

THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS: TRIPS, BITS, AND THE SEARCH FOR UNIFORM PROTECTION

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I. INTRODUCTION

In 1959, Germany and Pakistan quietly made history when they signed the world's first bilateral investment treaty (BIT).¹ Fifty years later, several thousand of these treaties have been negotiated, ratified, and implemented across the globe—the majority of them in the past fifteen years.² BITs are contracts between two countries that govern the investment relationship between each other and their respective citizens. They are trade agreements that use binding international arbitration to protect particular itemized assets from expropriation by compensating expropriated parties and holding expropriating parties accountable. The assets that BITs protect include stocks, bonds, liens, mortgages, construction contracts, and real property. Also among these protected assets are intellectual property rights (IPR or IPRs).

In an increasingly globalized world, the importance of protecting intellectual property across national boundaries has risen exponentially. Protecting intellectual property solely within a country's borders, without some degree of transnational cooperation, simply will not suffice. BITs are part of the international contractual fabric that fill this void. They provide investors (usually corporations but also individuals) with the ability to directly submit an investment dispute to binding international arbitration against the expropriating party's home state. Notably, the investor can put this mechanism to use without seeking their own country's approval. Nor does the investor need to reach a contractual arrangement with the host state. Rather, the host state consents to arbitration by virtue of signing the BIT. Obviously, this is a powerful tool, and one that saves investors the headaches (and uphill odds) associated with fighting to protect an investment in another country's court system. Ultimately, or at least theoretically, this investor–state arbitration mechanism should provide investors with at least a modest dose of peace of mind.

In spite of this and other innovations on the international intellectual property scene, there remains no consistent “international standard” for the protection of IPRs. Although the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³ set forth a foundation for what the

¹ Kojo Yelpaala, *Fundamentalism in Public Health and Safety in Bilateral Investment Treaties* (pt. I), 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 235, 236 (2008).

² *Id.*

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (entered into force Jan. 1, 1995) [hereinafter TRIPS].

content of such a standard could be, the standards contained in TRIPS are not universal—either in name or in practice. On the heels of thirty-five years of BITs, the TRIPS agreement set out to deliver a level playing field for all IPR players by eschewing the bilateral BITs model in favor of a multilateral model. The multilateral framework was appealing because it brought together many scores of nations as one big group. These nations then negotiated and agreed to common investment terms *en masse*, instead of simply in pairs. Regrettably, much like other multilateral regimes that preceded it, TRIPS has failed in its basic mission. It did not effect a comprehensive, level playing field with respect to IPR protection. Instead, TRIPS merely established a baseline of minimum protections. This is evidenced by the fact that in the years since TRIPS's adoption, BITs have proliferated more rapidly than ever before. Thus, the multilateral TRIPS regime did not do away with the preexisting bilateral BITs regime. Instead, it simply added to it.

Today, TRIPS and BITs represent two core layers of nation-to-nation IPR-protection mechanisms. In most cases, the new fleet of post-TRIPS BITs have raised the standards set forth in TRIPS. What these BITs have not done, however, is create a consistent *worldwide* layer that encompasses all nations. Such a layer, if it existed, would apply equal standards to all relationships between nations and their investors. Of course, this goal is eminently easier said than done.

Perhaps the greatest roadblock to establishing a consistent international standard is the very nature of international relationships in the twenty-first century. Not all countries are created equal. Some are imbued with dominant economic positions that translate into net exports of capital. Other nations are net capital importers. In effect, the barrier is the developing nation–developed nation dichotomy. These basic facts dictate that the terms of BITs, free trade agreements (FTAs), and other international investment agreements are bound to be skewed in favor of certain nations and against others.

When capital-exporters and capital-importers negotiate an investment deal, their motivations and objectives are directly at odds. The dominant nation usually will want high intellectual property protections, while the weaker nation usually will desire the opposite. Moreover, the gap in the negotiating abilities of these very different nations is typically quite considerable. If the twentieth century taught the IPR community any lesson, it is that even after an agreement is reached and signatures are applied to the contract, griping is bound to arise as soon as the ink has dried. Indeed, the tale of the past fifteen years, told through the eyes of developing nations, is that these investment agreements markedly favor developed nations over developing ones. To the extent that this belief is true, it creates serious obstacles to attaining a

consistent international standard upon which all nations (or even a critical mass of nations) can agree. Ultimately, this is the weighty roadblock that currently stands in the way of achieving a uniform, global intellectual property protection regime.

This Article analyzes the current international standards for the protection of intellectual property rights by the use of international investment agreements, particularly bilateral investment treaties. The Article begins with a brief history of international efforts at intellectual property protection. It then examines TRIPS (the most recent effort at establishing an international intellectual property protection scheme) and BITs (which add a layer of protection on top of TRIPS). Finally, the article considers the future of international standards for the protection of intellectual property rights, including: (1) the continued vitality of TRIPS- and BITs-based IPR enforcement as evidenced by recent U.S. dealings with both Russia and China; (2) ongoing efforts by the European Union (EU) to create a uniform bloc-wide patent litigation system; and (3) perceived benefits of pursuing uniform IPR protection via BITs-based arbitration rather than traditional litigation.

This Article demonstrates that there continues to be a search for consistency in international standards for the protection of intellectual property rights post-TRIPS. International investment relationships historically have been, and will indefinitely remain, fluid rather than static. Bilateral agreements are here to stay and developed nations will continue to favor them as a means of increasing the minimum IPR protections contained in TRIPS. However, to the extent the U.S., EU, and other developed countries continue to engage in forum shifting through the use of bilateral agreements, they risk further alienating the developing world. Developing nations, for their own benefit and that of the international IPR regime, must endeavor to apply a critical cost-benefit analysis to each and every BIT negotiation and renegotiation. In the final analysis, the present multi-layered international IPR protection regime that has been created likely will continue for some time, if not indefinitely into the future.

II. HISTORY

Intellectual property (IP) law seeks to promote and protect innovation by conferring valuable property rights on those who innovate, while simultaneously requiring those who benefit from others' innovation to pay their fair share. International intellectual property treaties have attempted to deal with the colossal challenge posed when this undertaking is played out on a worldwide stage. The present global IPR regime operates by layering

multilateral and bilateral agreements upon one another.⁴ TRIPS comprises the predominant multilateral layer, while BITs comprise the bilateral layer.⁵ When these international IP treaties do what they are intended to do, they promote innovation on a global level.⁶ In theory, they do this by creating particular definitions of “investment” that simultaneously encourage trade between nations while also putting in place safeguards for the protection of both existing and future IPRs.⁷

Nevertheless, history teaches us that innovation can occur without any IP protection at all. Switzerland is an example of a nation that may have seen more innovation without IP law than with it, because it disallowed chemical patents until 1978.⁸ Notably, three of the world’s largest pharmaceutical companies are based in Switzerland even though the country did not allow pharmaceutical product patents until 1975.⁹ Similarly, Spain did not allow chemical or medicine patents until 1992.¹⁰ Thus, for Switzerland and Spain, innovation occurred without IP protection in certain areas. Once it became advantageous for them to protect what their citizens and corporations had already developed, national IPR regimes flourished.

It is a challenge to make IP work on the national level. On the international level, where disparate national strategies and degrees of IP development collide, IPR protection is much more difficult.

International intellectual property agreements have been in place since the nineteenth century.¹¹ The first agreement in the late-1800s was multilateral;

⁴ See U.N. Conf. on Trade & Dev. [UNCTAD], *Intellectual Property Provisions in International Investment Arrangements*, at 2, IIA MONITOR No. 1 (Jan. 5, 2007), U.N. Doc. UNCTAD/WEB/ITE/IIA/2007/1, http://www.unctad.org/en/docs/webiteia20071_en.pdf [hereinafter *Intellectual Property Provisions*].

⁵ See SANYA REID SMITH, *INTELLECTUAL PROPERTY IN FREE TRADE AGREEMENTS 1* (2008) (noting that the WTO regime establishes a minimum of IP protection and that BITs can “increase effective levels” of that protection).

