

Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?

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This article examines the current wave of US bilateral agreements with respect to their strategic and political value at the plurilateral level. The US government has explicitly recognized its objective of leveraging bilateral agreements in order to influence regional and multilateral negotiations. Although it may be too early to assess the full effectiveness of this US strategy, the article argues that there are clear signs that the exploitation of bilateral agreements will not independently achieve the goal of strengthening plurilateral patent norms. This finding is supported by an assessment of six potential roads from bilateralism to plurilateralism: chain reaction, pressure for inclusion, coalition building, emulation, legal interpretation and adherence. The assertion that bilateral trade deals have a huge impact on international patent law making, made both by proponents and critics of the Agreement on Trade-Related Aspects of Intellectual Property Rights-Plus, is unsubstantiated. The author concludes that the US Government Accountability Office and Congress are justified in questioning whether the negotiation of these bilateral agreements, at least in the realm of intellectual property law, is a wise investment of US Trade Representative's resources.

Keywords bilateralism; multilateralism; United States; TRIPs-Plus

Bilateralism in the International Patent Regime

The move towards bilateralism in international patent law making is controversial. Bilateral agreements typically provide broader and stronger patent standards compared with their multilateral equivalents, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These so-called “TRIPs-Plus agreements” are pushing the frontier of the international patent system.

Although the European Union (EU), Switzerland and the European Free Trade Association are all engaged in such bilateral negotiations with developing countries across the globe (El Said, 2007), the United States is the most active country on the bilateral front since TRIPs entered into force. Following the signing of TRIPs in 1994, the Clinton administration signed partial trade agreements or bilateral agreements specifically devoted to intellectual property (IP) with Jamaica, Lithuania, Latvia, Trinidad and Tobago, Cambodia, Laos, Nicaragua and Vietnam. In 2002, the Bush administration obtained Trade Promotion Authority from the Republican Congress. Thereafter, the United States signed full-fledged free-trade agreements (FTAs) that contained IP chapters with Singapore, Chile, Central American countries, Dominican Republic, Australia, Morocco, Bahrain, Oman,

Peru, Colombia, Panama and Korea, and is presently negotiating FTAs with Malaysia and the United Arab Emirates.

Theorists have suggested that bilateralism is used by economically powerful states as their control over multilateral negotiation declines (Caporaso, 1992, pp. 599–632; Greenaway and Milner, 2001, p. 162; Yarbrough and Yarbrough, 1987, p. 23). Introducing broader and stronger patent protection norms is considered more easily achieved through bilateral agreements than in the multilateral fora. Asymmetry in economic power presents powerful states with an alternative path in creating desired norms that they would not be able to negotiate successfully at the multilateral level.

Several publications have already denounced this approach in the creation of patent norms (Abbott, 2006; Fink and Reichenmiller, 2005; Krikorian and Szymkowiak, 2007; Kuanpoth, 2006; Mayne, 2004; Price, 2004; Roffe, 2004; Roffe and Spennemann, 2006; Rossi, 2006; Vivas-Eugui, 2003). The increased pace at which bilateral agreements have been concluded in the past decade is thought to undermine the legitimacy of multilateralism. The shift to bilateral negotiations when multilateral negotiations are gridlocked has been described as a “grotesque” means for making gains that could not be achieved at multilateral negotiating tables (GRAIN, 2001, p. 7).

Proponents and critics of bilateral agreements agree on one point: their conclusion is not, for the US government, a goal in itself, but a means towards increased revenues for patent holders. One can wonder, then, why the United States has not signed bilateral agreements with the countries that most seriously threaten the interests of American IP Right (IPR) holders, such as China, Russia, Egypt and India. These and other countries are considered by the US administration as major counterfeiting countries and have been placed on the US “301 Priority Watch List” (USTR, 2007). Most of them were put under pressure and have agreed to sign bilateral memoranda of understanding on IP with the United States. However, none of them were invited by the US government to sign a formal bilateral treaty, legally binding in international law.

It is also surprising that, in the post-TRIPs period, the United States has not pursued bilateral negotiations with its major economic partners. With the high volume of trade and investment flows between developed countries, even small discrepancies in patent standards could represent large transaction costs. However, to date, the United States has not negotiated harmonized patent standards with the EU or Japan outside of multilateral fora. These omissions beg the question as to whether US investment in time, political capital and human resources in creating complex legal structures with countries like Dominican Republic and Bahrain, which are neither major trading partners nor major counterfeiters, is worthwhile?

Peter Drahos (2003) explains the US strategy by locating the current shift to bilateralism within a cycle of negotiation. Drahos suggests that bilateral agreements are supposed to lead to regional agreements, which ultimately support increased protection that states previously did not agree to at the multilateral level. Drahos

emphasizes that the United States is in the bilateral stage of this cycle, seeking to use bilaterals in a manner that will ultimately “ratchet up” IP protections at a multi-lateral level. Santo Domingo and Port of Spain are stopovers on the way to Paris, Moscow and Beijing. Seen from this perspective, a bilateral agreement with the smallest economy among World Intellectual Property Organization (WIPO) members could provide a major strategic value.

