



Università Carlo Cattaneo Castellanza, LIUC

Paper presented at

**Workshop on the Law and Economics of
Intellectual Property and Information Technology**

July 22-23, 2005

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**Law and Economics of Bilateral Investment Treaties regulating
Intellectual Property Rights:
Challenge for Developing Countries?**

*Rosa Castro Bernieri**

INTRODUCTION

Developing Countries achieved some flexibilities in the Trade Related Aspects of Intellectual Property Rights Agreement (hereinafter, TRIPS) and in the Doha Declaration, especially regarding Public Health issues. These flexibilities, constitute limitations to the objectives of Developed Countries, which have sought different ways to further increase the level of protection for Intellectual Property Rights (hereinafter, IPR), up to the extraterritorial application of their own domestic IPR regulation¹. The interaction of International Trade regulation in different forums has been described in the International Trade scenario as an “spaghetti bowl”(referring to Free Trade Agreements and Regional Trade Agreements within the multilateral framework of the World Trade Organization, hereinafter, WTO). This idea, can also be applied to the International Intellectual Property Regulation, which is contained not only in the TRIPS but in a great number of Regional and Bilateral Agreements.

One of the ways to achieve this desired and increased level of regulation has been the use of Bilateral Investment Treaties (hereinafter BITs). These Agreements describe IPR as one type of investment and therefore extend all the protection that the host country should guarantee including the Fair and Equitable Standard Treatment and the Most Favored Nation principle (hereinafter MFN).

This paper aims to give some arguments, based on the economic approach to law regarding the institutional choice of BITs as the regulatory tool for International Intellectual Property and some of the possible consequences for Developing Countries.

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¹ See Public Law on the Trade Promotion Authority of the U.S.A. www.tpa.gov/p1107_210.pdf

The analysis, from a Law and Economics perspective, can shed some light on the understanding of the effects that this trend could have for the National Welfare of these countries, as well as for the International Standards of IPRs and the new challenges in the forthcoming times. This paper does not pretend to give an exhaustive analysis of all the issues and consequences implied in the use of BITs as a regulatory choice for IPRs, but only to cover some relevant Institutional aspects such as the Forum shifting practice. Specifically, some comments will be given with regard to the principles and standards stated in these Agreements and applied generally, such as the Most Favored Nation (hereinafter MFN), Fair and Equitable Standard and Highest International Standards. Aspects dealing with the substantive rules used in BITs will not be dealt here, because generally, these Treaties do not regulate these aspects directly but through the establishment of the general principles and standards above mentioned.

In this analysis we take as a first assumption, a rational approach. That is, countries are seen as rational maximizers over some set of preferences that constitute their utility function. The welfare function of a State will include a weight of the different constituencies, because some of them will count more heavily than others. Following this assumption, Developing Countries want to attract Foreign Direct Investment (hereinafter, FDI), which is supposed to be beneficial for them. Another assumption that follows and provides the basis for the analysis is that BITs and other Free Trade Agreements (hereinafter FTAs) and Regional Trade Agreements (hereinafter, RTAs) containing Investment provisions are supposed to attract or induced a higher flow of FDI². On the other hand, Developed Countries, also as rational welfare maximizers, want to have as much protection as possible for the Investment they are exporting abroad and this includes especially, provisions regarding IPRs protection. Developing Countries, instead, want to attract FDI, but want to keep the level of protection for investment and for IPRs as low and flexible as possible.

Regarding Investment, they want to do so, because protecting investment means sometimes limiting the capacity of maneuvering in public policies for the Host Countries.

² But against, see Hallmard-Driemeier M. (2003).

In the case of IPRs, the argument is that Developing Countries, as net importers of technology want to buy it as low as possible and higher standards of protection for IPRs are associated with higher prices of technology.

Therefore, whatever assumption we take about the nature of the preferences of each group of countries, a divergence can and will most likely arise between the National maximand and the Global maximand³. Another important caveat that should be mentioned is that in the International Law and Economic analysis, efficiency is in most of the cases based on the Kaldor-Hicks or Potential Pareto Improvement basis. That is because a Pareto Improvement is not likely to be reached, given the divergences between the National maximand and the Global maximand (a change which can make at least somebody better off while not making anybody worse off). Therefore, we assume the former, more flexible standard for efficiency, that is, at least those who are made better off, should have benefits that exceed the losses suffered by those being made worse off, so that compensation is at least possible).

Following the rational economic theory, it is sometimes difficult to give a complete picture of the reality. Therefore, in some cases we open the "black box" of each country as a rational individual maximizer, in order to suggest some answers guided by Public Choice Theory.