⁶ Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 BERKELEY TECH. L.J. 867, 924 (2008).

⁷ *Intellectual Property Provisions*, *supra* note 4, at 4.

⁸ SMITH, *supra* note 5, at 4.

⁹ F.M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. TELECOMM. & HIGH TECH. L. 167, 202 (2009); see also Peter Drahos & John Braithwaite, *Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context*, 20 WIS. INT’LL.J. 451, 476 (2002) (grouping Switzerland with nations that embrace “substantial intercompany cooperation including sharing of innovation, with the state playing a framework-setting role”).

¹⁰ SMITH, *supra* note 5, at 4.

¹¹ See Pedro Roffe, *Bringing Minimum Global Intellectual Property Standards into Agriculture: The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, in *THE FUTURE CONTROL OF FOOD: A GUIDE TO INTERNATIONAL NEGOTIATIONS AND RULES ON*

bilateral agreements began to emerge in 1959.¹² In 1970, the World Intellectual Property Organization, or WIPO, was formed with the mission of administering IP issues for the United Nations (UN).¹³ The developed world eventually grew tired of WIPO and business interests articulated their desire for stronger investment and IPR protections.¹⁴ This became clear in the early-1980s, when senior executives of a large multinational American corporation conceived of creating a trade-based approach to intellectual property protection.¹⁵ Such an approach theoretically would protect investments made in the developing world. It would entail a comprehensive multilateral agreement with global IPR coverage.¹⁶ In 1994, TRIPS was born in response to such a vision.¹⁷ Touted as the most ambitious international IP agreement in history,¹⁸ it brought together all WTO member nations to set a global baseline for minimum IPR protection standards.¹⁹

TRIPS meant different things to different nations. It was welcomed by developing nations because they believed it would establish a permanent and comprehensive IPR baseline. In other words, they did not anticipate that later bilateral agreements would be negotiated and layered atop the TRIPS framework. Developed nations, on the other hand, envisioned TRIPS as a minimum-standards agreement, with the expectation that later ad hoc agreements would remedy the one-size-fits-all problems of TRIPS. After all, the constituencies present at the Uruguay Round meetings were remarkably

INTELLECTUAL PROPERTY, BIODIVERSITY AND FOOD SECURITY 48, 48 (Geoff Tansey & Tasmin Rajotte eds., 2008), *available at* <http://www.idrc.ca/openbooks/397-3/>.

¹² See *id.* (describing late-nineteenth century multilateral agreements such as the Paris Convention of 1883); MAHNAZ MALIK, REPORT ON BILATERAL INVESTMENT TREATIES BETWEEN EUROPEAN UNION MEMBER STATES AND PACIFIC COUNTRIES 2 (2006), <http://www.thecommonwealth.org> (enter document title into “search” box, follow link for pdf of report) (discussing the history of BITs, starting with the 1959 agreement between Germany and Pakistan).

¹³ CTR. FOR INT’L ENVTL. LAW (CIEL), A CITIZEN’S GUIDE TO WIPO 9 (2007), *available at* http://www.ciel.org/Publications/CitizensGuide_WIPO_Oct07.pdf. The WIPO Convention was signed in 1967 and took effect three years later. *Id.* at 9 n.3.

¹⁴ Fukunaga, *supra* note 6, at 871–73. Problems with WIPO included that it set low minimum standards for the various WIPO conventions. *Id.* at 871. In addition, WIPO convention membership was limited and “major sources of infringing goods (particularly India, Singapore, and South Korea) were excluded.” *Id.* at 872. WIPO also failed to provide a practical means of dispute resolution. *Id.* at 872–73.

¹⁵ JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 61–62 (2000).

¹⁶ *Id.* at 62.

¹⁷ *Id.* at 63.

¹⁸ Fukunaga, *supra* note 6, at 878–79.

¹⁹ OFFICE OF U.S. TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT, at 12 (2008), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf.

diverse.²⁰ For developed nations, shoehorning all of these nations' needs into one agreement was not only impractical, but it was also ultimately deemed to be poor policy.²¹ The TRIPS negotiations created openings for weak nations that normally would have had no leverage to extract benefits from the likes of the U.S. and EU.²² Consequently, through the Uruguay Round negotiations, this is precisely the benefit many developing nations gained.²³

Although the Uruguay Round talks ended with an agreement, TRIPS has not had the finality that the developing world hoped it would have. Rather, the minimum IPR standards set forth in that multilateral agreement have been raised by higher standards contained in numerous bilateral agreements.²⁴ Many TRIPS signatory nations were given a grace period for compliance; they were not required to institute the regime in 1995, when the agreement formally took effect for some.²⁵ But by means of BIT agreements in 1995 and thereafter, developed nations successfully convinced their counterparts in the developing world to bargain over their grace periods.²⁶

This bargaining process lies at the very core of TRIPS's lack of finality. For example, Nicaragua signed TRIPS in 1994, but was not obligated to implement the agreement until 2000.²⁷ In 1995 the U.S. and Nicaragua began negotiations in which the U.S. conditioned a new BIT (that Nicaragua presumably wanted) upon greater Nicaraguan protection of U.S. IPRs (that

²⁰ Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 143–44 (2003–2004).

²¹ See Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 796 (2001) (stating that TRIPS-style multilateralism “has not worked to stabilize IP standards” and that the U.S. and EU continue to pursue, bilaterally, stronger standards than TRIPS provides).

²² See Fukunaga, *supra* note 6, at 874–75 (stating that developed nations negotiated “countervailing benefits to developing countries” in return for “the desired minimum IP standards”).

²³ See *id.* (pointing out that the votes of developing nations were secured particularly through the use of a “package deal” with compromises in their favor).

²⁴ *Id.* at 798–99.

²⁵ *Id.* at 869.

²⁶ See Drahos, *supra* note 21, at 794, 796 (pointing out that IP provisions in BITs are often used where developing nations want trade agreements and are thus more willing to accede to intellectual property rights protection provisions).

²⁷ Rahul Rajkumar, *The Central American Free Trade Agreement: An End Run Around the Doha Declaration on TRIPS and Public Health*, 15 ALBANY L.J. SCI. & TECH. 433, 450 (2005); Inti Linkletter Knapp, Comment, *The Software Piracy Battle in Latin America: Should the United States Pursue Its Aggressive Bilateral Trade Policy Despite the Multilateral TRIPS Enforcement Framework?*, 21 U. PA. J. INT'L ECON. L. 173, 178–79 (2000).

Nicaragua presumably did not otherwise want).²⁸ The result was that Nicaragua gained trade advantages with the U.S. in exchange for implementing TRIPS's IPR protections years in advance.²⁹ This is one illustration of the BITs bargaining process driving a wedge between developed and developing nations, and impeding achievement of a post-TRIPS equilibrium.

This tension between developed and developing countries is not new. The Paris Convention of 1883 is the world's oldest IP treaty.³⁰ The signatories to the Paris Convention³¹ were essentially industrialized European countries.³² At that time, developing nations had little interest in agreeing to an international IP agreement.³³ Later, when WIPO was negotiated in the 1960s, developing countries played a larger role, but continued to oppose higher IP standards.³⁴ Developing nations persisted in that posture in the 1980s and 1990s.³⁵ In the TRIPS negotiations, the developing world believed the developed world was bargaining over its affinity for ad hoc bilateral agreements in favor of a universal standard negotiated on a multilateral basis.³⁶ Today, however, TRIPS forms a minimum foundation for the protection of IPRs.³⁷ Given the proliferation of BITs since 1995, TRIPS does not provide the universal global standard that the developing world had anticipated.³⁸ Indeed, BITs now play a crucial role, offering investor-state dispute settlement provisions that empower investors by enabling them to bring direct actions against a host state for IPR violations.³⁹ While BITs provide a novel enforcement tool that

²⁸ Drahos, *supra* note 21, at 796.