In fact, the US government has explicitly recognized its objective of leveraging bilateral agreements in order to influence regional and multilateral agreements. This strategy was called “competitive liberalization” by the former US Trade Representative (USTR), Robert Zoellick: “By moving forward simultaneously on multiple fronts, the United States can . . . create a fresh political dynamic by putting free trade on the offensive” (US Government Accountability Office [GAO], 2004, p. 57). A GAO report later clarified that one of the key criteria in selecting an FTA partner was its capacity to influence other countries (2004, pp. 7–11). Towards this end, the United States has spread its geographical breadth, enabling it to establish regional “poles” that can provide bases that act as catalysts for regional or multilateral initiatives (GAO, 2004, pp. 8–9). As a result, in the 2 years that followed the adoption of the Trade Promotion Authority (TPA) by Congress, the US signed FTAs with countries in Asia, Oceania, Africa, the Middle East, South America and Central America.

The historical development of international IP law supports the argument that bilateral agreements can serve as building blocks for subsequent plurilateral (regional or multilateral) agreements. Bilateral IP agreements that were negotiated in the nineteenth century acted as models for drafting provisions of the Paris Convention for the Protection of Industrial Property in 1883 (Gervais, 2002, pp. 234–5; Okediji, 2004, p. 133; Yu, 2004, p. 14). A century later, US bilateral negotiations under the so-called “Super 301” mechanism, threatening developing countries of unilateral trade sanctions, also played a crucial role in reaching US objectives in TRIPs (Drahos, 2003, p. 104; Sell, 2003, p. 108.)

This article offers a preliminary examination of the current wave of US bilateral agreements with respect to their strategic value at the plurilateral level. Although it may be too early to assess the full effectiveness of the US strategy, it argues that there are clear signs that the exploitation of bilateral agreements will not independently achieve the goal of strengthening multilateral patent norms. Thus far, more than a decade of active bilateralism has not produced preferred results for the United States. This article therefore argues that the assertion that bilateral trade deals have a huge impact on international patent law making, both by proponents and critics, is unsubstantiated.

This conclusion is supported by an assessment of six potential roads from bilateralism to plurilateralism. First, bilateral agreements can create a chain reaction under which developing countries fall under US norms like dominos. Second, they could attract new parties and progressively evolve toward plurilateral agreements. Third, they can build coalitions for multilateral negotiations. Fourth, they can create success stories that can be used to promote and justify US patent

norms in multilateral settings. Fifth, their provisions can offer tools for interpretation of existing multilateral agreements or serve as the basis for new international customary norms. Sixth, they could promote accession to existing multilateral agreements. Our analysis shows that only this last use of bilateralism—the reinforcement of existing multilateral agreements—has succeeded so far.

The Domino Effect

The broadest goal of bilateralism in the US playbook is to generate a measurable effect beyond the targeted country. One way to achieve this goal is the creation of a chain reaction, whereby bilateral agreements create a domino effect that transplants US patent norms beyond the original members. As the former USTR Robert Zoellick explained, the “idea is to start out with the leading reformers . . . and then try to connect others to it over time” (Yu, 2003). The hope is for the new partners to actively negotiate similar provisions in their treaties with third countries. An example of a chain reaction through bilateral agreements from the pre-TRIPs period is the North American Free Trade Agreement (NAFTA) requirement that Mexico give effect to the International Union for the Protection of New Varieties of Plants (UPOV, 2008) Convention. Subsequent to signing on to NAFTA, Mexico imposed the same requirement on Bolivia, a non-party to the UPOV Convention.

While a chain reaction would evidently benefit the United States, the motivations for its partners to transplant US patent norms to third countries are less obvious. Two such incentives are suggested. The first results from the TRIPs Most Favored Nation provision (article 4), which states that members must offer “immediately and unconditionally” any enhanced protections to nationals of any other member of the World Trade Organization (WTO). Instead of offering these enhanced protections without any concession from third countries, partner states might try to conclude reciprocal agreements in order to maintain a level playing field and prevent neighbouring countries from gaining a competitive advantage as a result of weaker patent protection.

Second, they might be subject to a phenomenon described by Ikenberry and Kupchan as “socialization by external inducements” (1990, p. 291). This socialization, originating from the institutionalized cooperation formalized in bilateral agreements, leads the elites of developing countries to believe that US norms are in their best interest. This change in belief can result from technical assistance, capacity-building programmes or the frequent contacts with foreign authorities that usually follow the signature of an FTA. Tellingly, the US government has noted that “more and more of our trading partners are coming to understand that their future growth and development depends in large part on . . . strong intellectual property protection” (Larson, 2002).

The United States could reasonably have expected that signing bilateral treaties with certain chosen partners would have an important chain reaction potential. As shown in Table 1, bilateral treaties negotiated during the last decade coincided with

Table 1: Regional and Bilateral Discussions on IP Involving US Partners

US bilateral partners	IP cooperation in process when the US bilateral agreement was signed	IP negotiation in process when the US bilateral agreement was signed
Jamaica (1994)	Caribbean Community	
Latvia (1994)		Agreement with EFTA
Trinidad and Tobago (1994)	Caribbean Community	Free Trade Agreement of the Americas (FTAA)
Laos (1997)	Association of Southeast Asian Nations (ASEAN) Framework Agreement on IPR	
Nicaragua (1998)		FTAA
Vietnam (2000)	Asia Pacific Economic Cooperation (APEC) (Osaka Action Agenda) ASEAN Framework Agreement on IPR	
Jordan (2000)		FTA with EFTA
Singapore (2003)	APEC (Osaka Action Agenda) ASEAN Framework Agreement on IPR	FTA with Mexico FTA with Canada India-Singapore Comprehensive Economic Agreement FTA with Korea FTA with Jordan Treaty between ASEAN and China FTA with Japan Trans-Pacific Strategic Economic Partnership (SEP) Agreement
Chile (2003)	APEC (Osaka Action Agenda)	FTAA FTA with EFTA, article 46 FTA with Korea FTA with Japan Trans-Pacific SEP Agreement
Central America and Dominican Republic (2004)	Caribbean Community	FTAA FTA with Canada
Australia (2004)	APEC (Osaka Action Agenda)	FTA with Singapore FTA with Thailand
Morocco (2004)		Agadir Agreement FTA with Turkey Middle East Free Trade Initiative
Bahrain (2004)	Gulf Cooperation Council (GCC) Joint Committee with EFTA	Treaty between GCC and the European Community (EC) Treaty between GCC and India Middle East Free Trade Initiative
Oman (2006)	GCC Joint Committee with EFTA	Treaty between GCC and the EC Treaty between GCC and India

