

TRIPS-PLUS TRADE AND INVESTMENT AGREEMENTS: WHY MORE MAY BE LESS FOR ECONOMIC DEVELOPMENT

CHRISTINE HAIGHT FARLEY*

What is the relationship, if any, between intellectual property (“IP”) law and economic development? This is an important policy question that many have asked and sought to answer over the years. Our basic intuition informs us that strong IP protection will lead to increased foreign direct investment (“FDI”) and greater local innovation. If this intuition were borne from fact, it would make a good case for developing countries to adopt stronger IP laws. Thus, many have sought to prove this relationship empirically. These studies, however, have produced mixed results.¹

Despite the absence of proof for the proposition, most developing countries have adopted stronger IP policies anyway.² These countries often do not perceive any cost to adopting escalated protection. And even if they do, they may consider the advantages in trade deals to offset those costs. And because nations compete against one another to be the destination for multinational investments, this environment then produces the equivalent of an arms race amongst developing countries to have the stronger IP laws. It has therefore been suggested that if strong IP laws led to a strong economy, Sub-Saharan African countries would have the strongest economies in the world since these

* Professor, American University Washington College of Law. This essay was greatly benefitted by my participation in the University of Pennsylvania’s Journal of International Law’s 2013 Symposium on “International Regulation of Investment in the Rising Powers.” I am grateful for the outstanding research assistance I received from Ellie Atkins.

¹ Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 171, 171 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

² See Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT’L L. 109, 109 (1998) (listing China, Argentina, and Mexico as examples of developing countries expanding their intellectual property protection).

countries have adopted some of the highest protections seen anywhere.³

Obviously strong IP laws on the books do not always indicate strong IP laws in practice. (Although the Sub-Saharan African case is not entirely explained by this axiom.) In order to measure the strength of the IP protection in any country then, a study must consider more than the text of the laws, though the IP laws in place continue to dominate this analysis. The International Property Rights Index, for example, purports to measure the strength of patent and copyright protection in 130 countries.⁴ This study model includes 1) opinion surveys of IP protection; 2) an evaluation of patent laws' coverage, restrictions, enforcement, duration, and international treaties ratified; and 3) the level of copyright piracy.⁵ Not only does this study focus on the IP law enacted, but it is also influenced by the level of IP law adoption.

The basic premise - and all of the studies that set out to test it - presumes that the IP laws of any country can be quantified. In order to be quantified, of course, IP laws must be identified and evaluated for the protection they offer. This task, however, is near impossible. First, IP law is notoriously difficult to pin down even in highly developed countries with long histories of IP protections. Second, this essay will explain how IP law has become increasingly difficult to quantify due to the proliferation of trade and investment agreements.

IP is not protected at the international level, but instead territory by territory. And IP protections vary in each territory. The Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") may have brought us closer to harmonization, but the framework of that agreement expressly provided that member states could meet the minimum standards of TRIPS in various ways.⁶ TRIPS member states are also free to adopt higher

³ See Maskus, *supra* note 2, at 115 (discussing the "declining ability" of African countries to attract FDI).

⁴ *About*, 2013 REP. INT'L PROP. RTS. INDEX, <http://www.internationalpropertyrightsindex.org/about> (last visited Jan. 17, 2014).

⁵ *Data*, 2013 REP. INT'L PROP. RTS. INDEX, <http://www.internationalpropertyrightsindex.org/data> (last visited Jan. 17, 2014).

⁶ For example, the Preamble states: "Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the

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standards than the TRIPS minimum standards.⁷ TRIPS Article 1 specifically states that members “may, but shall not be obliged to, implement in their law more extensive protection than is required by this agreement, provided that such protection does not contravene the provisions of this agreement.”⁸ For these reasons, a variety of IP laws have been adopted by member states in the post TRIPS environment.

In addition, bilateral free trade agreements (“FTAs”) have proliferated post TRIPS.⁹ These agreements regularly include lengthy IP provisions.¹⁰ Many, if not most, of these agreements are between developed and developing countries.¹¹ For this and other reasons, the IP standards set in these agreements may not be those that have been or would be arrived at by a multilateral standard setting process. This forum shift has therefore been criticized.¹²

Many of the bilateral trade agreements that have been adopted after TRIPS contain so-called “TRIPS-plus” standards. These standards are TRIPS-plus because they establish higher standards for protection than is mandated by TRIPS, extend protection to a broader array of intangible property, and/or eradicate flexibilities established in TRIPS.¹³ Each new bilateral agreement results in a further ratcheting up of IP protections and a whittling down of TRIPS flexibilities. These agreements tend not to contain—though they could—any development-oriented provisions focusing on issues such as technology transfer or public health, for instance.

domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.” Trade-Related Aspects of Intellectual Property Rights, art. 1, Apr. 15, 1994, available at <http://www.wipo.int/treaties/en/agreement/trips.html>.

