection, including changes in international trade policy, the rapid rate of innovation diffusion and notions of unfair competition.³⁶ Later, the *voeux* of the Washington Conference of 1873 made reference to “changes in the present international commercial relations” as an important factor necessitating an international accord on industrial property.³⁷ These multilateral agreements were based in part on existing bilateral trade agreements between countries,³⁸ with new provisions negotiated to fill in gaps or to provide coherence. Even for countries that did not participate in multilateral negotiations, FCN treaties served to obtain bilateral benefits for intellectual property protection.

For the United States, FCN treaties were the premier mechanism of foreign policy³⁹ to secure commitments over a vast range of economic interests, including intellectual property rights.⁴⁰ Thus, although the United States did not participate in negotiations over the *Berne Convention*,⁴¹ as early as 1903—seventeen years after the completion of the *Berne Convention*—it had negotiated an FCN treaty with China that included copyright protection between the two

34. See *Paris Convention*, *supra* note 4.

35. Professor Ricketson dates the earliest attempts at multilateral copyright protection to the 1858 Brussels Conference on Literary and Artistic Property. See Ricketson, *supra* note 19 at 4. The first “formal” step toward the Berne Convention appears to be the 1878 International Literary Congress. (*ibid.* at 46–49). The *Berne Convention* was concluded in 1886. See *Berne Convention*, *supra* note 4.

36. Abdulqawi A. Yusuf, “TRIPs: Background, Principles and General Provisions,” in Correa & Yusuf, *supra* note 5, 7.

37. Yusuf, *supra* note 36 (quoting the *Voex*). See also Kronstein & Till, *supra* note 26; Erich Kaufert, *The Economics of the Patent System* (Chur, Switzerland: Harwood Academic Publications, 1989) at 8–9.

38. Ricketson, *supra* note 19 at 29 (noting the “intricate network” of arrangements, conventions and declarations existing between the majority of European states as well as several Latin American states for copyright protection. This network was in fact a network of trade and commerce treaties.) It should also be noted that within the Imperial context, the provisions of these bilateral agreements extended to colonies of the contracting states.

39. See generally Herman Walker, Jr., “Modern Treaties of Friendship, Commerce and Navigation” (1958) 4 *Minn. L. Rev.* 805 [Walker, “Modern Treaties”].

40. *Ibid.* See also U.S. Dept. of State, *Commercial Treaty Program of the United States*, Publication 6565 (Washington, D.C.: U.S. Government Printing Services, 1958) at 1 which explains that these general commercial treaties were designed specifically to “assure a greater measure of security for U.S. citizens and U.S. interests in foreign countries and to advance the general objectives of the Nation’s foreign policy” [*Commercial Treaty Program*].

41. The United States participated as an observer in the early Diplomatic Conferences. See Ricketson, *supra* note 19 at 922–23. It did not join the *Berne Convention* until 1988. *Berne Convention Implementation Act*, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

countries.⁴² Between 1891 and 1904 the United States had entered into treaties with at least fifteen countries for the protection of copyright.⁴³ By the mid-twentieth century, bilateral and regional trade agreements increasingly characterized United States foreign relations, particularly with the rise of the newly industrialized economies of Southeast Asia.⁴⁴ As labour costs and technological capacity usurped the competitive advantage that had long characterized the industrial age, the new comparative advantage occasioned by intellectual property protection assumed a primary role in transnational economic relations.⁴⁵ The explicit incorporation of specific intellectual property objectives in the *Omnibus Trade and Competitiveness Act of 1988*⁴⁶ heralded the beginning of a reformulated economic policy for commercial relations.

The notorious Section 301 provision of the Act consolidated the unilateral strategy of the pre-TRIPS era by targeting foreign violations of intellectual property rights. More broadly, section 301(a) of the *Trade Act of 1974*⁴⁷ authorizes the United States Trade Representative (USTR) to take action following a determination that an “act, policy or practice” of a foreign country detrimentally affects the rights of the United States under any trade agreement, or “unjustifiably burdens or restricts United States commerce.”⁴⁸ This unilateral scheme served to induce many countries to accede to international intellectual property agreements, and to make significant commitments to curtail infringing activity.⁴⁹ In addition to the threat of trade sanctions, foreign aid was sometimes also tied to intellectual property protection.⁵⁰ In essence, the unilateral scheme served to “upgrade” the domestic laws of many developing countries. However, the process had no formal enforcement mechanism, and the shifting dynamics of foreign relations also made these induced changes vulnerable to domestic pres-

42. See *Treaty Between the United States and China for the Extension of the Commercial Relations Between Them*, 8 October 1903, U.S. and Republic of China, 33 Stat. 2208, II, T.S. No. 430, Art. IX (trademarks), Art. X (patents), and Art. XI (copyright).
43. See (1905) Copyright Bull., No. 9 at 39. See also *Amity and Economic Relations*, 29 May 1966, U.S. and Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540, <<http://www.thaiembdc.org/politics/thaius/1966taer.htm>>.
44. *Agreement on Trade Relations Between the U.S. and U.S.S.R.*, 1 June 1990, U.S. and U.S.S.R., 29 I.L.M. 949 at Art. VIII, <http://170.110.214.18/tcc/data/commerce_html/TCC_2/RussiaTrade.html>; *Agreement Between the Government of the United States of America and the Government of the Republic of Indonesia on Copyright Protection*, 22 March 1989, U.S. and Indonesia, T.I.A.S. No. 11608; *Bilateral Copyright Agreement Between the Republic of Singapore and the United States of America*, 18 May 1987, U.S. and Singapore, T.I.A.S. No. 11928.
45. See *supra* notes 5, 10 and 11, and sources cited therein.
46. *Omnibus Trade and Competitiveness Act of 1988* (OCTA), Pub. L. No. 100-148, 102 Stat. 1107, 42 U.S.C.S. § 5403, <<http://www.nibs.org/cmclaws4.html>>.
47. Pub. L. No. 93-618, 19 U.S.C.S. §§ 301-09, 88 Stat. 1978, 2041 (1975).
48. 19 U.S.C. §2411(a)(1) (2000), <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+19USC2411>.
49. Robert E. Hudec, “The New WTO Dispute Settlement Procedure: An Overview of the First Three Years” (1999) 8 *Minn. J. Global Trade* 1 at 13 (describing how U.S. extracted concessions from other countries by agreeing not to use Section 301); Warren Newberry, “Copyright Reform in China: A ‘TRIPS’ Much Shorter and Less Strange than Imagined?” (2003) 35 *Conn. L. Rev.* 1425 at 1439 (noting U.S. use of Section 301 to achieve major bilateral agreements with China); see also Susan Tiefenbrun, “Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison” (1998) 46 *Buff. L. Rev.* 1.
50. Anne O. Krueger, “The Caribbean Basin Initiative” in *Economic Policies at Cross Purposes: The United States and Developing Countries* (Washington, D.C.: Brookings Institution Press, 1993) at 138–139.