I. HISTORY OF BITS AND IPRs PROVISIONS IN BITS:⁴

1. **The predecessors of BITS:** also called the "old bilateralism" were the Friendship, Commerce and Navigation Treaties (FCN) used by the U.S. since this country became independent. They covered a variety of issues and not only Investment, and were used until the GATT Agreement was achieved (After World War II). An important feature of these Agreements was the absence of enforcement mechanisms. The linkage of IPRs with Trade in the multilateral framework was meant to achieve

³ Sykes, A. (2004).

⁴ For an extensive historical analysis of BITS see Guzman, A. (1998) and Guzman, A. (2004). For a historical perspective on Bilateral Regulation of IPRs, see Okediji, R. (2004).

enforcement. Possible reasons that lead to need more enforcement (by Developed Countries) were to avoid piracy. But another suggestion is that the non multilateral frameworks needed to have more coherence, less dependence on the variable nature of political relations, capture the static gains from the bilateral Agreements already in existence and legitimize the use of unilateralism⁵.

The old bilateralism has been described as the extraterritorial extension of IPRs regulation to Developing Countries through the use of Treaty Power in a deliberate effort to maximize the gains of comparative and competitive advantages.⁶

2. **The Hull Rule as Customary International Law:** in the beginning of the XX century, there was a perception that investors should be entitled to have protection for their property by International Law, especially from cases of taking by a Host Nation. In 1930, a dispute arose between Mexico and U.S, in which investors from U.S. that had been object of expropriations in Mexico, sought the protection for their investments. In a diplomatic exchange of notes, the American Secretary of State, Cordell Hull, described a full compensation standard of “prompt, adequate and effective” compensation that became known as the “Hull Rule”.

3. **The disagreement about the Hull Rule as CIL:** After the ex-colonies became sovereign States and due to their economic and social conditions, these new formed countries became net importers of capital (and wanted to keep protection for investors as flexible as possible). On the other hand, Developed Nations have been net exporters of Capital (therefore wanted to have protection as stringent as possible). A battle arose out of this disagreement between these two groups of countries, and the focus was on the Hull Rule as a CIL, which was argued by Developed Countries, while Developing Countries denied this status.

4. **Developing Countries in the U.N.** Between the years of 1962 and the mid 1970s, Developing Countries found in this Forum a number advantage and therefore

⁵ Ibid, p.p. 135.

achieved to opposed the Hull Rule through several Resolutions that were passed to emphasize the sovereignty of Nations with respect to foreign investment, and denied the status of the Hull Rule as CIL. After that, there was uncertainty in the International Law arena, about the Regulations of Investment.

5. **Bilateral Investment Agreements:** The first BIT was signed in 1959, between Germany and Pakistan, and included in its interpretation of property, patents and technical knowledge. The first BIT signed by the U.S. was with Panama in 1982. But the U.S. initiated an aggressive Program of BITS in the 1980s, especially motivated by the reform of its Trade Act (of 1974) in 1988 in which a linkage was created with IPRs. The Special Section 301 of the Trade Act, is the principal tool that U.S. use to negotiate improvements in foreign IPRs regulations. Since then, it has been monitoring the level of compliance and enforcement of IPRs in countries and linking the Generalized System of Preferences (GSP) Program to the adoption of IPRs Regulation and enforcement of IPRS in partner countries all over the world. Along with the use of BITs, another highly used tool is FTAs and RTAs containing investment provisions and IPRs Regulations. Recent examples of FTAs are the CAFTA, which includes a chapter of Investment⁷

The U.S. uses a model BIT in its negotiation proposals to the other States. The version from 2004 includes IPRs, intangibles and licenses under the definition of investment⁸. Although there is a somewhat different approach held by the European Union, Canada, Japan and Australia, the general concepts discussed can be applied in some extent to all the new generation of BITs and Agreements containing Investment provisions.

From a Law and Economics perspective we apply to International Agreements some principles of Contract Law and Economics and their consequences. Therefore, an Agreement shall be expected when it lies in the core of the bargaining game. That is, each

⁶ Ibid, p. 136.

⁷ By the time of the last revision of this paper (08-07-2005) the CAFTA had been approved by the Senate and decision is now to be made by the U.S. House

⁸ For detailed information on recent BITs, see South Analytical Note (May 2005).

party has to perceive that it is better off by signing the Treaty⁹. As mentioned before, this is highly difficult in the International scenario, especially when differences in stakes and needs of different groups of countries (such as Developing and Developed) are present. Two solutions have been mentioned in this respect to achieve the above mentioned kind of Agreement. The first is the possibility of having monetary side payments. The second one, already mentioned is the issue linkage. Both of them respond to the need of having the parties perceiving themselves as getting some gains from the Agreement, or effectively have such gains.