Table 1: continued

US bilateral partners	IP cooperation in process when the US bilateral agreement was signed	IP negotiation in process when the US bilateral agreement was signed
Colombia (2006)		FTA with Chile
Panama (2007)		FTA with Singapore FTA with Chile
Republic of Korea (2007)	APEC (Osaka Action Agenda)	FTA with EU FTA with ASEAN
Peru (2007)	Joint Committee with EFTA Andean Community APEC (Osaka Action Agenda)	FTA with Canada FTA with Chile

Source: Original to this article

other regional or bilateral discussions on IP from which the United States was absent.

Despite the extensive efforts devoted to using bilateral partners as allies in the creation of a chain reaction, few subsequent dominoes have fallen for the United States. Indeed, US partners are not reproducing patent provisions from their US bilateral agreements in agreements with their own bilateral or regional trading partners. For example, Australia, a bilateral partner of the United States, concluded FTAs with Singapore and Thailand, which merely reaffirm the parties' commitment to TRIPs. Singapore, another US partner, also refrained from promoting US standards. Its FTAs with New Zealand and Jordan simply refer to TRIPs, its FTAs with Korea and Panama contain no substantive standards on patent law and its FTA with Japan only provides for an information-exchange process on the preferred IP law. Similarly, Chile's FTAs with Korea and Japan include detailed provisions on marks and geographical indications, but no mention is made of patents, and its FTAs with EFTA and China simply refer to TRIPs. Finally, the Trans-Pacific SEP Agreement among Chile, New Zealand, Singapore and Brunei Darussalam includes detailed provisions on marks and geographical indications but, again, patents are not mentioned. The list of US allies that failed to reproduce patent provisions with their own trading partners suggests that the use of bilateralism to promote the formation of chain links is ineffective. This objective was not, however, the only one pursued by the United States, as will be seen in the next section.

The Club Effect

Bilateral trade agreements could create a "pressure for inclusion" (Lawrence, 1996). This pressure acts as an incentive for third parties to join existing treaties to benefit from privileged trade access to the US market. It originates from a prisoner dilemma situation where developing countries believe they secure gains from acting

collectively. As a group and in absolute terms, they are better off rejecting bilateral trade agreements that include TRIPs-Plus provisions. However, a breach in the alliance compels neighbouring and competing countries to join the existing one. Ultimately, all the other developing countries could be forced to follow in order to catch up with this comparative trade advantage (Baldwin, 1997; Guzman, 1998).

Moreover, it is thought that countries without a trade partnership with the United States are more likely to endorse American norms if they are already adopted by other countries. The pre-existence of an agreement is a reassuring signal that joining the club is rational and will not seriously harm the economy. For example, in the 1980s, Mexico was among a number of countries that offered weak or no IP protection for pharmaceutical products. Once becoming party to NAFTA, however, Mexico sent letters of reassurance to developing countries encouraging the acceptance of US norms in the context of the TRIPs negotiation (Rein, 2001, p. 382).

In this context, the US government expected that third countries might eventually want to join its bilateral agreements. In particular, it hoped that treaties concluded with Morocco, Oman and Bahrain would lead to a large free trade area in the Middle East before 2013 (USTR, 2003). The preambles of these three FTAs highlight that the parties are “affirming their support for the participation of the Parties in the establishment of an expanded free trade area in the Middle East that would contribute to economic liberalization and development in the region”. The United States had similar designs in parlaying country-level FTAs in the Western hemisphere into a regional FTAA (Hufbauer and Kotschwar, 1998). Even the agreements with Singapore and Korea refer to the goal of enhancing regional integration in the Asia-Pacific region. Not surprisingly, several bilateral agreements explicitly permit the adhesion of other countries or groups of countries (see Central American FTA (CAFTA)–DR–US FTA, article 22.6; US–Australia FTA, article 23.1; US–Bahrain FTA, article 21.41; US–Morocco FTA, article 22.5; US–Oman FTA, article 24.2(1); US–Peru TPA, article 23.5; US–Singapore FTA, article 21.6). Since these bilateral agreements may eventually be transformed into regional agreements if third countries decide to adhere, it is important to fix the US-style IP protection from the outset.

However, stories of states caught in a prisoner dilemma are more common in theorists’ models than in real life. No third countries have ever acceded to an existing bilateral agreement. At best, some countries have initiated negotiations with the United States after a neighbouring country signed a bilateral agreement (such as Trinidad and Tobago after the signature of an IP agreement between the United States and Jamaica) or joined ongoing negotiations (such as Dominican Republic as Central American countries were negotiating with the United States). The objective of a Middle East Agreement or an FTAA based on the US FTA model is far from being reached. Indeed, existing regional trade fora often grumble when one of their members signs a bilateral agreement with the US. The Arab GCC (AGCC), for example, urged Bahrain to denounce its FTA with the US because of

its negative effect on the future cooperation and development of the AGCC (El Said, 2007, p. 167). Existing bilateral agreements will likely remain in their current form rather than expanding their parties and evolving toward plurilateralism.