tures unrelated to the economic interests.⁵¹ Further, the importance of intellectual property rights to domestic productivity had gained new ground with modern policymakers. While global piracy was allegedly the source of significant economic losses,⁵² the new competitive global market also required investments in the macroeconomic environment to foster and support innovation. Consequently, the decade between 1980 and 1990 witnessed significant developments in domestic intellectual property law. Importantly, the *Bayh-Dole Act*⁵³ was enacted to facilitate the commercialization of federally funded research; the *Berne Convention* was ratified;⁵⁴ a new Court was established for patent appeals;⁵⁵ and science and education policy became an important policy priority for Congress.⁵⁶ A series of other modest changes also took place.⁵⁷ Throughout most of these domestic developments, discussions and negotiations for the TRIPS Agreement were taking place, and the industry-state coalition that set the agenda for the TRIPS negotiations had been established.⁵⁸

It is important to emphasize that the integration of intellectual property and trade in that multilateral trade context was not solely or even primarily to curtail piracy in global markets, although this was certainly an important issue. The more vital role of the trade context for intellectual property was the consolidation of a *domestic* reconditioning of the basis of comparative advantage in order to exploit both factor endowments and to adjust to the new division of labour evident in the global economy. To secure these ends, a new multilateral order was necessary to: provide coherence in the global intellectual property framework; decrease the dependence of effective protection on the vagaries of political relations; capture the static gains of the multiple bilateral agreements already in place; and legitimize the economic imperative of unilateralism. The old bilateralism was an extraterritorial extension of intellectual property norms to developing countries, (and at times other developed countries), through the agency of the treaty power.⁵⁹ In short, it was an explicit instrument to inject

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51. This led eventually to the “trade and” linkages that dominated free trade discourse during the Uruguay Round negotiations. Indeed, some commentators suggest that the return to bilateralism generally is another manifestation of the “trade and” phenomena. See Thomas Palley, “After Cancun: Possibilities for a New North-South Grand Bargain on Trade” (2003) *Foreign Policy in Focus*, <<http://www.fpif.org/papers/cancun2003.html>>.
 52. Business Software Alliance, *Global Software Piracy Study: Trends in Software Piracy, 1994–2002* (2003), <http://global.bsa.org/globalstudy/2003_GSPS.pdf> (stating that global dollar losses due to software piracy increased 19% in 2002 to \$13.08 billion); Letter from International Intellectual Property Association (IIPA), to Marilyn R. Abbott, Secretary, U.S. International Trade Commission, 14 February 2003, <http://www.iipa.com/rbi/2003_Feb14_ITC.pdf> (estimating that IIPA member industries lose about \$20–22 billion annually around the world due to copyright piracy).
 53. 35 U.S.C. §§ 200–212 (2000), <http://www.access.gpo.gov/uscode/title35/partii_chapter18_.html>.
 54. Irvin Molotsky, “Senate Approves Joining Copyright Convention” *The New York Times* (21 October 1988) C5.
 55. *Federal Courts Improvement Act of 1982*, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C. (1982)).
 56. Editorial, “When Big and Small Science Vie for Dollars” *The New York Times* (8 June 1987) A18 (noting that “science now amount[ed] to sixteen percent of domestic non-entitlement outlays”).
 57. See Joshua A. Newberg & Richard L. Dunn, “Keeping Secrets in the Campus Lab: Law, Values and Rules of Engagement for Industry-University R&D Partnerships” (2002) 39 *Am. Bus. L.J.* 187 at 195–96, n.30 summarizing the strengthening of domestic intellectual property rights in 1980s.
 58. Ruth L. Okediji, “Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement” (2003), 17 *Emerg. Int’l L. Rev.* 819 at 839–861 [Okediji, “Public Welfare”].
 59. Vernon G. Setser, “Treaties to Aid American Business Abroad” *Foreign Commerce Weekly* 40 (11 September 1950) 3. See also Walker, “Modern Treaties,” *supra* note 39.

domestic norms into international economic relations⁶⁰ while also securing favourable terms of economic activity in foreign markets. In the melange of international agreements, originating from the early FCN commercial treaties,⁶¹ the old bilateralism—superimposed on unilateral strategies such as Section 301—facilitated a complex foreign relations policy that at once relied on the integrity of international legal arrangements and the politics of economic advantage. In other words, the old intellectual property bilateralism was an extension of a post-War strategy aimed at facilitating access to foreign markets on grounds similar to what citizens would enjoy in the domestic context⁶² in a deliberate effort to, *inter alia*, maximize the gains of comparative and competitive advantage.