²⁹ The U.S. Department of State reports that a key policy goal with respect to Nicaragua remains to "develop[] a free market economy with respect for property and intellectual property rights." U.S. Dep't of State, Background Note: Nicaragua, Aug. 2009, <http://www.state.gov/r/pa/ei/bgn/1850.htm>.

³⁰ Charles R. McManis & Eul Soo Seo, *The Interface of Open Source and Proprietary Agricultural Innovation: Facilitated Access and Benefit-Sharing Under the New FAO Treaty*, 30 WASH. U. J.L. & POL'Y 405, 421 (2009).

³¹ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

³² Maria Julia Oliva, *Promoting and Extending the Reach of Intellectual Property: The World Intellectual Property Organization (WIPO)*, in *THE FUTURE CONTROL OF FOOD*, *supra* note 11, at 69, 70; Fukunaga, *supra* note 6, at 922.

³³ Fukunaga, *supra* note 6, at 922-23.

³⁴ *Id.* at 923.

³⁵ *Id.*

³⁶ Drahos, *supra* note 21, at 791.

³⁷ *Id.*

³⁸ Okediji, *supra* note 20, at 141-42 (positing that bilateralism, rather than the multilateralism of TRIPS, is the "principal agency for foreign investment regulation today").

³⁹ DAVID VIVAS-EUGUI, REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS

previous IPR-protection fora did not, they have not resolved the historic tension between developed and developing nations.⁴⁰

At the center of the world's failure to attain a consistent international standard for protection of IPRs is a constant shifting of fora within which these standards are determined.⁴¹ A "forum" is simply a framework convention (in person) or agreement (in writing) that various IPR players have agreed to mutually rely upon in handling and resolving international IPR issues.⁴² Importantly, international investment agreement fora have constantly changed for more than a century—from Paris and Berne⁴³ in 1883 and 1886, to WIPO in 1967, to WTO/TRIPS in 1994, and now to BITs.⁴⁴ By definition, a multilateral negotiation requires the coming together of many different parties at one table. Occasionally, the various constituencies will reach an agreement. More often than not, their meetings end in stalemate. Yet even when the parties do reach an agreement, the result is often that the developed nations driving those negotiations decide that they conceded too much and that more robust IPR protection is desirable.⁴⁵

Ultimately, the phenomenon of buyer's remorse leads to "forum shifting"—the decision by capital-exporting nations to try an end-run around their recently bartered treaty in favor of an alternative platform that allows for a higher level of overall IPR protection than otherwise would have been possible.⁴⁶ Forum shifting involves a determination by developed nations that IPR protection goals could be better realized by utilizing some other

WORLD: THE FREE TRADE AREA OF THE AMERICAS (FTAA) 8–9 (Geoff Tansey ed., 2003), available at <http://homepages.3-c.coop/tansey/pdfs/ftaa-a4.pdf>.

⁴⁰ MALIK, *supra* note 12, at 2.

⁴¹ Rosa Castro Bernieri, Law and Economics of Bilateral Investment Treaties Regulating Intellectual Property Rights: Challenge for Developing Countries? 9–10 (July 22–23, 2005) (unpublished manuscript), http://www.liuc.it/ricerca/istitutoeconomia/laweconomicsjuly2005/papers/castro_liucpaper.pdf.

⁴² Okediji, *supra* note 20, at 141 n.95 (describing the phenomenon of "forum shifting" as a means of increasing or decreasing the strength of protection of intellectual property rights).

⁴³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised* July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

⁴⁴ Okediji, *supra* note 20, at 127 & nn.1–4 (discussing the evolutionary step represented in the change to a WTO forum as part of TRIPS agreement, as well as the TRIPS agreement's "notable predecessors" in international intellectual property); Bernieri, *supra* note 41, at 10.

⁴⁵ See Fukunaga, *supra* note 6, at 922–24 (discussing parties' post-hoc dissatisfaction with levels of IP protection in international agreements, as demonstrated by the widespread use of forum-shifting and use of external bodies such as the WHO for increasing the flexibility of the agreement).

⁴⁶ Okediji, *supra* note 20, at 141 n.95.

international institution or arrangement than that being utilized at the time.⁴⁷ For the most part, these forum-shifting moves are made by the U.S., EU, and a few other developed nations.⁴⁸ For example, the shift from WIPO to TRIPS was largely brought on by the U.S. in response to an inability to advance its objectives under the framework then in place.⁴⁹ Over time, this process has resulted in a layer-by-layer development of international IPR protections.⁵⁰

Since the 1994 TRIPS agreement, the critical additional layer has been comprised of bilateral negotiations that begin with “model” or “form” documents drafted by the capital exporter and end with a net ratcheting-up of IPR standards.⁵¹ This shift to BITs is rooted in the failure of TRIPS to serve the purposes of various developed nations.⁵² For example, TRIPS forced developed nations to accede to the involvement of relatively non-influential developing nations who normally would not have had a seat at the bargaining table.⁵³ This result was hardly ideal; it provided the U.S. and EU little in the way of a net IPR gain. Accordingly, the move toward the use of BITs suggests that the U.S. and EU are less interested in the traditional justifications of private innovation and public interest and more interested in promoting their own unilateral agendas.⁵⁴ Indeed, “the [U.S.] has never lost a single dollar in an ‘investor–state’ dispute” under any of its BITs.⁵⁵ Conversely, the fact that developing nations sign BITs with one another suggests that the phenomenon of BIT proliferation is not exclusively driven by the dominance of developed nations.⁵⁶ Likewise, at least one empirical analysis examining the relationship

⁴⁷ *Id.*

⁴⁸ Bernieri, *supra* note 41, at 9.

⁴⁹ Okediji, *supra* note 20, at 141 n.95.

⁵⁰ Paul Alexander Haslam, *BITing Back: Bilateral Investment Treaties and the Struggle to Define an Investment Regime for the Americas*, 23 POL’Y & SOC’Y 91, 109 (2004).

⁵¹ Okediji, *supra* note 20, at 144 (noting that perceived “dead weight loss” by developed nations acceding to multilateral agreements can often be recouped via bilateral agreements).

⁵² Haslam, *supra* note 50, at 93–94.

⁵³ See Okediji, *supra* note 20, at 141 n.95 (noting that “developing countries have also utilized forum shifting to roll back or weaken [IP] rights,” with TRIPS as a recent example); Drahos, *supra* note 21, at 805–06 (suggesting that developing countries could use the TRIPS council to form a “veto coalition” in an effort to prevent further ratcheting-up of intellectual property rights protection standards worldwide).

⁵⁴ Okediji, *supra* note 20, at 141.

⁵⁵ Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy that Reflects American Values*, 45 HARV. J. ON LEGIS. 377, 407 n.193 (2008).

⁵⁶ See Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 491 n.92 (2008).

between stronger IPR protections and growth suggests that low-income developing nations benefit significantly from such heightened protections.⁵⁷ In sum, the history of international IPR protection has been profoundly influenced by power struggles between developed and developing nations which in turn have fueled a periodic rewriting of the rules of the game.

III. TRIPS

The TRIPS Agreement was reached in 1994 and became effective in 1995.⁵⁸ It was the first international IP agreement to provide a meaningful enforcement mechanism.⁵⁹ TRIPS required all WTO member nations to abide by certain minimum IP standards.⁶⁰ Examples include twenty-year patents in all technology fields and fifty-year copyrights for the majority of copyrightable materials.⁶¹ Growing piracy issues essentially mandated that a firm global baseline be set in place “against which investors and innovators could restructure the sources of competitive gain without compromising traditional guarantees of free trade.”⁶² TRIPS also included, for example, provisions requiring protection of new plant varieties.⁶³ This protected investors breeding improved plant varieties (e.g., those with greater disease-resistance characteristics).⁶⁴ But this new provision also demonstrated the relative hollowness and over-flexibility of the agreement, because TRIPS did not specify substantive protection standards.⁶⁵ For example, with respect to

⁵⁷ See Rod Falvey et al., *Intellectual Property Rights and Economic Growth* (U. Nottingham, Internationalisation of Econ. Pol’y, Research Paper No. 2004/12) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=715982. The study concludes that heightened IPR protections have a significant positive effect on growth in high- and low-income nations, whereas “growth in middle-income countries is not significantly affected by IPR protection.” *Id.* at 17.