7. International Regulation of IPRs and BITs: Protection of IPR in the standards wanted by Developed Countries was successfully achieved in the multilateral negotiations of the Uruguay Round, due to the mechanism of linkage bargaining¹⁰, which related the negotiation of IPR to other trade related issues of interest for Developing Countries. But a minimum level of harmonization from the perspective of Developed Countries was not enough. Although this minimum level was evaluated as too high for Developing Countries, for Developed Countries is perceived as too low and when the flexibilities established in the TRIPS Agreement and further developed in the Doha Declaration are added, the outcome does not satisfy the expectations of the latter. In order to achieve the desired level of protection, the U.S. and other countries have initiated an aggressive trend that includes signing a significant number of BITs in order to negotiate with each country more protection for IPRs. BITs Agreements are one of the tools used in what has been described as TRIPS-plus¹¹ Commitments.

II. WHY DEVELOPING COUNTRIES AGREE TO SIGN BITS?

1. The game theoretical explanation:

- a. Dynamic Inconsistency: this problem exists when a preferred course of action cannot be adhered to without the establishment of some commitment mechanism.

⁹ Sykes, A. (2004).

¹⁰ Linkage bargain diplomacy is a theory of trade negotiations that suggests the key to reaching an agreement is getting the correct mix of issues into negotiation. Uruguay Round allowed an agreement linking trade and IPRs. (Petherbridge, 2004).

¹¹ TRIPS-plus: are commitments that go beyond what is included in the TRIPS Agreement, implying the inclusion of a new area of IPRs, the implementation of a more extensive standard or the elimination of an option or flexibility for Members under the TRIPS Agreement (Vivas, 2003).

- It constitutes a sub-game equilibrium that is avoided in most private transactions through contract, but in the International setting it constitutes a barrier to efficient Foreign Direct Investment (hereinafter, FDI). To solve this problem BITs are used, in order to achieve more rapidly a credible commitment (the market mechanism to achieve a reputation of commitment could be longer in time). By setting some rules regarding the protection of investors it is assured that the Host State will not act opportunistically (and change the rules in its own convenience) after the investment is made and is "sunk" for investors.
- b. The similarities: between the historical evolution in terms of institutional choice and usage of different levels of negotiation of Treaties dealing with Investment and IPRs, make possible to apply some of the arguments provided for Investment Treaties.
 - c. How to solve the Prisoner's dilemma? One author ¹²claims that the reason why Developing Countries agree to sign treaties that hurt them can be explained from a game theoretical perspective. It has been argued that BITs are signed in order to solve a prisoner's dilemma faced by Developing Countries. Although the latter will be better off as a group without committing themselves to these Agreements, each of them is individually better off signing the Agreements in order to attract investment to their own territory at the expense of the other Developing Countries. Therefore, Developing Countries are behaving as competitors and this leads to a perfect competition outcome in which each country by raising the commitment through BITs is lowering the price for "import of investment" and eventually gaining zero profits

The reasons, therefore, to engage in BITs seem to be a competition and the inability of Developing Countries to collude through multilateral Agreements in order to maintain market power, when selling their markets to attract foreign investment. The outcome of this theory is that, by signing BITs, Developing Countries are better off individually, but worse off as a group. However, one question remains related to the initiative of proposing these Treaties, which comes

¹² See Guzman (1998).

from Developed Countries such as the U.S. with its aggressive Program on BITs. If Developing Countries are really better off with BITs individually, then Why is that they are not proposing BITs to Developed Countries? Instead, we find that the latter are the ones leading this trend.

It also seems that the Multilateral Level has been used before to achieve also an increasing level of protection of IPR and therefore to extend extraterritorially the domestic laws of Developed Countries. Even now, it is reported that TRIPS-plus Agreements are achieved not only in the bilateral level, but also in the regional and multilateral (especially in the World Intellectual Property Organization context)¹³.

Many issues remain to need more empirical evidence, to establish them more clearly. Are the BITs increasing the level of Foreign Direct Investment? And if the answer is positive: Are the gains obtained in terms of more FDI, greater than the costs arising out of increasing level of protection (and therefore less scope for maneuvering in Public Policy for Developing countries) of IPRs and generally in Investment?

2. Bilateralism as the rule and Multilateralism as the exception: another author¹⁴ suggests that bilateralism should be held as the rule, while multilateralism could be seen as an “aberration” in International IPRs Regulation. Therefore, the Regional and Bilateral trend, reflects the normal strategy lead by Foreign Policy, especially for Developed Countries to advance their interests in Developing Countries. This conclusion is drawn from the historical trend of bilateralism in connection with the implementation of the TRIPS Agreement.

3. Public Choice based Theory: another claim¹⁵ is that the move towards Bilateral and Regional forums for the Negotiation of IPRs Regulations has been led by the

¹³ Musungu, S. and Dutfield, G. (2003a).

¹⁴ Okediji, R. (2004).