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2. THE NEW BILATERALISM

ALTHOUGH EARLIER COMMERCIAL TREATIES were concluded by the United States prior to independence and the Constitution,⁶³ for my purposes the period of old bilateralism discussed above began with the United States' need for European support of American independence.⁶⁴ Commercial treaties with the conditional MFN principle⁶⁵ were utilized as a blunt instrument of American foreign policy in response to the discriminatory policies adopted by European states.⁶⁶ The use of commercial treaties for the overtly political objective of securing recognition of American sovereignty inevitably provided a context for stabilizing economic relations with other countries, including eventually, European states. Indeed, the

60. Consequently, fundamental freedoms reminiscent of the Bill of Rights and other Constitutional freedoms were often part of the commercial treaties. See *Commercial Treaty Program*, *supra* note 40 at 1 (giving examples of personal rights in commercial treaties including freedom of travel and residence; liberty of conscience; the right to hold religious services; freedom of communication; the right to gather and report news; guarantees of decent and humane treatment when in police custody; guarantee of a prompt trial and services of competent counsel; freedom from unlawful searches; and the right to just compensation in the event of a taking of property by the state). As rationalized by the State Department, "[i]t is no accident that these treaties begin with such guarantees, for implicit in them is the belief that good international relations, like good government at home, can have no stronger foundation than respect for the person and property of the individual."
61. See Herman Walker, "United States Commercial Treaties Today" in David R. Deener, ed., *De Lege Pactorum: Essays in Honor of Robert Renbert Wilson* (Durham: Duke University Press, 1970) at 258 who states that the 1946 US-China FCN "inaugurated a new series intended by the United States to be negotiated with as many countries as possible throughout the world, and cast in a 'comprehensive' mold embodying a strengthening of content and purpose... It blazed the trail for those to follow, and set a model for them to emulate" [Walker, "Commercial Treaties"].
62. Eileen M. Mullen, "Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law" (1993) 45 Stan. L. Rev. 725 at 758 (describing the purpose of post-war FCN treaties as opening market access to citizens of each contracting party).
63. See Walker, "Commercial Treaties," *supra* note 61 who cites treaties with: France (1778), TS 83; Sweden (1783), TS 346; and Prussia (1785), TS 292.
64. Herman Walker, "The Post-War Commercial Treaty Program of the United States" (1958) 73 Pol. Sci. Q. 57 at 58 (stating that one early purpose of FCN treaties was to help secure recognition of American independence); Culbertson, *supra* note 19 at 25; Setser, *supra* note 59 at 3.
65. Unlike the regular MFN principle, the conditional MFN was, as the name suggests, dependent on certain stipulations such as that benefits extended to the other contracting party could not be extended to any other country. The conditional form of the MFN principle essentially limited the benefits of nondiscrimination only to the parties to the treaty.
66. Culbertson, *supra* note 19 at 25. A main interest in the conditional MFN clause include the United States' interest in obtaining exclusive advantages for certain countries under reciprocal tariff arrangements. For a discussion of tariff bargaining for the purpose of extracting exclusive favours from countries, see *ibid.* at 28–29.

promotion of stability and consistency in sovereign relationships was a premier function of the earliest commercial treaties,⁶⁷ particularly as technological developments and improvements in transportation led to an expansion of trade between countries. As mentioned earlier, two fundamental principles—national treatment and the unilateral, unconditional most favoured nation⁶⁸—evolved as increased volumes of trade between countries took place and the scope of the new relations required more complex arrangements. National treatment guarantees equal treatment as between the citizens of the contracting parties on the subjects specified in the treaty, and the MFN principle requires equality of treatment as between a third party state and each of the contracting states with respect to the same subjects. Both these principles are vital to the liberal trade system⁶⁹ and are now standard features of both trade agreements and intellectual property treaties.⁷⁰

In the period after World War II, bilateral commercial treaties shifted focus in light of the global interest in directing American capital to European reconstruction efforts.⁷¹ Private economic activity in foreign markets assumed a priority in United States foreign relations and the government began an affirmative program to address the treatment of foreign investment in host countries. In the early stage of these efforts, the principles of unconditional most-favoured nation and national treatment quickly became pillars of formalized commercial relations between states. Under the earlier FCN treaties, intellectual property rights were treated generally as part of the private property interests of American businesses. In some treaties, the term “property” was simply extended

67. See Claude S. Phillips, Jr., “The Bilateral Treaty Network of Non-Western States” in Deener, *supra* note 61 at 202, who provides empirical survey evidence of the use of treaties by non-Western states to formalize international relations in the period shortly after independence. The leading topic of treaties in order of frequency between Western and non-Western states were air transport, cultural affairs, frontier formalities and visas, and general trade (*ibid.* at 207). For the United States, these treaties emphasized economic assistance, a point that has an important implication for bilateral intellectual property agreements.

68. For some time, the United States, and others, had dabbled with various forms of the MFN principle. For a brief overview of these different forms and practices, see Culbertson, *supra* note 19 at 27–29.

69. After World War II, political leaders were of the opinion that the war had in part been caused by economic tensions between countries. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2d ed. (Cambridge: MIT Press, 1997) at 13.

70. See Ricketson, *supra* note 19 at 32, noting that pre-Berne bilateral agreements for copyright protection adopted the national treatment as a general rule; and at 36, noting that among others, MFN clauses were also incorporated into the pre-Berne bilateral conventions as “unhappy borrowings” from commercial treaties that had been simultaneously negotiated. For national treatment and MFN clauses in TRIPS, see Art. 3(1): “Each member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property...” The MFN principle is stated in Art. 4: “With regard to the protection of intellectual property any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.” See also Reichman, “Universal Minimum Standards,” *supra* note 5 at 347 describing the national treatment principle and its carryover into the MFN, as the “most important” basic principle of the TRIPS Agreement.

71. It is important to note, however, that the inter-war period also witnessed a rise in bilateral commercial treaties, specifically in an effort to strengthen comity among nations. Discriminatory tariff policies adopted by the United States and other countries in the early twentieth century affected political relations and, by some accounts, internal economic conditions. For example, there is some contestation between economic historians about the effect of the trade wars on the Great Depression. See e.g. Richard N. Cooper, “Trade Policy as Foreign Policy” in Robert M. Stern, ed., *U.S. Trade Policies in a Changing World Economy* (Cambridge: MIT Press, 1987) at 291; Barry J. Eichengreen, “The Origins and Nature of the Great Slump Revisited” (1992) 45 *Econ. Hist. Rev.* 213.

to such intangible rights,⁷² while in others explicit reference was made to patents, copyrights and trademarks.