⁵⁸ TRIPS, *supra* note 3.

⁵⁹ Carsten Fink & Patrick Reichenmiller, *Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements*, TRADE NOTE, Feb. 7, 2005, at 4, available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/TradeNote20.pdf>.

⁶⁰ Drahos, *supra* note 21, at 802.

⁶¹ SMITH, *supra* note 5, at 1.

⁶² Okediji, *supra* note 20, at 128.

⁶³ SMITH, *supra* note 5, at 19–22.

⁶⁴ See *id.* at 19 (discussing countries’ obligation under TRIPS to “make available ‘patent protection for plants that are new, involve an inventive step and are capable of industrial application’ ”); Dianne Daley, *Intellectual Property in the EPA: Broad Scope, Huge Impact — Part III*, JAMAICA OBSERVER, July 23, 2008, available at http://www.bilaterals.org/article.php3?id_article=12767.

⁶⁵ Daley, *supra* note 64.

protecting new plant varieties, TRIPS simply required signatory nations to invoke either a traditional patent regime, another regime of the nation's choosing, or some combination of both.⁶⁶ Naturally, this created a great deal of "wiggle room" for countries to do as they saw fit and to potentially avoid the requirement entirely by invoking a lax protection regime.⁶⁷

The multilateral rubric of TRIPS has both advantages and disadvantages. On the one hand, transaction costs can be relatively contained compared with conducting numerous bilateral negotiations because a multilateral negotiation consolidates numerous negotiations into one.⁶⁸ This consolidation saves a nation the price of multiple plane tickets, multiple lodging expenses, and other redundant costs associated with sending trade representatives overseas for multiple one-on-one (i.e., bilateral) negotiations. On the other hand, more parties at a single bargaining table means a greater likelihood of watering down the discussion and blunting the issues that would otherwise have been most sharply in contention and in need of resolution.⁶⁹

Overall, the weakness of TRIPS lies in having left too much space for post-hoc self-interested maneuvering. In this way it is no different than the various international IP accords that came before it. The multilateral character of TRIPS allowed signatory nations to walk away from the 1994 meetings armed with substantial discretion.⁷⁰ In the words of Professor Ruth Okediji, "multilateralism is quintessentially about identifying the lowest common denominator for a majority of states."⁷¹ In the process, these bloc negotiations forced developed nations like the U.S. to indirectly subsidize the participation of non-influential developing nations with which the U.S. would not ordinarily have any strategic incentive to engage in IPRs negotiations.⁷²

⁶⁶ *Id.*

⁶⁷ See Okediji, *supra* note 20, at 143–44 (discussing the general tendency of multilateral negotiations to lead to the dilution of certain strong interests and the injection of "wiggle room," and the manifestation of that tendency in the TRIPS Agreement).

⁶⁸ *Id.* at 143.

⁶⁹ *Id.* at 144.

⁷⁰ *Id.*; see also Drahos, *supra* note 21, at 792–93 (noting the availability to developing nations of additional measures to avoid U.S. action under Section 301); *infra* note 79 and accompanying text (introducing concept of "TRIPS-plus" agreements).

⁷¹ Okediji, *supra* note 20, at 144.

⁷² *Id.*

IV. BITS

BITS represent the latest wave of IPR protection. BITS are bilateral agreements, typically between a developed nation and a developing one, which establish additional IPR commitments that are layered upon preexisting IPR obligations set forth in TRIPS and other agreements.⁷³ Various influential industry interests are the key drivers behind these increases in standards.⁷⁴ In practice, this has meant that plants and animals, for example, can no longer be excluded from signatory nations' patent laws.⁷⁵

However, BITS-driven bilateralism is not simply replacing TRIPS-based multilateralism. Instead, the two are working in tandem.⁷⁶ In the fifteen years since TRIPS, BITS have rapidly proliferated.⁷⁷ Although BITS have existed since 1959, it is those agreements signed since 1995 that have had the most impact on international IPR protection. Through these agreements, the U.S., EU, and various developed nations have bolstered IP protection beyond the minimum standards set forth in TRIPS.⁷⁸ As a result, BITS are sometimes called "TRIPS-plus" measures⁷⁹ because they place additional commitments atop those already agreed to in TRIPS. These additional commitments effectively raise the minimum standards in the multilateral TRIPS agreement by implementing further requirements by means of post-hoc bilateral agreements.⁸⁰

⁷³ VIVAS-EUGUI, *supra* note 39, at 3.

⁷⁴ Carlos M. Correa, *Bilateral Investment Agreements: Agents of New Global Standards for the Protection of Intellectual Property Rights?* 4 (Aug. 2004), http://www.grain.org/briefings_files/correa-bits-august-2004.pdf.

⁷⁵ Aziz Choudry, *Corporate Conquest, Global Geopolitics: Intellectual Property Rights and Bilateral Investment Agreements*, SEEDLING, Jan. 2005, at 9, available at http://www.grain.org/seedling_files/seed-05-01-2.pdf.

⁷⁶ *See id.* (pointing out that BITS facilitate the United States' procurement of "commitments that overcome the deficiencies . . . of WTO's TRIPS agreement").

⁷⁷ MALIK, *supra* note 12, at 2.

⁷⁸ Okediji, *supra* note 20, at 144–45.

⁷⁹ SMITH, *supra* note 5, at 2.

⁸⁰ VIVAS-EUGUI, *supra* note 39, at 2. Most of these bilateral agreements are between two countries and are aimed at directly regulating investment while indirectly regulating IPRs. *Id.* at 7. Some bilateral agreements, however, fit into one of two other categories: namely, trade or intellectual property. *Id.* This Article focuses primarily upon BITS.

A. Typical BIT Provisions

Most BITs consist of commitments between two nations to protect State A investors when they make investments in State B.⁸¹ BITs are relatively broad in scope, encompassing all investment activities between two countries related to entry, treatment, protection, and exit.⁸² A BIT usually operates in ten-year terms, at which point a party to the BIT can give notice of termination. Otherwise, renewal generally is automatic.⁸³

There are certain key terms that show up in nearly all BITs. For example, most BITs contain certain assurances of “fair, equitable and non-discriminatory treatment.”⁸⁴ This means a host state will not favor certain investors or discriminate against others when enforcing agreement provisions.⁸⁵ Other critical provisions common among BITs include provisions that cover the scope and definition of “foreign investment”; promise national and most-favored-nation (MFN) treatment; guarantee compensation for expropriation; and provide for dispute settlement.⁸⁶ Equal national treatment and MFN treatment are perceived to be the “hallmark” of BITs.⁸⁷ BITs will thus require that investors and their covered investments (i.e., investments of nationals or companies of one BIT party in a host state) receive the same favorable treatment that host parties would confer upon their own investors as well as upon investors from any other nation.⁸⁸ Most U.S. BITs provide “the better of national treatment or most-favored-nation treatment for the full life-cycle of investment—from establishment or acquisition, through management, operation, and expansion, to disposition.”⁸⁹

MFN treatment thus gives an investor the benefit of another BIT’s favorable substantive provisions—provided that the BIT signed by the investor’s country included an MFN provision. This is an easy way for an investor to reap the benefits of another country’s hard bargaining. As for procedural provisions, an investor can sometimes take advantage of more favorable dispute resolution

⁸¹ MALIK, *supra* note 12, at 19.

⁸² VIVAS-EUGUI, *supra* note 39, at 8.

⁸³ See MALIK, *supra* note 12, at 23 (discussing standard in UK and German BITs).

⁸⁴ *Id.* at 2.

⁸⁵ *Id.* at 14–15.