The Coalition Effect

Bilateral agreements can also be used to create strategic alliances of like-minded countries in multilateral settings. From this perspective, bilateral agreements act cumulatively towards a single beneficial objective. By persuading more countries to accept its stringent IPR norms, the United States hopes that a critical mass of countries in multilateral fora, namely the WTO and WIPO, will support new international standards (Krikorian and Szymkowiak, 2007). This is consistent with the USTR observation that the United States' "very best allies for a strong Doha Round have been current and former [free trade] partners" (Rayasam, 2006, p. 22).

By expanding and strengthening its coalition, the United States simultaneously introduces division in developing countries' coalitions, such as the African Group, the Mega-diverse Countries and the Friends of Development (GAO, 2004, p. 9). Following this line of argument, some academics, such as Mohammed El Said, worry that bilateral agreements will result in breaking the resistance of developing countries in Geneva "since countries which are committing themselves to TRIPs-Plus provisions are not able to further object, under the multilateral forum for additional IPRs protection, once discussions on such matters are brought back to the multilateral paradigm" (2007, p. 164).

Evidence of the American strategy is to be found in the substance of the bilateral agreements themselves. The Australia–US FTA, for example, requires parties to participate in multilateral negotiation: "each Party shall endeavor to participate in international patent harmonization efforts, including the WIPO fora addressing reform and development of the international patent system" (article 19.9.14). The United States also carefully introduces into its bilateral agreements provisions, which are, at that juncture, actively being negotiated at the multilateral level. A key example surrounds the negotiations of the Substantive Patent Law Treaty (SPLT) and the attempts to find a common definition of "industrial applicability". In May 2003, three rival definitions were still on the negotiating table and the US delegation was supporting one extracted from the US Patent and Trademark Office (USPTO) Utility Examination Guidelines (SCLP 9th session, 2003, SCP/9/5). Alongside these SPLT negotiations, the US signed FTAs with the Central American countries, Australia and Morocco, which stated that "[e]ach Party shall provide that a claimed invention is industrially applicable if it has a specific, substantial, and credible utility" (CAFTA-DR–US, article 15.1.10; US–Australia, article 17.9.13; US–Morocco, article 15.10.11). By propagating its own definition of utility through FTAs, the United States attempted to secure allies for SPLT negotiations.

Further, the United States made at least one direct appeal to its partners for supporting a multilateral forum. In 2006, the United States requested that its partners support its position on a resolution at the World Health Organization's (WHO) Intergovernmental Working Group on Public Health, Innovation and Intellectual Property Rights. The resolution mandated the working group to devise a plan for implementing the World Health Assembly's Resolution 59.24, on "securing an enhanced and sustainable basis for needs-driven, essential health research and development relevant to diseases that disproportionately affect developing countries". The United States expressed concerns, in communications to its FTA partners, that the working group was stepping outside of its mandate and that the WTO was a "more appropriate forum" (Gerhardsen, 2006).

Another indication of US reliance on its bilateral partners as allies is the negotiation of the FTAA. The expectation of support was apparent, given that the United States considered a commitment to FTAA negotiations an important criterion for its selection of trade partners (GAO, 2004, p. 8). Between the first Summit of the Americas in 1994, which commenced the FTAA talks, and the Miami meeting of 2003, when it became clear that an FTAA would not include an IPR chapter, the United States signed bilateral agreements with Trinidad and Tobago, Chile, the Central American countries and the Dominican Republic, in addition to bilateral memoranda of understanding on IP with Paraguay and Peru. In 2003, negotiations were underway with Panama, Peru, Colombia and Ecuador. Overall, the United States systematically targeted at least one country in each of the four customary unions of the Americas, namely the Andean Community, the Caribbean Community, the Central American Market and Mercosur. The preambles of the FTAs with Chile, CAFTA-DR, Panama, Peru and Colombia referred to a "resolve . . . to contribute to hemispheric integration and provide an impetus toward establishing the Free Trade Area of the Americas". Hence, when Brazil opposed the US stance on IP, the latter launched a regional offensive against Brazil, which felt itself increasingly isolated. If one views the FTAA as a regional vehicle towards achieving stronger IP protections at the multilateral level (OECD, 2003, p. 112; Oliva, 2003), then the centrality of bilateral negotiations as a strategic tool for the United States becomes apparent.

However, the US investment in building strategic alliances failed to produce the sought-after results. The relationships fostered by the United States did not secure an international consensus on US priorities. Indeed, the SPLT negotiations are stagnating. Similarly, the FTAA negotiation did not culminate in an agreement, with differences over IP norms a chief point of contention between Brazil and the United States.

Not only were bilateral partnerships insufficient to securing American regional or multilateral ambitions, but some of their allies moved contrary to US interests. Notably, several US partners supported Resolution WHA60.30 passed in May 2007. This resolution empowered the WHO to provide technical assistance to states that wish to use trade law as a mechanism for improving access to medicines. These

partners moved forward in examining the relationship between IP and public health even though American negotiators walked out twice during negotiations and pressured their bilateral partners to divorce technical IP discussion from those relating to health (Gerhardsen, 2007).

In the area of genetic resources, Peru, which is an FTA partner with the United States, has been one of the most active members at the TRIPs Council and has opposed the US position on several occasions.¹ A good example of this opposition is when Peru, supported by Colombia and Dominican Republic, two other FTA signatories, co-sponsored a proposal that called for TRIPs to be amended so that patent applicants would be required to disclose the origin of genetic resources or associated traditional knowledge used in their inventions.² The United States was in total disagreement with the proposal.