It is important to note, too, that the period following World War II witnessed the establishment of international institutions whose functions assumed discrete subjects originally encompassed by the FCN treaties. Thus, for example, consular relations were addressed by the *Vienna Convention on Consular Relations*;⁷³ and tariff reductions/trade policies were subsumed by the *General Agreement on Tariffs and Trade*.⁷⁴ The fractionalization of the substantive content of FCN treaties, and the allocation of these subjects to newly established regimes and/or institutions, created an institutional lacuna in the area of private economic activity. Bilateral investment treaties, designed specifically to negotiate terms and conditions of the security and benefits of private investors, rapidly became the new instrument for addressing the protection of a variety of private economic priorities, including intellectual property rights.⁷⁵ In the period from the late 1970s through the Uruguay Round negotiations, these bilateral investment and trade treaties typically resulted in more detailed intellectual property clauses,⁷⁶ with stronger rights being demanded of developing countries, particularly in the late 1980s, as the domestic economy relied increasingly on knowledge goods as a source of comparative advantage.

An overlooked, but extremely important, aspect of the new bilateralism is the role of the post-War international context in encouraging developed countries to pursue multilateral trade agreements with developing countries,⁷⁷ and for the latter to accept such agreements. In addition to European reconstruction, an important international objective of the post-War era was the assimilation of newly independent countries into the global economic system. Development aid programs designed to help newly independent developing countries of Africa and Asia, particularly, were directed at encouraging foreign capital investment flows to those countries.⁷⁸ Multilateral investment agreements were advanced

72. See *Commercial Treaty Program*, *supra* note 40 at 1. According to the State Department, the postwar series of commercial treaties was "to use the treaty process to assure a greater measure of security for U.S. citizens and U.S. interests in foreign countries... Guaranties of security of rights in property...are of special importance to the American who goes abroad as a businessman... With [these guarantees]...the treaties come to be a code of fair treatment for the American businessman who seeks to trade, to invest, or to run a business in a foreign country."

73. 24 April 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

74. 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948).

75. Setser, *supra* note 59.

76. See Drahos, "BITs and BIPs," *supra* note 13 for a review.

77. Phillips, *supra* note 67 at 203–208 explains that between 1942 and 1965, a period associated with decolonization, the vast number of treaties signed by non-Western (*i.e.*, developing countries) were with Western (developed) countries, and mainly the United States.

78. As the State Department described the post-War treaty program:

To encourage the investment of American private funds in the actual producing of raw materials, goods and services in foreign countries was a matter of importance from the standpoint of our domestic economy as well as of the economic development of the foreign countries concerned. Investments leading to increased productivity and higher living standards abroad promised wider markets for American goods and further opportunities for fruitful investment.... The employment of [American capital] in advancing the economic development of our friends would promote the common defense as well as further our own prosperity in the course of furthering theirs.... In the present treaty program, therefore, emphasis has been placed upon expanding the provisions dealing with the rights of American citizens and their enterprises abroad.... [T]he aim of these treaties is to strengthen the hand of the Government in carrying out its obligation to safeguard American citizens and their interests in foreign countries."

See *Commercial Treaty Program*, *supra* note 40 at 4.

under the auspices of United Nations' agencies and other international institutions, such as the International Chamber of Commerce.⁷⁹ These framework proposals were intended to be followed by developed countries negotiating bilateral and multilateral commercial agreements with developing countries.⁸⁰ There was significant input by private industry in the United States, whose interests the investment agreements were designed to protect.⁸¹ Notably, one specific recommendation by industry was that countries who might benefit from United States programs designed to assist weaker economies be required to enter into FCN treaties with the United States, similar to earlier FCN treaties but with stronger provisions.⁸² These types of demands by industry were a precursor to the complete co-opting of the public international law process by private interests that typified the TRIPS negotiations almost fifty years later,⁸³ and the post-TRIPS copyright treaties.⁸⁴ Such demands remain strongly manifest in the new international intellectual property bilateralism of the post-TRIPS era. Further, private industry suggested that the government withhold economic aid from developing countries that refused to provide strong levels of protection for foreign investors.⁸⁵ Although this coercive approach was once deemed inappropriate, impracticable and politically destabilizing,⁸⁶ it later became the practice of the United States under the Section 301 scheme.⁸⁷ The "gentler" version of this coercive strategy perhaps is the current model in bilateral and multilateral agreements, such as the proposed Free Trade Area of the Americas (FTAA)⁸⁸ and other trade negotiations. These agreements are "gentler" because, in theory, developing countries can obtain additional concessions and benefits during such negotiations.

In reality, however, the global environment is fundamentally arranged in a manner that makes it highly unlikely that developing countries can respond in any meaningful way to the aggressive erosion of their capacity to regulate intellectual property rights for domestic interests. Both with its central doctrines and institutions, the international legal system has, since the independence era, encouraged developing countries to transfer regulatory powers to markets. The agents of this strategy to aid the development process were international pro-

79. Setser, *supra* note 59 at 4.

80. *Ibid.*

81. *Ibid.* at 4–5, 38.

82. *Ibid.* at 4–5.

83. Okediji, "Public Welfare," *supra* note 58 at 825–839, 842–861 highlights the role of private industry in a game theory perspective of the TRIPS negotiations. See also Gail Evans, "Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights" (1994) 18:2 *World Competition L. & Econ. Rev.* 137. For a detailed history of the provisions of TRIPS, see Daniel Gervais, *The TRIPs Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 1998).