⁸⁶ Neil Sorensen, Inst. for Agric. & Trade Policy, *Bilateral Investment Treaties and Disputes* (Feb. 2001), available at http://www.bilaterals.org/article.php?id_article=122.

⁸⁷ MALIK, *supra* note 12, at 14.

⁸⁸ *Id.* at 14–15.

⁸⁹ Office of U.S. Trade Representative, *Bilateral Investment Treaties*, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Mar. 19, 2010).

methods included in another BIT.⁹⁰ These provisions, then, also serve to boost overall IPR protections internationally.⁹¹

IPR protections can be realized both directly, when “investment” includes IP, and indirectly, by means of an expropriation provision.⁹² Most U.S. BITs list IPRs in the definition of investment, thus providing direct IPR protection.⁹³ For example, the U.S.-Uruguay BIT, signed November 4, 2005, includes the following typical model language:

“[I]nvestment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) *intellectual property rights*;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.⁹⁴

Investment and IPRs tend to be defined broadly in BITs. For example, in the Canada-Venezuela (1998) and Canada-Costa Rica (1999) BITs, “IPRs are defined as including: ‘Copyright and related rights, trademark rights, patent rights, rights on layout designs of semiconductor integrated circuits, trade secret rights, plant breeders’ rights, rights in geographical indications and

⁹⁰ MALIK, *supra* note 12, at 14.

⁹¹ Drahos, *supra* note 21, at 798–99.

⁹² SMITH, *supra* note 5, at 1.

⁹³ Fink & Reichenmiller, *supra* note 59, at 7.

⁹⁴ Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 1, Nov. 4, 2005, S. TREATY DOC. NO. 109-9 (2006) (citations omitted) (emphasis added).

industrial design rights.’”⁹⁵ Similarly, the Bolivia-U.S. BIT (1998) defines an investment of a national or company to include “every kind of investment owned or controlled directly or indirectly by that national or company.”⁹⁶ This “includes, but is not limited to, rights in companies, contractual rights, tangible property (real estate) and intangible property (rights such as leases, mortgages, liens and pledges); *intellectual property rights*; and rights conferred pursuant to law, such as licenses and permits.”⁹⁷

The U.S. has reached BIT agreements with many nations.⁹⁸ U.S. BITs are based on a model text periodically released by the U.S. Trade Representative (most recently revised in 2004).⁹⁹ The U.S. Senate ratifies the model treaty and then U.S. negotiators come back to the Senate for formal approval once agreements are reached. In practice, the Senate usually rubber-stamps the BIT. U.S. BITs also provide investors from each nation the right to submit investment disputes with the host nation to international arbitration.¹⁰⁰ Naturally, this is a major benefit for private investors, because it means they need not use the foreign state’s domestic courts with which they may be entirely unfamiliar. Likewise, host country courts are often considered to be biased in favor of their own corporations and against foreign ones.¹⁰¹ BITs thus provide investors with peace of mind because their investments in foreign states will be protected from lax IPR protections. Moreover, BITs create incentives for host states to comply with the agreed-upon terms, because their national reputation and foreign policy interests would be at risk if they did not.¹⁰²

At the same time, BIT compliance requires some sacrifice as well. In exchange for anticipated investments made by newly-incentivized foreign investors, a host country pays the substantial price of forfeiting its ability to use policy tools, ranging from taxation to regulation to capital restrictions, as soon as it enters into a BIT.¹⁰³ Thus, ratifying and complying with an investment treaty is costly because these policy tools are the typical governmental means

⁹⁵ VIVAS-EUGUI, *supra* note 39, at 7–8 (citation omitted).

⁹⁶ *Id.* at 7.

⁹⁷ *Id.* (citation omitted) (emphasis added).

⁹⁸ Correa, *supra* note 74, at 4.

⁹⁹ Office of U.S. Trade Representative, *supra* note 89; Correa, *supra* note 74, at 4 n.6.

¹⁰⁰ Office of U.S. Trade Representative, *supra* note 89.

¹⁰¹ Stiglitz, *supra* note 56, at 545.

¹⁰² Choudry, *supra* note 75, at 10.

¹⁰³ Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 279–80; Choudry, *supra* note 75, at 10.

of doing business with one's international counterparts. Signing over these rights invariably creates certain political and economic consequences.¹⁰⁴

B. The Role of BITs Today

The U.S. approach to IPR protection in 2010 remains predominantly bilateral, but elements of multilateralism are present as well.¹⁰⁵ The U.S. approach is occasionally unilateral to the extent that Section 301 of the Trade Act of 1974¹⁰⁶ is imposed on other nations automatically.¹⁰⁷ That is, foreign nations cannot do business with the U.S. without abiding by the minimum level of IPR set forth therein.¹⁰⁸ The U.S. has been including IP provisions in BITs since the early-1980s.¹⁰⁹ The practice began at a time when developing nations were increasingly insistent that they had the right to expropriate foreign-owned assets (and were making these bold assertions to the UN, no less).¹¹⁰

The spread of BITs has been a significant factor in increasing international IPR standards post-TRIPS.¹¹¹ As a major capital-exporter, the U.S. has had a substantial incentive to seek agreements that promote its investors' and innovators' interests abroad.¹¹² A byproduct of these efforts has been meaningful gains not just for American IPR owners, but for IPR owners worldwide.¹¹³ This is because a higher standard in one BIT effectively means higher standards for others as well. For example, the previously mentioned MFN clauses that are built into most BITs guarantee that globally, each nation doing business with a host state is entitled to all the benefits of the nation that

¹⁰⁴ Elkins et al., *supra* note 103, at 279–80.

¹⁰⁵ Okediji, *supra* note 20, at 140; *see also* Haslam, *supra* note 50, at 93 (noting that the U.S. “alternates between a multilateral and unilateral/bilateral approach”).

¹⁰⁶ Trade Act of 1974, 19 U.S.C. §§ 2101–2476 (2006).

¹⁰⁷ Okediji, *supra* note 20, at 140.

¹⁰⁸ *See id.* (discussing the extent to which the U.S. has established the practice of invoking Section 301 “to secure extra-TRIPS or ‘TRIPS-plus’ commitments from other countries”).

¹⁰⁹ Correa, *supra* note 74, at 3–4.

¹¹⁰ Haslam, *supra* note 50, at 103.

¹¹¹ *See* Drahos, *supra* note 21, at 798–99 (discussing a ratcheting process that elevates minimum standards); Okediji, *supra* note 20, at 141 n.95 (pointing out that forum shifting can be used for specific IP-related purposes).

¹¹² *See* Okediji, *supra* note 20, at 144 (noting that “dead weight loss” is absorbed primarily by capital-exporting countries, like the U.S., that “seek[] the highest return for intellectual property rights”).

¹¹³ *See id.* at 145 (suggesting that “the incorporation of intellectual property in bilateral and regional trade agreements . . . becomes the logical place to reconsider the gains and losses of the multilateral bargain,” and opens the door to negotiation of specific protection strategies).

has the most favorable provisions in place with the host.¹¹⁴ As discussed below, this is a substantial part of the ratcheting mechanism that has led to progressively higher IPR protection standards in the wake of TRIPS. As a result of the TRIPS-plus phenomenon, IPR commitments are theoretically higher now than they have been at any previous time. BITs continue to proliferate, and IPR provisions are included more frequently and robustly than in prior decades.¹¹⁵

C. *"Highest International Standards"*

International investment agreements include IPR obligations to meet various objectives, such as staving off "free riders," expanding market access and penetration, and boosting the overall level of IPR protection above the TRIPS minimum baseline.¹¹⁶ Before TRIPS, nations essentially tailored their own level of IP protection. Whether they needed higher or lower levels of protection, they had broad discretion to determine how they would protect IPRs. Accordingly, as indicated previously, Switzerland did not allow chemical patents until 1978, and Spain did not allow chemical or medicine patents until 1992.¹¹⁷ TRIPS curtailed some of this national discretion in the name of promoting an international effort to dissuade developing nations from violating developed nations' IPRs.