Finally, at the WIPO Assembly, the Development Agenda, initiated by Argentina and Brazil, was actively supported by US bilateral partners, like the Dominican Republic and Peru (May, 2007; WIPO, 2004). This Development Agenda was adopted as a reaction to the WIPO Patent Agenda and demonstrated a shift in WIPO priorities from a technical focus on the protection and governance of IPRs to a shared United Nations (UN) focus on global developmental issues. This paradigm shift indicates that the creation of a coalition of like-minded countries is not sufficient to impede the adoption of agendas that are not supported by the United States.

The Emulation Effect

Former USTR Kantor believes that “many U.S. trading partners have recognized—and this has been reflected in their trade negotiations with the United States—... that strong intellectual property protections attract foreign investment into their countries” (Kantor, 2005). The United States presents these success stories as “models to follow”, wherein social and economic benefits are promoted to subsequent negotiating partners to persuade them to adopt similar IP norms in order to attract similar investment flows and foster technological developments (Schott, 2004, p. 372). While some precedent may be necessary during the initial stage to convince sceptics and critics, it is hoped that, in a second wave, third countries will voluntarily and unilaterally adopt similar norms, or, at a minimum, be less resistant to US proposals.

The CAFTA negotiations exemplify the promotion of existing IP norms as a template for growth. During these negotiations, Pharmaceutical Research and Manufacturers of America (PhRMA) strategically advertised the model of Mexico, a NAFTA member. PhRMA claimed that under NAFTA the “health of patients across Mexico has improved dramatically” while countries “without strong intellectual property regimes, like India, have very poor access to new medicines” (PhRMA, 2005). During the same negotiations, PhRMA also made allusions to Jordan as a model: “New launches of pharmaceutical products more than doubled

in Jordan as a result of strong intellectual property laws it enacted after signing the U.S.–Jordan Free Trade Agreement” (PhRMA, 2005).

The latter case is a key “success” story frequently cited by advocates of US bilateralism. One of them is the International Intellectual Property Institute (IIPI), a not-for-profit organization funded jointly by the US government and private corporations to increase awareness “on the use of intellectual property as a tool for economic growth, particularly in developing countries”. According to IIPI, due to “improved” IP norms “Jordanian companies have become attractive business partners for international pharmaceutical companies as well as diversifying the export markets”. The USTR exemplifies Jordan and concludes that it “is an example of how strong intellectual property protection can bring substantial benefits to developing countries” (USTR, 2004). According to the USTR, the Jordanian model demonstrates that strong patent protection cannot only contribute to economic growth, but it can also promote access to medicines. Since the FTA was signed in 2000, the USTR highlights that “there have been 32 new innovative product launches in Jordan, [and] a substantial increase in the rate of approval of innovative drugs, helping [to] facilitate Jordanian consumers’ access to medicines” (USTR, 2004).

Similarly, Andres Mejia-Vergnaud and Ben Irvine (2008), from the Instituto Desarrollo y Libertad and the International Policy Network, respectively, two pro-free trade think tanks, used the example of Morocco to influence Thailand’s policies. While Thailand was negotiating an FTA with the United States in 2004, they published an op-ed in the *Wall Street Journal Asia* concluding that “If I were in Thailand, I would urge my government confidently to follow the lead of Morocco”.

Empirical evidence, however, does not support this optimistic viewpoint. The suspended FTA negotiation between the United States and Thailand is illustrative. Although the suspension is largely due to the emergence of a political crisis in the country, after 18 months of negotiations the two sides still disagreed on a number of sensitive issues, including the protection of IPRs (CRS Report for Congress, 2006). Discussions surrounding IPRs have attracted strong opposition from non-governmental organizations, academics and bureaucrats who, after having closely studied the consequences of FTAs involving the United States, called on the Thai government to halt the negotiations. The WHO Country Representative in Thailand, Dr William Aldis, warned about the negative effects on the Thai national AIDS programme and its highly praised “30 baht” programme (Aldis, 2006). The World Bank affirmed that if Thailand would have signed an FTA with the United States, then its compulsory licensing would be severely restricted—representing an additional cost of \$3.2 billion for the Thai national health budget over 20 years (Revenga *et al.*, 2006). This strong resistance demonstrates the ability of opponents to draw equally negative parallels from previous US FTA forays.

The negotiations between the United States and the Southern African Customs Union are another example of a rejection of the US model. These negotiations,

underway since 2003, came to a standstill in 2004. South Africa's chief negotiator stated that the parties were unable to resolve differences in areas such as IP. Informed especially by the Australian and the Moroccan experiences, he suggested that the US demands "may not be appropriate for a developing county" (Mnyanda, 2004). This statement is particularly telling as it was a rejection of the USTR openly framing the US–Jordan FTA as a tool to improve access to medicines (USTR, 2004).