84. See *WIPO Copyright Treaty*, 20 December 1996, 36 I.L.M. 65; *WIPO Performances and Phonograms Treaty*, 20 December, 1996, 36 I.L.M. 76. For an account of the negotiations leading to the WIPO treaties, see Pamela Samuelson, "The U.S. Digital Agenda at WIPO" (1997) 37 *Va. J. Int'l L.* 369.

85. Setser, *supra* note 59 at 38. See Drahos, "BITs and BIPs," *supra* note 13 at 801 (discussing other trade levers used to secure intellectual property protection in developing countries).

86. *Ibid.* at 38–39.

87. See Drahos, "BITs and BIPs," *supra* note 13 at 793–797 describing how the spectre of Section 301 exerts direct and indirect pressure on developing countries during negotiations with the United States.

88. For a review of the intellectual property issues associated with the FTAA negotiations, see Vivas-Eugui, *supra* note 13. See also Michael Geist, "Why We Must Stand Guard over Copyright" *Toronto Star* (22 October 2003).

grams and institutions, which established guidelines for loans and other economic assistance that essentially stripped many developing countries of the capacity to pursue economic development on their own terms.⁸⁹ Developing countries' willingness to enter bilateral or regional trade agreements that "cost" more in intellectual property terms is simply a reflection of an extant and established wisdom handed down by the international agenda of the post World War II era to assimilate developing countries into the world economic order on terms predetermined by the developed world based on its own historical experiences⁹⁰ and priorities.⁹¹ This tendency was the case in all areas of developed country encounters with developing countries, including intellectual property law.⁹²

The use of bilateral agreements to accomplish foreign policy goals is well established in the international economic relations of the United States. Despite the hope that the TRIPS Agreement would diminish the use of bilateralism to secure international protection for intellectual property, post-TRIPS bilateralism remains the dominant policy of the United States. Intellectual property bilateralism is evident in trade negotiations such as the recent FTAA negotiations, in the continued use of Section 301 of the *Trade Act of 1974*⁹³ to secure extra-TRIPS or "TRIPS-plus" commitments from other countries, as well as in pure bilateral intellectual property agreements. While the old bilateralism did not extract substantive intellectual property commitments from developing countries, and certainly none that deviated from the existing multilateral agreements, this was more likely because, as a domestic matter, intellectual property was not a foreign policy priority at the time. As this situation changed in the 1980s, both unilateral actions through section 301, and explicit intellectual property agreements were negotiated as part of bilateral investment treaties⁹⁴ as well as trade agreements.

Both in its scope and substantive provisions, the new bilateralism differs

89. See Anghie, *supra* note 17. See also Halim Moris, "Self-Determination: An Affirmative Right or Mere Rhetoric?" (1997) 4 *ILSA J. Int'l & Comp. L.* 201 at n. 36.

90. *Commercial Treaty Program*, *supra* note 40 at 4:

In seeking to promote the economic development of other countries through private capital the United States is applying the lessons of its own national experience. Since the early days of the Republic, this country has followed a policy of welcoming foreign capital. Events have proved the soundness of this policy, for foreign capital has played a vital role in our economic development. Railroad, mining, ranching, textile manufacturing, and other important American industries owe much of their initial progress to the willingness of the foreign investor to risk his funds inside his country. An important element in the willingness of foreign venture capital to invest in the United States, of course, was the existence of conditions of security for the investor and his enterprise.

See also Walker, "Modern Treaties," *supra* note 39.

91. Walker, "Commercial Treaties," *supra* note 61 at 259–260. This was evident in the events leading up to the TRIPS negotiations. See Okediji, "Public Welfare," *supra* note 58.

92. See Gana, "Prospects for Developing Countries," *supra* note 7. See generally, Ruth L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property," (1995) 24 *Denv. J. Int'l L. & Pol'y.* 109; Ruth L. Okediji, "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System" (2003) 7 *S.J.I.C.L.* 1.

93. *Supra* note 47. The EU challenged the WTO-consistency of Section 301 but did not succeed.

94. See Drahos, "BITs and BIPs," *supra* note 13 at 796–798 describing the link between investment treaties and intellectual property treaties. Most investment treaties, like the early FCN treaties, had provisions for intellectual property protection. See e.g. Art. 1(c), *Treaty Concerning the Reciprocal Encouragement and Protection of Investments*, 3 December 1985, U.S. and Turkey, 25 *I.L.M.* 85, <<http://www.usemb-ankara.org.tr/IRC/treaty/1985BIT.HTM>> (defining investment to include intellectual property rights); Art 1(c), *Treaty Concerning the Reciprocal Encouragement and Protection of Investments*, 27 October 1982, U.S. and Egypt, 21 *I.L.M.* 927 (same). Bilateral investment treaties between other developed countries and developing countries also contained similar provisions. See Art. 1(a) (iv) of the *Agreement for the Reciprocal Promotion and Protection of Investments*, 23 September 1981, Sri Lanka and Switzerland, 21 *I.L.M.* 399.

from the old by utilizing the bilateral and regional processes primarily for strategic purposes. The new bilateralism is clearly a tool to effectuate the benefits of forum shifting,⁹⁵ to overcome limitations imposed by the TRIPS Agreement,⁹⁶ and to sustain the expansion of intellectual property rights at the expense of the public interest both in developed and developing countries.⁹⁷ Long gone is any meaningful justification that this bilateralism is designed to prosper and aid the development of technology importing countries, although these arguments are certainly still the “official” justification offered by some policymakers. Indeed, the very assimilation of intellectual property in the liberal trade regime is a manifestation of the premise that developing countries are disadvantaged by unbalanced intellectual property rights precisely because global protection of such rights at ever increasing levels is necessary to secure the comparative advantage of developed countries. Increasing empirical evidence affirms that intellectual property rights should be less strong in early developmental stages, or at the very least balanced with limitations and exceptions to encourage public access for purposes of encouraging downstream innovation and promoting competition.⁹⁸ Developing countries, nonetheless, participate in these bilateral negotiations and agreements for the same reasons they have been participating in bilateral investment agreements since the late '60s and '70s, namely, the orthodoxy that foreign investment and foreign aid are an indispensable aspect of promoting economic development,⁹⁹ despite the absence of evidence that the adoption of intellectual property laws has effected measurable domestic innovation.