A principal U.S. aim involves achieving the "highest international standards" for IPRs. In addition, European Community BITs will often expressly list this objective in the agreement.¹¹⁸ However, no true "international standard" exists. Instead, there is a layering of multilateral and bilateral standards that creates a *set* of standards instead of a solitary, universal one. The challenge for the U.S. and the EU going forward is to get past the belief among developing nations that this goal of attaining a "highest international standard" simply means attaining the standards that would most benefit the U.S. and the EU.¹¹⁹ As one commentator has stated, "In the absence of any benchmark, the inference is that the US (and EU) standards are the world's standards. With respect to biological diversity—from sacred plants to

¹¹⁴ See Correa, *supra* note 74, at 29 (stating that "MFN clauses in investment agreements contribute to a global elevation of protection standards").

¹¹⁵ VIVAS-EUGUI, *supra* note 39, at 7.

¹¹⁶ *Id.* at 5.

¹¹⁷ SMITH, *supra* note 5, at 4.

¹¹⁸ Correa, *supra* note 74, at 20.

¹¹⁹ Choudry, *supra* note 75, at 9–10.

human DNA—that means heading towards ‘no limits’ on what can be patented by corporations.”¹²⁰

Ultimately, the U.S. desires to commit other nations to higher standards for the protection of IPRs. As it continues to build upon its growing list of BIT agreements, the U.S. creates a higher likelihood that bloc-opposition by developing nations will be less of an impediment to a higher (or highest) international standard for IPR protections.¹²¹ Perhaps even more importantly, the TRIPS-plus phenomenon signals the great influence the U.S. has in determining how IPR protections will play out on the worldwide stage.¹²²

V. THE FUTURE

A. Recent Developments Confirm Continued Vitality of TRIPS and BITs

Barack Obama’s election to the U.S. presidency set in motion a thorough review by the Office of the U.S. Trade Representative of pending bilateral negotiations pursued by the prior administration. The Obama administration intends to conduct “extensive outreach and discourse with the public” regarding the question of whether U.S. BITs “advance the public interest.”¹²³ Given this stated objective, it appears likely that the administration will tinker with pending agreements. At the very least, it has become quite evident that the new leadership in Congress and the White House are both extremely suspicious of numerous trade deals pursued by the prior administration—some completed long ago, some still pending.¹²⁴ As for pursuing new deals, U.S. Trade Representative Ron Kirk has suggested that the U.S. will not necessarily aspire to make a large number of new agreements, stating that he is not afflicted with “deal fever,” and will thus not subscribe to negotiating new deals “just for the sake of doing some.”¹²⁵ Overall, the Obama administration has expressed its intent “to promote adherence to the rules-based international

¹²⁰ *Id.* at 10.

¹²¹ *Id.* at 11.

¹²² See Haslam, *supra* note 50, at 110 (stating that U.S. use of BITs “may lay the foundation . . . for a global investment regime”).

¹²³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 4 (2009) [hereinafter 2009 TRADE POLICY AGENDA], available at http://www.ustr.gov/sites/default/files/uploads/reports/2009/asset_upload_file86_15410.pdf.

¹²⁴ Doug Palmer & Roberta Rampton, *Enforcement Top U.S. Trade Priority: USTR Nominee*, REUTERS, Mar. 9, 2009, <http://www.reuters.com/article/idUSTRE5285W020090310>.

¹²⁵ *Id.*

trading system.”¹²⁶ This most likely means that the U.S. will remain loyal and committed to the multilateral TRIPS framework.

Arguably, the extent of U.S. loyalty to TRIPS will be measured in large part by whether the U.S. continues to push for Russian membership in the WTO. Since late 2007, the U.S. and Russia have discussed the possibility of a U.S.-Russia BIT.¹²⁷ Negotiators from the two countries held formal discussions in February 2008, discussing their respective model BITs and conducting a preliminary evaluation of the potential for finding common ground that could eventually make a U.S.-Russia BIT a reality.¹²⁸ Presently, negotiations remain nascent but positive.¹²⁹ An agreement between the U.S. and Russia would complete a protracted post-Cold War courtship between the two that extends back to 1992, when they negotiated and signed a BIT that the Russian Duma ultimately never ratified.¹³⁰ Most importantly, this development could pave the way for a more integrated Russian role in the global economy,¹³¹ and would confirm the continued relevance of the TRIPS-plus model of international investment and IPR protection.

In addition, the U.S.'s recent and successful WTO dispute settlement panel win against China seems to confirm the continued vitality of TRIPS.¹³² In April 2007, after several years of bilateral discussions proved unsuccessful, the U.S. brought claims against China asserting that China's IPR protection regime inadequately protected and inadequately enforced copyrights and trademarks on a broad host of products.¹³³ The products included films for theatrical release, DVDs, music, books, and journals. A panel was formed in September 2007 to address and resolve U.S. concerns. In January 2009, the WTO panel found China's IPR regime to be deficient and, therefore, incompatible with

¹²⁶ 2009 TRADE POLICY AGENDA, *supra* note 123, at 1.

¹²⁷ *Id.* at 143.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Jim Lobe, *U.S.: Bipartisan Experts Urge "Partnership" with Russia*, INTER PRESS SERVICE, Mar. 16, 2009, <http://www.ipsnews.net/news.asp?idnews=46130> (discussing further trade partnership with Russia as a goal of the Obama Administration).

¹³² See Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009), available at http://www.wto.org/english/tratop_e/dispu_e/362r_e.pdf (declaring certain Chinese copyright laws contrary to TRIPS law and principles).

¹³³ Press Release, Office of U.S. Trade Representative, United States Wins WTO Dispute Over Deficiencies in China's Intellectual Property Rights Laws (Jan. 26, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c>.

TRIPS obligations.¹³⁴ In December 2009, the WTO Appellate Body confirmed that China failed to abide by its WTO restrictions on the importation and distribution of certain copyright-intensive products.¹³⁵ Prior to the panel report and appellate confirmation, China had denied copyright protection to works that did not meet the country's "content review" standards.¹³⁶ By doing so, China had, in effect, largely avoided its TRIPS obligations by setting an unduly high minimum threshold for acting on IPR threats.¹³⁷ Ultimately, with the aid of the WTO dispute settlement mechanism, the U.S. forced Chinese compliance with TRIPS-based IPR protection provisions. In turn, given the U.S.'s successful use of this mechanism, it is inevitable that the Obama administration will continue to rely upon the existing multilateral framework in its dealings with various WTO-member trade partners.

B. Toward a Uniform EU-Wide Patent Litigation System

EU member states have long discussed the creation of a Unified Patent Litigation System (UPLS). Although the European Commission (EC) first formally advocated a UPLS in an April 3, 2007 Communication,¹³⁸ discussions date back to the 1970s.¹³⁹ Throughout this time, disagreement concerning language and court structure has prevented the project from becoming a reality.¹⁴⁰ At present, European patent litigation is highly fragmented. This makes for a system that is complex, costly, and oftentimes inaccessible.¹⁴¹ In the past, businesses have had little choice but to litigate in parallel in all

¹³⁴ *Id.*

¹³⁵ Press Release, Office of U.S. Trade Representative, WTO Appellate Body Confirms Finding Against China's Treatment of Certain Copyright-Intensive Products (Dec. 21, 2009), available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/wto-appellate-body-confirms-finding-against-china>.

¹³⁶ Press Release, Office of U.S. Trade Representative, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ Press Release, European Commission, Patents: Commission Sets out Vision for Improving Patent System in Europe (Apr. 3, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/463&format=HTML&aged=1&language=EN&guiLanguage=en>.

¹³⁹ See Huw Jones, *EU Takes Key Step Towards Bloc-Wide Patent System*, REUTERS, Mar. 24, 2009, available at <http://www.forexpros.com/news/financial-news/eu-takes-key-step-towards-bloc-wide-patent-system-38827> (stating that such a system has been a goal for decades).