These rejections of success stories are not the only examples indicating that the use of bilateral agreements as models to follow is not working as planned. Indeed, most academics describe the economic effects of bilateral agreements by using the language of costs and risks rather than benefits and opportunities. El-Said and El-Said (2005), for example, argued that the benefits to Jordan's drug sector have been largely overestimated and the costs underestimated (2005). Drahos *et al.* (2004) stated before the Senate Select Committee on the US–Australia FTA that Australia's Pharmaceutical Benefits Scheme (PBS) will have to pay at least one third more for its drugs under the FTA than without it (2004). Krikorian *et al.* (2008) demonstrated that the new IP rules adopted after the signing of the US–Morocco FTA are causing a threat to the availability of cheap medicines for Moroccans. The voices of academics are supplemented by organizations that are similarly critical of the success stories promulgated. OXFAM affirmed that there have been no benefits from introducing strict IP rules in Jordan, despite positive assertions made by the USTR (2007). The Centre for International Environmental Law—referring to positions taken by the WHO, the UN and the International Law Association—highlighted the negative effects of IP provisions in trade agreements. The intended success stories are thus reinterpreted and widely communicated in scary stories.

The Interpretative Effect

Bilateral agreements can arguably be used as interpretative tools for existing multilateral agreements. More specifically, it has been proposed that in future disputes over provisions of TRIPs, the United States could present to the WTO Dispute Settlement Body (DSB) bilateral agreements as evidence in support of its desired interpretation. The Industry Functional Advisory Committee (IFAC), a supporter of this view, stated in a report to the US government that FTAs "have facilitated national implementation of the TRIPs obligations and have provided the vehicle . . . for *significant clarifications of TRIPs obligations in the FTA partners*" (emphasis added, IFAC-3, 2004a; 2004b, p. 5)

The view that FTAs could be used to interpret TRIPs is not only expressed by interested lobby groups but also by concerned academics. Several have noted that the WTO agreements should not be interpreted in "clinical isolation from public international law" (*United States—Gasoline*, 1996, p. 16) and consider harmonization efforts in other fora positively (Trachtman, 2006). On the specific issue of IP, Ruth Okediji expressed worries that the norms comprised in bilateral treaties will form the context for interpreting treaties to which the United States is a signatory

(2001, pp. 602–4). Indeed, the Vienna Convention of the Law of Treaties 1969 provides, for the purpose of the interpretation of a treaty, that the context comprises “any agreement relating to the treaty which was made between all the parties” and that “any subsequent practice in the application of the treaty” shall be taken into account (article. 31). David Vaver (2003) offers an interesting example when he argues that the higher the number of FTAs imposing the patentability of business methods on states, the more inclined the WTO special groups will be to consider business methods as an “invention” under TRIPs. Moreover, non-WTO awards resulting from disputes over bilateral agreements “may prove useful as guidance, even path breaking in legal theory or rationale, for WTO panels and the Appellate Body” (Bhala, 2007, p. 84).

Two cases brought before the DSB provide some insight into the applicability of this strategy. In the first case (*Canada—Term of Patent Protection*, 2000), the United States alleged that Canada was not complying with the TRIPs requirement to grant a minimum term of protection from the filing date to all patents existing as of the date of the application of TRIPs. In an effort to relax the interpretation of this requirement, Canada argued that NAFTA recognizes as equivalent the terms of protection of 20 years from the filing date and of 17 years from the granting date. The panel considered the argumentation presented on that point in referring to the decision taken in *United States—Restriction on Imports of Tuna* (1994). In the latter decision, the panel acknowledged the Vienna Convention’s general rule of interpretation of international treaties, but ultimately concluded that the bilateral agreements cited were not relevant to the interpretation of the General Agreement on Tariffs and Trade (GATT). Many were concluded before the negotiation of the GATT and none could be taken as practice under the GATT. Thus, the panel in *Canada—Term of Patent Protection* did not consider that the NAFTA provision was a useful tool of interpretation to determine whether Canada complied with TRIPs. This case demonstrates the unlikelihood that bilateral agreements will prove useful as interpretive tools for multilateral agreements such as TRIPs. One must note, however, that NAFTA was signed before TRIPs and that a future panel may be inclined to take post-TRIPs bilateral agreements into consideration.

In the second case (*Canada—Patent Protection of Pharmaceutical Products*, 2000), the EU sought a ruling on a Canadian exception that allowing manufacturers of generic drugs to use the patented invention to obtain marketing approval, similar to the US Bolar exception, violated TRIPs. The panel held that the legal situation in various countries—including the United States—could not serve as a tool in the interpretation, despite the Vienna Convention’s article 31 regarding “subsequent practice”. Article 3(2) of the Dispute Settlement Understanding provides that panels cannot add to or diminish the rights and obligations of members. According to the panel, this provision indicates that WTO members wanted to retain strict control over the modification of the rules that they had agreed to and did not wish the meaning of rules to be changed in any other way (p. 61). Additionally, the panel noted that the requirements for establishing “subsequent practice” would be difficult

to satisfy in practice due to the fact that, according to the wording of the general rule, a “subsequent practice” must establish a tacit agreement between *all* parties (p. 61).

Moreover, even if states come to an agreement on the interpretation of an unclear provision in a multilateral treaty during the dispute-settlement process, that interpretation has limited application. Agreements made between states when a multilateral provision is unclear only apply to the dispute in question and between the states directly involved (Rhodes, 2000, pp. 555–6).

The situation might be different if a large proportion of WTO members had agreed to a specific provision in bilateral agreements and enforced it domestically. Peter Yu considers that the provisions contained in bilateral agreements could eventually create new customary international norms (2004, p. 397). This could occur only if a sufficient number of countries expressly and consistently recognize these provisions as legal norms governing their state’s conduct. In a bilateral dispute-settlement process, the United States would then be in a position to ask a third country to comply with these new norms of international customary law.