By the conclusion of the TRIPS Agreement, the regulation of foreign investment was dominated by bilateralism.¹⁰⁰ The strong network of bilateralism

95. Forum shifting is the practice of utilizing different institutional fora to accomplish desired goals. For example, the shift from WIPO to the WTO was classic forum shifting by the United States, which at the time was frustrated with WIPO's institutional weaknesses. Similarly, the shift from the WTO to bilateral and multilateral arrangements is another example of forum shifting to accomplish specific goals with respect to intellectual property. See generally John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) at C. 24; Drahos, “BITs and BIPs,” *supra* note 13 at 798 (stating that the ability to ratchet intellectual property rights is dependent partially on the process of forum shifting). Just as developed countries have used forum shifting as means to strengthen intellectual property rights, developing countries have also utilized forum shifting to roll back or weaken these rights. See also Laurence Helfer, “Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking” 29 *Yale J. Int'l L.* [forthcoming 2004].
96. Drahos, “BITs and BIPs,” *supra* note 13.
97. See Okediji, “Global Perspective,” *supra* note 18; Okediji, “International Fair Use,” *supra* note 12.
98. See Reichman, “Free Riders,” *supra* note 5. See also Keith Maskus, “Intellectual Property Rights and Economic Development” (2000) 32 *Case W. Res. J. Int'l L.* 471 at 476; Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, D.C.: Institute for International Economics, 2000) at 236.
99. See Elihu Lauterpacht, “International Law and Private Foreign Investment” (1997) 4 *Ind. J. Global Legal Stud.* 259 at 265 (noting that developing countries realized that development required both public government loans as well as private investment flows). Although FCN treaties also regulated foreign investment conditions, the terms of these often compromised the needs of developing countries who were fairly desperate for the benefits of foreign investment (see *ibid.* at 266).
100. By one 1997 estimate, there are at least 400 bilateral investment treaties. *Ibid.* at 267. Most of these treaties utilize the same form developed by the United States. For examples, see *Agreement for the Promotion and Protection of Investments*, 23 January 1987, U.K. and Dominica, 3 ICSID Investment Treaties 1987-a; *Treaty Concerning the Reciprocal Encouragement and Protection of Investments*, 3 December 1985, U.S. and Turkey, 25 I.L.M. 85; *Agreement for the Reciprocal Promotion and Protection of Investments*, 23 September 1981, Sri Lanka and Switzerland, 21 I.L.M. 399; *Agreement on the Encouragement and Reciprocal Protection of Investment*, 28 January 1977, Egypt and Japan, 18 I.L.M. 44 (entered into force 14 January). See generally Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: M. Nijhoff, 1995); Margrete Stevens & Ruvan de Alwis, “References on Bilateral Investment Treaties” (1992) 7 ICSID Review: Foreign Investment L. J. 229. See also Mohamed I. Khalil, “Treatment of Foreign Investment in Bilateral Investment Treaties” (1996) 7 ICSID Review: Foreign Investment L.J. 339; Alejandro Escobar, “Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States” (1996) 11 ICSID Review: Foreign Investment L. J. 86.

in foreign investment regulation, with many of these agreements containing provisions for intellectual property protection,¹⁰¹ established the foundation and model for the new intellectual property bilateralism. Although a major multilateral instrument was negotiated for foreign investment in 1985,¹⁰² the bilateral treaties remain the principal agency for foreign investment regulation today.

It can certainly be argued that the bilateral investment treaties of the '70s and '80s represent the old bilateralism of the pre-TRIPS era.¹⁰³ However, new investment treaties were concluded post-TRIPS which contained substantive intellectual property provisions beyond the TRIPS requirements,¹⁰⁴ suggesting a continuum between the so-called old and the new. The result is that both investment and trade agreements constitute potential mediums for new intellectual property obligations to be imposed on developing countries. The new bilateralism is essentially a reflection of the splintering of the early FCN treaties into discrete subject matters for treaty negotiation, and of the relevance of intellectual property protection both for foreign investment interests as well as trade interests of the United States. The presence of two equally justifiable hosts for proliferating expansive intellectual property rights suggests one interesting, if subtle, proposition: forum shifting may be less the problem for developing countries than the nascent institutional neutrality that bilateralism is likely to engender. In other words, rather than utilize WIPO or the WTO for negotiations, the new bilateralism can rely simply on the availability of multiple texts and contexts within which to advance its expansionist agenda. This view suggests that the regime shifting (as opposed to forum shifting)¹⁰⁵ strategy of *developing* countries may have also become part of the arsenal of developed countries in the bid to secure strong global intellectual property rights.¹⁰⁶

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3. BILATERALISM AND THE FUTURE OF TRIPS

A CAREFUL REVISION of the economic relations of the United States reveals a very deliberate and consistent use of bilateral commercial agreements for explicit foreign policy objectives, ranging from the recognition of its political sovereignty to the promotion of private interests in foreign countries, the preservation of comparative advantage, and the interest in maximizing worldwide economic gain for owners of intellectual property rights. These foreign policy goals are evident in the evolution of intellectual property bilateralism, from the general obligations of the FCN treaties to the substantive delineation of intellectual property obliga-

101. See *supra* notes 92–98.

102. See *Convention Establishing the Multilateral Investment Guarantee Agency* (MIGA), 11 October 1985, 24 I.L.M. 1605. See generally Ibrahim F.I. Shihata, ed., *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency* (London: Kluwer Academic, 1988).

103. This is the approach taken by Peter Drahos. See Drahos, "BITs and BIPs," *supra* note 13 at 793.

104. Drahos, "BITs and BIPs," *supra* note 13 at 796–797 describes the U.S.-Nicaragua investment treaty that successfully linked expansive intellectual property rights with bilateral trade and investment treaties, "spiced" with a Section 301 branding of Nicaragua.