¹⁴⁰ *Id.*

¹⁴¹ *Patents: Next Steps for the Creation of a Unified Patent Litigation System – EU Recommendation*, EUBUSINESS, Mar. 26, 2009, <http://www.eubusiness.com/Rd/patent-litigation-briefing/> [hereinafter *Patents: Next Steps*].

countries where the patent is validated.¹⁴² Naturally, this approach is problematic to the extent it guarantees some degree of legal insecurity, especially with regard to transnational patent disputes.¹⁴³

Recently, the European Council announced its unanimous adoption of conclusions on an enhanced European patent system. The draft agreement is pending before the European Court of Justice, which is reviewing it for compatibility with existing EU treaties.¹⁴⁴ The court is expected to rule as early as Summer 2010.¹⁴⁵ The Council's draft agreement "encompasses the main features of a future patent court in the EU," including "a specialised patent court [which] will allow cases to be heard before judges with the highest level of legal and technical expertise in patents."¹⁴⁶ The agreement would prevent parties from the costly practice of litigating disputes in parallel in multiple countries.¹⁴⁷

For the time being, however, the splintered nature of the existing and long-standing system precludes truly effective patent enforcement.¹⁴⁸ For example, the European patent litigation system currently makes it possible for parties litigating the same patents to obtain entirely contradictory rulings concerning patent infringement and validity. The "Epilady" and *Angiotech* cases provide useful and telling examples of this phenomenon. In "Epilady," British and German courts disagreed about whether an identical claim for a device, named "Epilady" by plaintiffs, including a rotating helical spring that plucked hairs from the leg was infringed by a device including a rotating rubber bar with slits in it.¹⁴⁹ Despite the same products and the same statute (the European Patent Convention) being in issue, the German court found infringement while the British court did not.¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Press Release, European Commission, Patents: EU Achieves Political Breakthrough on an Enhanced Patent System (Dec. 4, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1880&format=HTML&aged=0&language=EN&guiLanguage=fr>.

¹⁴⁵ European Patent Office, EU Patent: EU Council Agrees on Next Steps Regarding the Community Patent (EU Patent), <http://www.epo.org/patents/law/legislative-initiatives/community-patent.html> (last visited Mar. 19, 2010).

¹⁴⁶ Press Release, European Commission, *supra* note 144.

¹⁴⁷ *Id.*

¹⁴⁸ *Patents: Next Steps, supra* note 141.

¹⁴⁹ *Improver Corp. v. Remington Consumer Prods. Ltd.*, [1989] R.P.C. 69 (U.K.).

¹⁵⁰ Compare *id.* (finding no infringement), with *Oberlandesgericht [OLG] [Ct. of App.]* Nov. 21, 1991, *Improver Corp. & Sicommerce AG v. Remington Prods. Inc.* (F.R.G.) (finding infringement).

EU courts also reached opposite conclusions regarding infringement and validity of equivalent patents in *Angiotech Pharmaceuticals, Inc. v. Conor Medsystems, Inc.*¹⁵¹ In *Angiotech*, a U.K. court upheld a lower court's revocation of a medical patent held by a U.S. corporation, affirming the finding that it was invalid for obviousness.¹⁵² But on the following day, a court in the Netherlands upheld the validity of the Dutch equivalent of the same patent, found infringement, and ordered the infringer to pay damages and stop selling its infringing product.¹⁵³ Thus, the "Epilady" and *Angiotech* decisions demonstrate that this major structural roadblock continues to stand in the way of effective patent enforcement in Europe.

Fortunately, the EC recently renewed its earlier request to get the UPLS up and running.¹⁵⁴ In March 2009, the EC invited member states to approve plans for a system that would have jurisdiction over existing European patents as well as a future single EU community patent.¹⁵⁵ This rubric would go a long way toward bolstering uniformity of protection in Europe. Rather than the current state of affairs in which companies must litigate patents in multiple European countries—and in multiple languages—the UPLS would extinguish the need for multi-forum litigation. This would promote legal certainty, which is sorely lacking under the present framework. Predictions suggest that the UPLS could save businesses 148 to 289 million Euros annually by 2013.¹⁵⁶

Ultimately, the UPLS could even be used to remedy other developing issues currently facing intellectual property advisers, including bringing uniformity to international attorney-client privilege standards.¹⁵⁷ To that end, WIPO recently issued findings noting that no international intellectual property treaty regulates attorney-client privilege.¹⁵⁸ The WIPO panel concluded that the IPR-protection community badly needs a uniform law of international privilege with

¹⁵¹ *Angiotech Pharms. Inc. v. Conor Medsystems Inc.*, [2007] EWCA Civ 5, [2007] R.P.C. 20 (Eng.), *rev'd*, *Conor Medsystems Inc. v. Angiotech Pharms. Inc.*, [2008] UKHL 49, [2008] R.P.C. 28 (Eng.).

¹⁵² *Id.*

¹⁵³ *Conor Medsystems Inc./Angiotech Pharm. Inc.*, Rechtbank 's-Gravenhage [District Court of the Hague], Jan. 17, 2007 (Neth.), *available at* http://www.ipeg.com/_UPLOAD%20BLOG/Conor_Angiotech%2017jan07%20ENG.pdf.

¹⁵⁴ Jones, *supra* note 139.

¹⁵⁵ *Id.*

¹⁵⁶ *Patents: Next Steps*, *supra* note 141.

¹⁵⁷ See Erin Marie Daly, *WIPO Panel Calls for Clarity in Privilege Laws*, LAW360, Mar. 30, 2009, <http://ip.law360.com/articles/94465> (stating that WIPO's Standing Committee on the Law of Patents cites "[d]ifferent standards of privilege and its recognition [as] causing problems in dealing with and enforcing IP rights").

¹⁵⁸ *Id.*

respect to communications with IP advisers.¹⁵⁹ Ostensibly, such a scheme might come in the form of an amendment to TRIPS. National practices currently diverge enough, however, that a uniform law of international privilege is not likely to come soon. The panel acknowledged that the goal remains abstract, and that “further investigation as to the feasibility of such a minimum standard would be required.”¹⁶⁰ For its part, the International Chamber of Commerce (ICC) has urged WIPO to take immediate action either by adopting a proposed international framework (already developed by the ICC), or by undertaking its own focused evaluation.¹⁶¹

C. Forum-Barriers to Uniform Protection

Meanwhile, recent case law suggests that, in the future, uniform IPR protection will not be readily available in U.S. courts. In the past, U.S. courts would not exercise jurisdiction over foreign patents unless issues relating to the foreign patent formed a “common nucleus of operative fact” with issues raised by a separate U.S. patent.¹⁶² In 2007, the Court of Appeals for the Federal Circuit stayed loyal to this path, declining to exercise such jurisdiction given the lack of common ground between the U.S. patent regime and those of several of its foreign counterparts.¹⁶³ In *Voda v. Cordis Corporation*, a plaintiff claiming that a competitor infringed three U.S. patents sought to amend his complaint to add claims that the competitor also infringed his European, Canadian, U.K., French, and German equivalent patents.¹⁶⁴ The Federal Circuit concluded that U.S. courts generally cannot exercise jurisdiction over claims seeking to determine the infringement or validity of foreign patents.¹⁶⁵ Indeed, the court found that exercising such jurisdiction would almost always interfere

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Letter from the Int'l Chamber of Com., ICC Statement on Attorney-Client Privilege, to the WIPO Standing Committee on the Law on Patents (SCP) (Jan. 28, 2010), http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/Attorney_Client%20privilege%20Statement%20WIPO%20SCP%2014_28%2001%2010.pdf.

¹⁶² See *Stein Assocs. v. Heat & Control, Inc.*, 748 F.2d 653, 658 (Fed. Cir. 1984) (“Only a British court, applying British law, can determine validity and infringement of British patents.”).

¹⁶³ See *Voda v. Cordis Corp.*, 476 F.3d 887 (Fed. Cir. 2007) (holding that considerations of comity, judicial economy, convenience, fairness, and other circumstances constituted compelling reasons to decline to exercise jurisdiction over foreign patent infringement claims).