⁷ *Id.*

⁸ *Id.*

⁹ See *Other IP Treaties*, WIPO, http://www.wipo.int/wipolex/en/other_treaties/#23 (last visited Jan. 17, 2014) (providing a list of IP-relevant bilateral treaties).

¹⁰ See *id.*

¹¹ See *id.*

¹² Laurence R. Helfer, *Regime Shifting in the International Intellectual Property System*, 7 *PERSPECTIVES ON POLITICS* 39-44 (2009).

¹³ See Henning Grosse Ruse-Khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 *J. INTELL. PROP. L.* 325, 327 (2011) (describing TRIPS-plus standards as those introduced often in Free Trade Agreements that extend IP protection beyond that providing for in TRIPS).

Because in many instances, developing countries have not had an opportunity for meaningful input into treaty negotiations, it should not be surprising that they are not then invested in the treaty standards after the treaties are signed.¹⁴

This ratcheting up of IP standards in FTAs could have a much broader impact on IP protection internationally. It is not yet clear whether or not a TRIPS member state that obligates itself to TRIPS-plus protection in a bilateral agreement will then be obligated to extend these standards to all other World Trade Organization ("WTO") members due to the most favored nation ("MFN") clause in the TRIPS agreement.¹⁵ TRIPS Article 4 provides that "any advantage, favour, privilege, or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members."¹⁶ TRIPS does not set out criteria to determine when, if ever, bilateral trade agreements concluded after TRIPS may be exempt from this MFN provision. Thus, it might be possible for a WTO member to take advantage of a TRIPS-plus standard in a bilateral agreement to which it is not a party. A state may, for instance, shop around for a FTA that further restricts compulsory licenses.

Bilateral investment treaties ("BITs"), like FTAs, have proliferated in number in recent years.¹⁷ Essentially, BITs protect investment assets by prohibiting the expropriation of those assets by the host state. Increasingly, BITs address IP protection standards by defining investment assets as including a wide array of IP.

¹⁴ That developing countries have not had much input into FTA negotiations is self-evident from the fact that most of the FTAs the U.S. has signed contain nearly identical provisions. See *Free Trade Agreements*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

¹⁵ See generally Lee Ann W. Lockridge, *Honoring International Obligations in U.S. Trademark Law: How the Lanham Act Protects Well-Known Foreign Marks (and Why the Second Circuit Was Wrong)*, 84 ST. JOHN'S L. REV. 1347, 1348 (2010) (speculating that the Most-Favored Nation Treatment provision requires the United States to honor the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks for all World Trade Organization Member Nations due to a bilateral agreement with Singapore).

¹⁶ Trade-Related Aspects of Intellectual Property Rights, *supra* note 6, at art. 4.

¹⁷ See *Other IP Treaties*, WIPO, http://www.wipo.int/wipolex/en/other_treaties/#23 (last visited Jan. 17, 2014) (providing a list of IP-relevant bilateral treaties).

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BIT arbitrations have also surged in recent years, and the “indirect” expropriation¹⁸ theory has proven quite popular with investors.¹⁹ An indirect expropriation may exist where an investor has experienced an impairment of control or an impairment of value of their investment, such as IP, if the effect is the same as would have occurred with a direct taking. Host states must provide investors with “effective” means of asserting IP claims and enforcing their IP rights. To be effective, rights and remedies must be enforceable.

The extent to which IP rights constitute an investment asset may therefore become a central issue in investment disputes. As such, investment arbitrators must evaluate domestic laws for how they define the availability, validity, and scope of IP rights. These are difficult and often elusive substantive questions of IP protection when they occur in traditional fora and are thus likely beyond the competence of investment arbitration tribunals to determine. IP law is notoriously full of gray areas due to finely balanced policy objectives and the tendency of technology to outpace legal solutions.

These elusive determinations may become even more challenging in the context of a BIT. For instance, in order to be covered, the investment must be in the territory of the host state.²⁰ Determining the location of an intangible property is, however, fraught. What geographical space does an idea or knowledge inhabit?