However, before this can happen, several conditions must be met. Indeed, the behaviour of states may only be considered customary law when it fulfils two chief conditions: it must reflect the general practice of states, and states must believe that there is a legal obligation to conduct themselves in such a manner (Kindred and Saunders, 2006, p. 148). Presently, the more stringent IP norms imposed through FTAs do not meet these two criteria. The first condition is not fulfilled as those norms are not sufficiently “numerous, general, constant, and uniform” in their application. When one considers the massive rejection of the more stringent IP norms by several countries, in addition to the harsh criticisms of TRIPs-Plus agreements expressed by some delegations at WIPO and at WHO, one can conclude that there is no belief that there is a legal obligation to respect those norms. Several countries that enhanced their patent protection did so to respond to economical and political pressure, not to comply with an emerging customary norm. Therefore, US bilateral agreements are unlikely to serve as the basis for new interpretations of existing multilateral agreements or new customary international norms.

The Adherence Effect

Little success, if any, can be attributed to the use of bilateral agreements as strategic tools to create chain links, coalitions of the like-minded, models to follow, new interpretation of multilateral treaties or customary international law. They can, however, reinforce their IP-related multilateral cousins by requiring signatories to become party. Indeed, a number of the US FTAs require signatories to adhere to multilateral treaties that are not mentioned in TRIPs. In this manner, the United States is harmonizing the trade environment to favour a smooth transition towards stronger IP protections at the multilateral level.

There are four multilateral agreements that the United States has seemingly identified as important to the global IP architecture. The first is the Budapest Treaty

on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. The US agreement with Jordan requires that: “when it is not possible to provide a sufficient written description of the invention . . . each Party shall require a deposit with an “international depository authority,” as defined in the Budapest Treaty” (article 4.21). While this wording does not require that Jordan comply with the Treaty of Budapest, this subsequently became required in all US FTAs. Indeed, in the US bilateral treaties signed with Morocco, Australia, Bahrain, countries of Central America and Dominican Republic, Colombia, Oman, Panama, Republic of Korea and Peru, each contain the wording: “[e]ach party shall ratify or accede to . . .” (US–Morocco FTA, article 15.1.2; US–Australia FTA, article 17.1.2; US–Bahrain FTA, article 14.1.2; CAFTA–DR–US, article 15.1.3; US–Colombia FTA, article 16.1.2; US–Oman FTA, article 15.1.2; US–Panama TPA, article 15.1.2; Korea–US FTA, article 18.1.3 and US–Peru TPA, article 16.1.2.) While some of these countries have yet to ratify, including Morocco, Bahrain and Costa Rica, a number of CAFTA countries, including the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua, ratified the treaty following their FTA with the United States.

Second, several FTAs refer to the Patent Cooperation Treaty (PCT), even though such a requirement is not found in TRIPs or bilateral treaties concluded before 2003. The US–Jordan agreement, concluded in 2000, was the first US FTA that referred to the PCT. The agreement states that parties will “make best efforts to ratify or accede to the Patent Cooperation Treaty (1984)” (article 4.2). Although the wording does not require PCT membership, later bilateral treaties have (US–Australia FTA, article 17.1.2; US–Singapore FTA, article 16.1.2; US–Morocco FTA, article 15.1.2; CAFTA–DR–US, article 15.1.3; US–Chile FTA, article 17.1.2; US–Bahrain FTA, article 14.1.2). In certain situation this requirement was not onerous as the partner was already party to the PCT. However, in the case of at least seven FTAs, this provision requires the further compliance of the US partner.

The United States has increasingly required undertakings from partners to the Patent Law Treaty (PLT). The first reference to the PLT was in the US–Chile FTA in 2003. It provides that “[e]ach Party shall undertake reasonable efforts to ratify or accede to the [PLT] in a manner consistent with its domestic law” (article 17.1.4). A few months later, the CAFTA–DR treaty used almost identical wording (article 15.1.6). The wording of the subsequent FTAs with Australia, Morocco and Bahrain used progressively stronger language. None of the bilateral treaties, however, require ratification of the PLT. This may be explained by the fact that the United States itself has still not ratified the PLT. Nonetheless, by referring to the PLT in its recent bilateral treaties, it has supported the diffusion, the momentum and coming into force of this treaty.

Fourth, of the developing countries that recently joined UPOV, many did so after concluding a bilateral treaty with the United States (Table 2). This suggests that several countries may have joined UPOV to honour bilateral commitments. A number of other factors likely contributed to their accession to UPOV, including

Table 2: Correlation Between Developing Country Becoming Party to a Bilateral Treaty with the US Referring to or Requiring UPOV Membership

UPOV Members	Bilateral treaty that refers to the UPOV	Date of Signature of Treaty with US	Date of UPOV accession
Ecuador	IP Agreement with the US (article 6)	1993	8 August 1997
Jordan	FTA with the US (article 4.1)	24 October 2000	24 October 2004
Latvia	Commercial Agreement with the US (article 6)	6 July 1994	30 August 2002
Lithuania	Commercial agreement with the US (article 6)	26 April 1994	10 December 2003
Morocco	FTA with the US (article 6)	2 March 2004	8 October 2006
Mexico	NAFTA (article 1701)	17 December 1992	9 August 1997
Nicaragua	IP Agreement with the US (article 1)	7 January 1998	6 September 2001
Singapore	FTA with the US (16.1.2)	6 May 2003	30 July 2004
Dominican Republic	FTA with the US (CAFTA–DR) (15.1.5)	5 August 2004	16 June 2007

Source: Original to this article

the TRIPs provision to protect plant varieties (article 27(3)(b)), the growth in exports of cut flowers and horticultural plants coming from certain developing countries, negotiations for WTO membership, the return of the UPOV Convention to the international agenda during its review in 1991 and the extended deadline in 1998 to join the previous version of the convention. FTAs are therefore not the only driving force behind the growing number of countries joining the UPOV. However, several countries with a large number of small farmers did not necessarily want to develop their seed industries in a manner that was UPOV compliant, and would have preferred to develop their own *sui generis* systems.