¹⁶⁴ *Id.* at 891.

¹⁶⁵ See *id.* at 898–99 (providing the Paris Convention for the Protection of Industrial Property as an example of documented policy against U.S. courts determining “the validity and infringement of foreign patents”).

with the laws of sovereign nations, impose unnecessary burdens on U.S. courts, and prove fundamentally unfair in practice.¹⁶⁶

Voda began by acknowledging that treaties are “the supreme law of the land” under Article VI of the U.S. Constitution.¹⁶⁷ The U.S., in turn, entered into major international intellectual property treaties such as the Paris Convention (1970 and 1973), the Patent Cooperation Treaty (1978), and TRIPS (1995).¹⁶⁸ The Federal Circuit concluded that these treaties all confirmed the independence of each member nation’s unique and separate patent adjudication system.¹⁶⁹ For its part, TRIPS specified that “[p]arties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions,” and that such review should be “subject to jurisdictional provisions in a Member’s law.”¹⁷⁰ TRIPS also expressly stated that it could not “affect the capacity of Members to enforce their law in general.”¹⁷¹ Consequently, neither TRIPS nor any of the other IPR treaties contemplated or allowed one jurisdiction to adjudicate another jurisdiction’s patents.¹⁷² In spite of this, the plaintiff insisted that TRIPS and its predecessors “evinced a trend of harmonization of patent law.”¹⁷³ But the court stuck to its analysis, rejecting the contention that exercising jurisdiction over *Voda*’s foreign patent infringement claims would somehow “further[] the harmonization goals underlying the treaties.”¹⁷⁴

For all practical purposes, the *Voda* holding precludes U.S. courts from exercising jurisdiction over foreign patents. The decision suggests that the current international IPR regime is, by design, rooted in the disparate practices and legal regimes of different nations. As such, *non*-uniformity pervades the very fabric of the TRIPS regime. On one hand, this lack of international interdependence may appear to expose a great likelihood of failure in the continued search for worldwide uniformity in IPR protection. On the other hand, it simultaneously confirms the relative benefit of the TRIPS-plus IPR enforcement mechanism, granting an investor the right to submit a dispute to binding arbitration against the expropriating party’s host state. To the extent that arbitration offers a cheaper and more streamlined regime for resolving

¹⁶⁶ *Id.* at 902.

¹⁶⁷ *Id.* at 898 (quoting U.S. CONST. art. VI, cl. 2).

¹⁶⁸ *Id.* at 898–99.

¹⁶⁹ *Id.* at 898–900.

¹⁷⁰ *Id.* at 899.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 900.

disputes,¹⁷⁵ the TRIPS-plus arbitration route may be preferable to incurring heavy costs in multiple litigation fora with divergent laws.¹⁷⁶

D. Bridging the Developed/Developing Divide

Ultimately, the history of international IPR standards suggests that investment relationships are fundamentally fluid rather than static.¹⁷⁷ This results in changing norms and the creation of many different standards rather than a single one. The history of TRIPS and BITs thus far also indicates that the fora in which international investment agreements are negotiated will similarly continue to change. For developing nations, IPR negotiations are best resolved on a multilateral plane. For developed nations, on the other hand, there are serious incentives to press for a forum-shift to bilateral negotiations as soon as a sufficient quantum of IPR leverage has been negotiated away.

At the same time, the U.S. and EU must resist the temptation of shifting fora too frequently. Among other things, such jockeying may engender resentment from developing nations, which may in turn lead to less cooperation between the developed and developing worlds in future discussions. The risk of such a result is that IPR standards will be effectively reduced to the detriment of private investors as well as to everyone who benefits from the development and propagation of those investors' innovations. But just as importantly, any perception that the U.S. and EU are actively changing the rules of the investment game to suit their needs at any given time also poses the danger of alienating the public interest and national development objectives. To the extent that this occurs without any concomitant benefit for protection of IPRs, the U.S. and EU will have done themselves and the entire global investment regime a sizeable disservice.¹⁷⁸

¹⁷⁵ See M. Scott Donahey, Presentation at the Annual Meeting of AIPPI, International Arbitration of Patent Disputes (Nov. 3, 2006), https://www.aippi.org/download/reports/forum/forum07/12/ForumSession12_Presentation_Scott_Donahey.pdf (noting the efficiencies and benefits of arbitration as compared with international litigation of patent disputes).

¹⁷⁶ See *Patents: Next Steps*, *supra* note 141 (discussing the costliness and complexity of international, often multi-forum, patent litigation); Jones, *supra* note 139 (discussing the costs and burdens of international patent litigation).

¹⁷⁷ Giovanni B. Ramello, *Intellectual Property and the Markets of Ideas*, 4 REV. NETWORK ECON. 161, 162 (2005), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1071&context=rne>.

¹⁷⁸ See Choudry, *supra* note 75, at 9 (claiming that TRIPS-plus agreements impose "industry-driven standards" that do not track the interests of developing countries); see also VIVAS-EUGUI, *supra* note 39, at 14 (stating that TRIPS-plus agreements impose "unmeasured" and unexpected costs and consequences).

Likewise, developing nations should be constantly considering what they can do to help strengthen IPR protections. Such protections, of course, do not solely benefit the developed world. As indicated above, at least one empirical analysis examining the relationship between stronger IPR protections and growth suggests that developing nations benefit significantly from such heightened protections.¹⁷⁹ Thus, in assessing each new international investment agreement negotiation opportunity, developing countries will play a critical role in determining the future face of IPR protections in an increasingly globalized world. Expanded market access and penetration benefits not only the investors making the investments, but also the consumers and government of the host state—provided that the negotiations are true negotiations characterized by a legitimate give-and-take rather than a hollow take-it-or-leave-it.¹⁸⁰

Practically speaking, this means that developing countries owe themselves and the system the benefit of a hard look, including a cost-benefit analysis before any agreement is reached or negotiated.¹⁸¹ It also means they should consult with all pertinent parties, such as consumers, corporations, and any relevant entities within their national government.¹⁸² Importantly, these analyses and consultations should also be incorporated in any renegotiations of existing BIT agreements.¹⁸³ Absent such an approach, the push-and-pull between developed and developing nations that has gradually created heightened IPR standards will be undermined, and protections will reflect the specific agendas of particular developed nations rather than an overarching international agenda that promises improved IPR protections for years to come.

VI. CONCLUSION

This Article has analyzed current international standards for the protection of intellectual property rights by the use of international investment agreements with particular emphasis on bilateral investment treaties. This Article has shown that international standards for the protection of intellectual property rights post-TRIPS remain inconsistent. International investment relationships have historically been fluid rather than static, and they will likely remain that

¹⁷⁹ Falvey et al., *supra* note 57, at 7.

¹⁸⁰ See VIVAS-EUGUI, *supra* note 39, at 22 (discussing the many non-commercial factors that should be weighed in negotiations).

¹⁸¹ SMITH, *supra* note 5, at 2.

¹⁸² Fink & Reichenmiller, *supra* note 59, at 10.

¹⁸³ MALIK, *supra* note 12, at 23.

way for years to come. Moreover, developed nations will continue to favor using bilateral agreements as a means of increasing the minimum IPR protections contained in TRIPS. However, the U.S., EU, and other developed countries and blocs must exercise caution when engaging in fora-shifting through the use of bilateral agreements, because they risk alienating the developing world even further. For their part, developing nations must endeavor to apply a critical cost-benefit analysis to each and every BIT negotiation and renegotiation. This is not only for their own benefit, but for the benefit of the international IPR regime as well.

In the final analysis, the present multi-layered international IPR protection regime likely will remain in place for the indefinite future. Indeed, recent TRIPS- and BITs-based U.S. dealings with both Russia and China confirm the continued vitality of the existing framework. At the same time, regardless of the consistent application of that framework, the search for consistent substantive standards for international protection of intellectual property rights will continue.