105. Helfer, *supra* note 95.

106. *Ibid.*

tions in investment and trade agreements both pre- and post-TRIPS. It should be noted that bilateralism also reflects the deep-seated inclination of the United States towards unilateralism and isolationism in the international political realm.

What are the implications of this unabated bilateralism? Might it suggest that the virtue and success of the TRIPS Agreement was exaggerated, or that TRIPS was perhaps a decoy to trap developing countries in a never-ending spiral of ever increasing intellectual property rights that impedes access to science, technology and other knowledge goods? While both of these suggestions can be justified, neither fully captures the instrumentalism that permeates international intellectual property regulation. Each kind of treaty—bilateral and multilateral—serves functions that cannot be duplicated by the other, with attendant advantages and challenges for both developed and developing countries.

As suggested earlier, bilateralism is a vintage strategy of the United States' economic relations. Hence, it is important to recognize that it is likely to remain a viable part of intellectual property regulation for the foreseeable future, either directly through bilateral intellectual property agreements or indirectly through investment treaties or other economic arrangements. This does not suggest, however, that multilateralism is ineffective or superfluous. Multilateralism plays an important coordinating function. Multilateral efforts to harmonize intellectual property norms should be anticipated by developing countries once the network of bilateral agreements is sufficiently dense to warrant a mechanism to consolidate and (perhaps improve) the gains from bilateralism. This was certainly the case with the *Berne Convention*,¹⁰⁷ and arguably the TRIPS Agreement as well. The proliferation of investment treaties with intellectual property provision, and the existence of Section 301, all engendered changes in the national laws of developing countries. Specific intellectual property agreements with states, either through regional arrangements like North American Free Trade Agreement (NAFTA),¹⁰⁸ or through independent intellectual property treaties, and the large numbers of members in existing multilateral conventions on intellectual property, triggered the density point necessitating the TRIPS negotiations. It is true that none of these issues were explicit factors in the events that led up to the TRIPS negotiations, but it seems evident from the game strategies employed by developed countries¹⁰⁹ that the TRIPS negotiations would not have been possible without some core set of principles and relations already in place.¹¹⁰ The TRIPS negotiations thus served a coordinating function both in terms of the relationships between states as well as in determining the substantive obligations that will bind them.¹¹¹

However, multilateralism, while avoiding the high transaction costs of bilateralism, still may not yield a net welfare value for the developed countries with the greatest interest in maximalist intellectual property rights. For example, the presence of multiple parties with diverse interests in a variety of issues will

107. Ricketson, *supra* note 19.

108. *North American Free Trade Agreement*, 17 December 1992, 32 I.L.M. 289 (1993).

109. Okediji, "Public Welfare," *supra* note 58.

110. See Walker, "Commercial Treaties," *supra* note 61 at 259; Okediji, "Public Welfare," *supra* note 58.

111. Okediji, "Public Welfare," *ibid.*

make agreement on principles difficult. Thus, multilateralism always runs the risk of diluting the objectives of stronger states by avoiding contentious issues or agreeing to allow national discretion over others.¹¹² This is paradigmatically manifest in the “wobble room” available in TRIPS for developing countries, and other countries, to interpret certain provisions in a manner consistent with domestic interests.¹¹³ The TRIPS Agreement, like its predecessor conventions, contains room for sovereign discretion, or simply left out of its ambit issues on which agreement could not be reached.¹¹⁴ At best, multilateralism is quintessentially about identifying the lowest common denominator for a majority of states. This denominator may exist via shared membership of extant international agreements, or through linkage bargaining that provides a leverage for concessions between negotiating parties. Both these strategies strongly characterized the TRIPS negotiations.

Another difficulty for developed countries, particularly the United States, is the dead weight loss that can be associated with multilateralism. In the specific context of the trade and intellectual property merger, many countries not particularly high or important on the foreign relations list of the United States can detrimentally affect negotiations substantively or strategically through membership in coalitions. Such countries may obtain the same concessions as the coalition without the developed country gaining anything since, for all practical purposes, no economic relations or interest exist for the United States with that country. Being forced to negotiate multilaterally with countries who have strategic power based on membership in a coalition but whose domestic markets are not currently attractive to developed countries, means that the multilateral process imposes some dead weight loss on those developed countries. In the context of TRIPS, the dead weight loss is absorbed by the countries seeking the highest returns for intellectual property rights, namely the United States and the EU. To ameliorate that loss, these developed countries will turn inevitably to bilateral strategies of the kind we are now witnessing. Of course, it is likely that even the least developed country with no technological infrastructure could still indirectly effect losses on developed countries, particularly to the extent that such countries could become havens for piracy or for trafficking in pirated goods. The point, however, is that certain countries are “carried” by the multilateral negotiations, and in essence free ride on the benefits associated with the bargain with little immediate loss to their domestic economy, since they are not equipped to exploit technology or other knowledge goods.

In these cases, bilateralism offers a precise and controlled opportunity to recover any perceived losses from the multilateral table, and to avoid giving up additional concessions to countries whose domestic markets hold no immediate economic interest or economic threat. Of course, bilateralism splinters any developing country coalition and may make it difficult to negotiate on a broad development platform. This is a key value of a bilateral strategy. It is important to note, however, that during the TRIPS negotiations, alliances formed between

112. Reichman, “Compliance with TRIPS,” *supra* note 3.

113. See Reichman, “Free Riders,” *supra* note 5 and Reichman, “Compliance with TRIPS,” *supra* note 3.

114. See Reichman, “Compliance with TRIPS,” *supra* note 3.

developed and developing countries over different issues;¹¹⁵ once the initial resistance to negotiating an intellectual property treaty was broken, there was no consistently observable developing country negotiating mandate.¹¹⁶ By facilitating targeted agreements with developing countries whose economies pose a threat to developed country interests, bilateralism helps those developing countries secure better gains than the pyrrhic ones generally associated with the TRIPS Agreement. What then are the prospects for developing countries more broadly, once a coalition is broken? At least one initial proposal is to move from coalitions based on substantive issues to coalitions based on resistance to processes utilized by developing countries.