Concluding Remarks

Through the use of bilateral agreements, the United States has sought to create a more stringent patent protection system than that stipulated in TRIPs. USTR Schwab epitomizes the overall objective of bilateral negotiations that “develop a precedent that could at some point be translated in a multilateral setting” (Rayasam, 2006, p. 22). This reality has, as a consequence, generated a great deal of negative commentary. The main thrust of this backlash is concerned that the US government is using bilateral agreements as vehicles in perpetuating its hegemony over the international patent regime.

This article examined the current wave of bilateral agreements through the lens of six mechanisms that could give rise to a strategic advantage for the United States. We conclude that, for the most part, the above claim must be nuanced. To date, US

efforts to use bilateral agreements as tools for reforming the international IP regime beyond the specific targeted countries seem to have failed. Only in its objective of promoting the accession to existing multilateral agreements has the United States demonstrated tangible results.

Moreover, the legitimacy of imposing TRIPs-Plus obligations on bilateral partners is being challenged within the US government. In the US Congress, it has been argued that IP provisions of FTAs “violate the requirement in section 2101 (b)(4)(C) of the Trade Promotion Authority Act 2002 to uphold the 2001 WTO Declaration on Public Health” (Congress of the United States, 2004). This led in 2007 to a compromise understanding entitled the Bipartisan Agreement on Trade Policy, also known as the New Trade Policy Template. It calls for enhanced provisions in all future US bilateral and regional free trade agreements on IP protection, striking a balance between the rights of drug companies to protect their patents and the need of developing countries for life-saving drugs.

As a result, the recent US FTAs with Colombia, Peru and Panama do not go as far beyond TRIPs as the 2003–5 FTAs. Several patent-related rules were relaxed in the latest agreements, including rules on data exclusivity, patent linkage and patent extension. A reference to the Doha Declaration and the ability of each country to protect public health was added in the body of these agreements instead of as an appended letter. In addition, side letters on biodiversity were signed, recognizing the importance of “respecting and preserving traditional knowledge and practices of indigenous and other communities”. According to Pedro Roffe and David Vivas-Eugui, “the criticisms related to some aspects of the agreements, particularly those concerning the reduction of TRIPs flexibilities have produced concrete results” (2007, p. 16).

On the whole, bilateral agreements have been successful in strengthening domestic IP protection under relatively limited circumstances. None of these cases involve major trading partners or major counterfeiters. Further, they have contributed to the anti-development reputation of the US government in a time when it is seeking support to conclude the Doha Round at the WTO. Instead of leveraging multilateral negotiations, bilateral agreements have created instability and fragmentation, among WTO members and within the US Congress, which could ultimately damage the bargaining position of the USTR.

Given these failures, it may be prudent for Congress and the American public to assess whether resources that are being dedicated to bilateral negotiations could be better allocated. For example, those same resources may be more efficiently spent on building multilateral relations, negotiating with European countries or providing enforcement support in countries known as major sources of counterfeit goods (Schott, 2004, p. 377). US failures also suggest that the EU, Switzerland, Japan and other states would not benefit from imitating the US model for negotiating FTAs in the area of IP.

There also exists an open question as to why this strategy failed. Although developing countries might not have interest in unilaterally implementing TRIPs-Plus provisions, they certainly have an interest, once they have signed an FTA with

United States, in seeing competitors adopting similar constrains. One explanation is that US partners lack the necessary incentive, i.e. a strong internal market, to duplicate the US strategy of using trade to promote strong IP standards. An alternative explanation is that the impact of the US bilateral strategy will only be noticeable in the following years. One decade of active bilateralism might not be enough to appreciate fully its dynamic effects on regional and multilateral negotiations. The multilateralization of Cordell Hull's vision of international trade law, for example, was only noticeable with the GATT of 1947, 13 years after the Reciprocal Trade Agreements Act 1934, after a period of intense bilateralism (Haggard, 1988).

Recent developments with the Anti-Counterfeiting Trade Agreement (ACTA) project indicate that it could soon become the first tangible success of the US bilateral strategy. Although little is known about the substance of the ACTA project, many suspect that it will be a free-standing plurilateral agreement that will include more stringent patent protection norms than those stipulated under TRIPs (Sell, 2008). Interestingly, nearly half of the parties that participated at the last ACTA negotiation held in Washington on 30–31 July 2008 were FTA partners with the United States. One wonders whether Jordan, Korea, Mexico, Morocco, Singapore and the United Arab Emirates would have actively participated in the ACTA process if they had not signed an FTA with the United States or were not in the process of negotiating such a bilateral agreement. If an extensive ACTA is made possible by the relations developed through bilateral agreements, it will constitute the first success for the US bilateral strategy. So far, bilateralism has brought more drawbacks than benefits to the US influence over international patent law.

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Notes

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- 1 For examples, see IP/C/W/484, IP/C/W/474, IP/C/W/458, IP/C/W/447, IP/C/W/441/Rev.1 and IP/C/W/442.
- 2 See IP/C/W/474 and IP/C/W/429/Rev.1/Add.3.

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US Bilateral Treaties Including Substantive Patent Norms Signed Since 1994

Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning Protection of Intellectual Property Rights (7 January 1998).

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