Perhaps in an effort to secure comprehensive IP protection, BITs sometimes expressly list the various forms of IP to be

¹⁸ Shain Corey, *But Is It Just? The Inability for Current Adjudicatory Standards to Provide “Just Compensation” for Creeping Expropriations*, 81 *FORDHAM L. REV.* 973, 976 (2012) (citing “creeping expropriation” as a common form of indirect expropriation where the host country institutes a legislative act (or acts) that has the effect of depriving the owner of the investment’s benefit without actually seizing ownership of that investment).

¹⁹ According to the United Nations Conference on Trade and Development (UNCTAD), during the past two decades, there have been more than 500 known investor-State disputes submitted to international arbitration. See *Recent Developments in Investor-State Dispute Settlement (ISDS)*, UNCTAD, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

²⁰ See, e.g., 2012 U.S. Model BIT, art. 1 (“[C]overed investment’ means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.”), available at <http://www.state.gov/documents/organization/188371.pdf>.

regarded as investment assets.²¹ Significantly, these lists tend to exceed the scope of IP protected in TRIPS and in so doing, they may invite difficult legal issues. For instance, some BITs include “goodwill” in addition to trademarks, and “confidential business information” in addition to trade secrets.²² This expanded list of IP may then result in novel IP questions such as how should goodwill that does not constitute a trademark be protected, or how should confidential business information be defined in order to distinguish it from trade secrets?

In an investment dispute that involves the indirect expropriation of IP, the ultimate legal question may be whether a host state’s IP protection meets “the highest international standards.” But where would an arbitrator look for such standards? If the issue was, for example, a host state’s failure to protect business-method patents, given the variety of policy and legislative responses to this phenomenon worldwide, and TRIPS’ silence on this issue, it is difficult to conceive how the highest standards of protection could be determined. Would it simply be a matter of locating the strongest protection available in any state?

And even in circumstances in which a TRIPS standard exists, it may be argued that this is not “the highest international standard” due to even higher standards set in certain domestic laws and subsequent regional and bilateral agreements. For instance, an investment arbitration tribunal might be asked to decide whether a compulsory license for a necessary pharmaceutical constitutes an indirect expropriation under a BIT. In such a case, it is not clear what relevance, if any, compliance with TRIPS compulsory-license standards would have. That is, an arbitration panel may find that a TRIPS compliant compulsory license is nevertheless an indirect expropriation under a BIT.

Another example of an escalating standard is the protection of

²¹ See, e.g., Agreement between the Government of Australia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments, Austl.-Chile, July 9, 1996 (entered into force Nov. 18, 1999), available at http://www.wipo.int/wipolex/en/other_treaties/details.jsp?group_id=23&treaty_id=769.

²² See, e.g., Treaty between the United States of America and the Republic of Cameroon concerning the Reciprocal Encouragement and Protection of Investment, available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=243217.

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non-traditional trademarks that cannot be visually perceived, such as a scent marks. Although a state may be TRIPS compliant by refusing registration of such a mark, the legislation of many developed countries permit such marks to be registered, and an increasing number of FTAs insist on this protection.²³

International IP law as developed through the many treaties administered by the World Intellectual Property Organization (“WIPO”), the TRIPS Agreement, and the WTO Dispute Settlement Procedure have emphasized domestic law remedies for the enforcement of IP rights and a state-to-state dispute settlement mechanism in cases where the domestic laws are below the established standards under the treaties.²⁴ Surely these are more appropriate fora to decide these questions. When it comes to asserting a TRIPS violation, a state must weigh the diplomatic costs in bringing a complaint to the WTO against another sovereign. Presumably, only meritorious and important claims will thus be made. Since BITs permit investor-state arbitrations whereby investors can commence a proceeding directly against a state, diplomatic concerns may not be present when considering whether to pursue a complaint.

In the case of tobacco plain-packaging regulations, there are live disputes progressing through both fora. Currently before the WTO is a dispute over a recent Australian tobacco regulation.²⁵ In addition to required large text and graphic warnings about smoking that cover most of the packaging, the Australian Tobacco

²³ See, e.g., U.S. FTAs with Australia, Bahrain, Chile, Colombia, Korea, Morocco, Oman, and Peru. These FTAs are available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

²⁴ See, e.g., TRIPS, *supra* note 6, at art. 41.

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

²⁵ *Dispute Settlement: Dispute DS435: Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (last visited Jan. 17, 2014) (providing the current status of the WTO dispute).