Developing countries negotiating bilateral agreements can consider how to utilize the negotiations to limit application of particularly harmful unilateral strategies such as Section 301, or even in negotiating dispute settlement strategies. Bilateralism portends easier monitoring of the costs and gains of the agreement. Thus developing countries in particular can evaluate whether promises are being kept by the developed countries and what, if any, gains have been obtained. If not, the appropriate demands for compliance can be made. While such demands may generally be unimpressive on developed countries, in the intellectual property context where developed countries have very definite interests in securing compliance and in obtaining “TRIPS-plus” protection, developing countries may actually have some leverage. This is an important point because it highlights the fact that forum shifting is necessary for developed countries not only in the development of norms, but in the possibilities for enforcement. Developing countries whose markets hold particular appeal to developed countries should certainly utilize this interest in the enforcement of intellectual property rights by developed countries to ensure that they are receiving the gains negotiated for under the bilateral accord.

Another important point is that developing countries should engage in a pro-active strategy of using bilateral agreements to strengthen the development friendly principles contained in the preamble of the Agreement, and in Articles 7 and 8.¹¹⁷ Basically, just as developed countries are using bilateralism to expand rights and limit national discretion, developing countries can negotiate specific implementation of the development friendly principles enunciated in TRIPS, or interpose such principles independently. Indeed, such a countervailing strategy might well be vital to ensuring that the MFN requirements of the TRIPS Agreement do not entrench “TRIPS-plus” as the *de facto* standard of global intellectual property rights. Other strategies noted by other commentators include negotiating maximum, rather than minimum intellectual property standards, declaring a moratorium on new intellectual property accords, and private-

115. Okediji, “Public Welfare,” *supra* note 58. See also generally Daniel Gervais, *The TRIPs Agreement, Drafting History and Analysis*, 2d ed. (London: Sweet & Maxwell, 1998) (providing a clause-by-clause analysis of the TRIPS Agreement).

116. This can also be attributed to the lack of expertise of most developing country negotiators, as well as the fact that side deals in agriculture, textiles and market access removed the edge to any resistance to the TRIPS Agreement.

117. See Okediji, “Public Welfare,” *supra* note 58 at 913–914 (pointing out the failure of the WTO dispute panels to interpret TRIPS obligations in light of these principles).

public collaborations to strengthen the innovation capacity of developing countries.¹¹⁸

My point is that the incorporation of intellectual property in bilateral and regional trade agreements offers benefits for developing and some developed countries, and becomes the logical place to reconsider the gains and losses of the multilateral bargain. Particularly with countries with significant economic relations with the United States such as China, India and Brazil, bilateralism may offer some important prospects for targeted objectives so long as developing countries understand how to effectively negotiate these difficult issues. The use of bilateral agreements to secure particular economic interests in foreign markets is entirely consistent with the historic practice of the United States. What makes this post-TRIPS vintage of the new bilateralism worrisome is the often recognized fact that expansive intellectual property rights have a tremendous negative effect on competition, innovation and the public welfare in access to knowledge goods.¹¹⁹

Despite the possible strategic opportunities that some developing countries may have in the course of negotiating bilateral agreements, there can be no substitute for continuing to resist the global agenda to gain complete control of how public knowledge goods are created, disseminated and used. In this regard, developing countries must consider the benefits of regional approaches to intellectual property protection.¹²⁰ Regionalism and bilateralism between developing countries have long been overlooked as a tool to formalize developing country positions in a number of areas.¹²¹ Additionally, cross-collateral trade or intellectual property agreements with developed countries with more moderate positions on intellectual property regulation can also offer opportunities for a mixed global coalition united in preserving access to public goods in the global market. In an increasingly contested arena such as intellectual property, the importance of regional and cross regional efforts to adopt and strengthen norms that are conducive to development should not be overlooked, and may well become the most viable strategy to combat the less palatable but paradigmatic North/South intellectual property bilateralism.

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CONCLUSION

THE NEW BILATERALISM IS NOT SO NEW as it is newly pronounced in its commitment to private industry interests. Both bilateralism and multilateralism are integral parts of the international intellectual property system. The TRIPS Agreement

118. See for example Reichman & Lange, *supra* note 15; J.H. Reichman, "Managing the Challenge of a Globalized Intellectual Property Regime," <http://www.iprsonline.org/unctadictsd/bellagio/docs/Reichmann_Bellagio2.pdf>.

119. Reichman, "Free Riders," *supra* note 5.

120. For one suggestion of how to reap real short-term benefits from regional trade agreements with developing countries (in this case the United States) without sacrificing regional economic, cultural and political concerns, see Frank J. Garcia, "'Americas Agreements'—An Interim Stage in Building the Free Trade Area of the Americas" (1997) 35 Colum. J. Transnat'l L. 63.

121. Although the data suggests a marked improvement from the initial post-colonial era, the fact remains that most treaties by developing countries are with developed countries. For a variety of historical reasons, the developing country to developing country (so called South/South cooperation) network of treaties remains weak. See generally Phillips, *supra* note 67 at 203.

remains an important hallmark of international intellectual property law, but it very well may just have been a pause—albeit a significant one—in the historical progress of bilateral commercial treaties used as instruments of foreign relations by the United States. While it is important to consider the possibilities for development strategies even within the stifling regime of intellectual property bilateralism, it should not be overlooked that the success of the new bilateralism is rooted in the structure of the larger global economic environment. To this end, international law, as well as intellectual property regulation, act in concert in ways that are problematic for developing countries. This result is ironic in light of the public welfare ideals that, classically, have motivated these two disciplines. Those ideals must remain at the forefront of efforts to infuse international intellectual property regulation with the promise of “progress” for all peoples.