Plain Packaging Act requires tobacco products to be sold in logo-free packaging.²⁶ No non-word signs of any kind can be used and word trademarks are limited to a particular font size, type, and color and are restricted to a particular space on the packaging.²⁷ This legislation is being challenged by Cuba, Ukraine, the Dominican Republic, and Honduras who allege that it impermissibly interferes with trademark owners' rights in violation of TRIPS.²⁸ Troubled by the same legislation, Philip Morris Asia Limited filed an arbitration claim against Australia under the Hong Kong-Australia BIT asserting that such restrictions on their use of their trademark are tantamount to an expropriation.²⁹ The extent to which trademark owners have a positive right to use their trademark and how such a right, if it exists, should be balanced by a state's obligation to legislate public health are important and fundamental legal questions for international IP law. These questions are appropriately addressed to the WTO and are beyond the competence of investment arbitrators. Moreover, the threat of BIT arbitration claims, may chill similar legislative efforts by other countries.

One would expect that one of the governing principles of investment decisions is that legal uncertainty is risky business.

²⁶ *Tobacco Plain Packaging Amendment Regulation Amendment 2012* (Cth) reg 2.4.2(2) (Austl.). See *Plain Packaging of Tobacco Products*, AUSTRALIAN GOVERNMENT DEPARTMENT OF HEALTH, <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-plain> (last visited July 13, 2013).

²⁷ *Tobacco Plain Packaging Amendment Regulation Amendment 2012* (Cth) reg 2.4.2(2) (Austl.).

²⁸ Request for Consultations by Cuba, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT DS458/1 (May 7, 2013); Request for Consultations by Ukraine, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT DS 434/1 (Mar. 13, 2012); Request for Consultations by Honduras, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT DS 435/1 (Apr. 4, 2012); Request for Consultations by the Dominican Republic, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT DS 441/1 (July 18, 2012).

²⁹ Another example of tobacco companies using BITs to fight anti-tobacco legislation occurred in Thailand where companies claimed that the law requiring ingredients to be printed on cigarette packaging was challenged as indirectly expropriating trade secrets.

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When deciding where to invest, a host that offers legal certainty is preferable to host that does not. An investor with significant IP assets will seek certainty that its IP will be protected. It is said that one of the biggest fears investing companies have is losing their trade secrets, for instance. Thus, it is not IP laws with high levels of protection investors seek, but confidence that there will be predictable answers to key legal questions. By successively increasing the complexity of IP standards, the TRIPS-plus standards contained in FTAs and BITs make a host state's legal framework unknowable and thus highly unpredictable.

Significantly adding to the complexity and ambiguity of IP protection is the current environment of ever growing legal standards to which developing countries obligate themselves. Ideally, an inventor, an investor, an arbitrator, or a judge could look to domestic law to understand the rules that govern the validity, scope, and applicable exceptions to IP rights. But today, consulting domestic law is only the first of many steps that must be taken to discern what IP standards exist.

Consider, for example, the governing IP law of Chile, a country that has for many years touted its hospitality to foreign investors and foreign trade. Today, Chile is party to over one hundred IP agreements including multilateral agreements, BITs, bilateral and regional FTAs, and stand-alone IP bilateral agreements.³⁰ It is likely that no two of these agreements protect IP in the same way. It is also likely that few lawyers are familiar with the precise standards contained in each of these agreements. In order for an investor to know whether Chile offers trademark holders anti-dilution protection, for instance, a lawyer would be required to expend many hours to arrive at an answer. In this environment it is impossible to create a consciousness of legal rights. In this way, the enlargement of IP agreements to which developing countries believe they must adhere in order to attract FDI, ultimately works against a free trader's goal of reducing trade barriers.

A premise of current economic research is that a strong economy is one that is "IP-intensive." Thus, the so-called "rising powers" are enjoying a current climate of IP investment that is

³⁰ See *Treaty Secretariat IP-Related Bilateral*, WIPO, http://www.wipo.int/wipolex/en/treaties/index_bilateral.jsp (last visited Jan. 17, 2014) (providing a list of the IP-related bilateral agreements entered into by Chile).

dissimilar to least developed countries. And significantly, these rising powers are increasing their own IP production.

This theory of measuring the impact that IP has on the economy is best exemplified by mirror studies done by the U.S. Patent and Trademark Office ("USPTO") in 2012 and the European Commission in 2013.³¹ According to these studies, IP-intensive industries account for about thirty-five percent of U.S. gross domestic product (GDP), and forty percent of all economic activity in the EU.³² In both, trademark-intensive industries account for the highest shares in both employment and GDP, followed by patents and copyright.³³ Trademark-intensive industries were determined by the ratio of trademark registrations to employment in a given industry.³⁴

Similar studies will no doubt soon be undertaken in other countries. In the meantime, statistics collected and analyzed by WIPO can be used to evaluate IP intensity. These statistics inform us that in 2012 the Chinese IP office was the largest recipient in the world of filings for four types of IP (patents, utility models, trademarks, and industrial designs).³⁵ In fact, for the first time, Chinese residents accounted for the largest number of applications filed throughout the world for these four types of IP.³⁶ If the intensity of IP investment and IP production are related to economic strength, these are good signs for China's economy.

³¹ See EUROPEAN PAT. OFF. & THE OFF. FOR HARMONIZATION IN THE INTERNAL MARKET, INTELLECTUAL PROPERTY RIGHTS INTENSIVE INDUSTRIES: CONTRIBUTION TO ECONOMIC PERFORMANCE AND EMPLOYMENT IN THE EUROPEAN UNION 6 (2013), available at http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf [hereinafter INTELL. PROP. RTS. INTENSIVE INDUSTRY] (discussing the EU study's intention to mirror the Economics and Statistics Administration and USPTO study).

³² ECON. & STAT. ADMIN. & U.S. PAT. & TRADEMARK OFF., INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS 3 (2012), available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf [hereinafter INDUSTRIES IN FOCUS]; INTELL. PROP. RTS. INTENSIVE INDUSTRY, *supra* note 23, at 6.

³³ INDUSTRIES IN FOCUS, *supra* note 24, at vi; INTELL. PROP. RTS. INTENSIVE INDUSTRY, *supra* note 23, at 50-55.

³⁴ INDUSTRIES IN FOCUS, *supra* note 24, at 13 (2012).

³⁵ WIPO, 2013 WORLD INTELL. PROP. INDICATORS 3 (2013), available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/941/wipo_pub_941_2013.pdf (crediting China as the "principal force driving global IP-filing growth").

³⁶ *Id.* at 5.

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Not unlike in the developed economies of the United States and the European Union, trademarks are also the most used form of IP in developing countries.³⁷ Whereas trademark applications have increased thirteen percent per year worldwide, non-resident trademark applications have held steady.³⁸ Meanwhile, resident trademark applications have been rising principally due to resident applications in developing countries.³⁹ Again, China has seen the largest growth in trademark applications—thirty-one percent.⁴⁰ Brazil follows China with a twenty-two percent increase in trademark applications.⁴¹ In contrast, the United States enjoyed only a nine percent increase.⁴² India's growth in trademark applications surpassed both Japan and Korea.⁴³

So if trademark-intensive industries are the key to economic prosperity, some of the rising powers appear well positioned. China, Brazil, and India are highlighted because they also have in common the characteristic of being cautious and deliberate in their adoption of IP standards. None of these countries can be said to have rushed to adopt the highest possible IP protections. India, for instance, took full advantage of the transitional periods for developing countries to become TRIPS compliant.⁴⁴ And China and Brazil have attracted significant FDI with “weak” IP laws.⁴⁵ Again, if stronger IP protection always leads to more FDI and local innovation, we would have seen huge increases in trademark filings in sub-Saharan African countries rather than China, Brazil,

³⁷ *Id.*

³⁸ *Id.* at 104.

³⁹ *Id.*

⁴⁰ *Id.* at 106.

⁴¹ *Id.* at 101.

⁴² See IP Statistics Data Center, WIPO <http://ipstatsdb.wipo.org/ipstatv2/ipstats/trademarkSearch> (last visited Jan. 16, 2014) (providing a tool to calculate the number of trademark filings per country over a range of years).

⁴³ *Id.*

⁴⁴ See generally Nadia Natasha Seeratan, *The Negative Impact of Intellectual Property Patent Rights on Developing Countries: An Examination of the Indian Pharmaceutical Industry*, 3 SCHOLAR 339, 362 (2001) (describing the dispute before the WTO brought by the United States against India for failing to comply with TRIPS despite the transition period provided for developing nations).

⁴⁵ Peter K. Yu, *Intellectual Property, Foreign Direct Investment and the China Exception*, in *THE GLOBAL CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS* 153 (Robert C. Bird & Subhash C. Jain eds., 2008).

and India.

The WIPO Development Agenda has stressed the need for a country-specific and context sensitive approach to developing TRIPS compliant IP protection.⁴⁶ But the massive proliferation of bilateral agreements is most likely not what WIPO had in mind. While this environment has unquestionably produced different regimes in various countries, it most definitely has not produced IP laws sensitive to the needs of the developing country. Of course that conclusion is somewhat hypothetical since one cannot be certain about just what exactly the law *is* in these countries.

⁴⁶ See WIPO, DEVELOPMENT AGENDA (2007), available at http://www.wipo.int/freepublications/en/general/1015/wipo_pub_11015.pdf.