¹⁵ Abbott, F. (2005).

lobbying of the U.S. Pharmaceutical Industry, and we should also add when considering this theory other corporations such as Software provider companies. Public Choice theory teaches that the objectives that individual countries pursue through International Agreements are determined by an interaction among organized interest groups¹⁶.

4. Public Choice plus the "new bilateralism" as the normal trend: a careful analysis of the above-mentioned theories leads to some further elaboration on them. It can be argued that in this case, Pharmaceutical, Software and other companies, as representing the producer's interests, will exercise greater influence, at least in the majority of the democratic countries in nowadays. These industries can be more easily organized in order to lobby for particular interests than for example, consumer associations. Producer Industries represent the possible beneficiaries of these Treaties in Developed Countries whereas consumers represent the potential losers in Developing Countries. Therefore, it can be argued that the former will easily get to fulfill their interests and have their respective governments as their representatives to impose those interests in the International trade scenario. Within that context, the rational assumption that whenever countries negotiate a Treaty, there will be some gains from trade that they will expect (at least a Potential Pareto Improvement shall be obtained out of an International Agreement)¹⁷ could not longer be applied. The so described " new bilateralism" as the general rule and not the exception, should be complemented by the idea that also the Multilateral framework has been used to achieve higher (and desired by Developed Countries) levels of protection, or the also desired level of enforcement.

This idea appears to be better explained by the forum shifting mechanism¹⁸ in which, different institutional forums are used to accomplish the desired goals. Therefore, the shift from WIPO to WTO, (initiated by the U.S. because of WIPO's Institutional weakness) or the shift from WTO to BITs, FTAs and RTAs (in order to strengthen even more the IPRs commitments), can be explained in terms of the Global IPRs trend. The U.S., Europe and a few other Developed Countries are pushing this trend.

¹⁶ Sykes, A. (1991). Quotation from Muller, D. (1973).

¹⁷ Sykes, A. (2004).

¹⁸ Okediji, R. (2004) and Drahos, P. (2002).

What is perhaps, the most relevant feature of forum shifting from Multilateral to Bilateral levels is, first, the wider possibility of Developed Countries to impose the agenda. This is achieved through the use of carrots (such as the GSP already mentioned) and sticks (such as threaten of use of the 301 Special Act by the U.S.). Second, transparency is present in the Multilateral Negotiations but not in the Regional or Bilateral Forums. Public opinion get to know the text of these latter when they are concluded or near to be concluded. This gives a narrow possibility for exchange of ideas between different interests groups and only permits the most organized and powerful to exercise some influence.

III. LAW AND ECONOMIC ANALYSIS OF SOME CONSEQUENCES OF REGULATING IPRS THROUGH BITS:

1. Definition of IPRs as assets: BITs usually define IPRs as assets (intangible assets) and therefore the protection given to assets as investments is also given to IPRs. This definition leads to the application of the rules protecting investments (against expropriation and regulatory takings), with some legal features that have been analyzed elsewhere¹⁹. As a consequence, the broadened scope of protection should be analyzed and empirically be measured in order to obtain a better assessment of the impact of BITs.

Important issues regarding the possible interpretation of legal measures that aim to protect investment when applied to IPRs are the applicability of different standards that we will analyze below.

However, uncertainty is the most important feature here. Since the application of protection for investment to IPRs has to be interpreted in the future, the consequences of these Treaties are not yet known and monitoring the future judicial decisions and their possible interpretations is vital, especially for Developing Countries. One problem is that decisions of the Arbitration Centers are not public. Although it is possible that people specialized in this field are limited in number and that expertise will be shared at least

among this privileged group, the effect of taking advantage of previous interpretations to avoid making the same mistakes, will be lost.

Some of the possible interpretations is to encompass IPRs that are not protected as such in the Host Country at the time of entry in to an investment Agreement. If these IPRs are interpreted to be covered investments under the provisions embracing "any other intangible property", for instance, the effect of protecting those "assets" will be to broaden the scope of IPRs protection. Some Agreements contain rules to guide the interpretation of what is to be considered as protected IPRs and some even have a negative list, but in general, the potential extension of patentable subject matter, for instance, raises a number of problematic issues that eventually could arise. In economic terms, it is known that there is an optimal scope of protection, although the exact level is not known and shall be established empirically. Nevertheless, deep differences among countries (regarding production capacity among other factors), suggests that some differentiation is needed (and this accepted by the TRIPS Agreement in some time concessions and the flexibilities of the Doha Declaration).

2. Most Favored Nation Principle:

- a. The Concept: According to the MFN principle stated in the TRIPS, any concession given by a signatory country to another country, whether member or not, should be extended to all members. It is a relative standard of investment protection²⁰.
- b. The effects of the MFN Principle plus Bilateralism: is to have higher and higher standards. Whenever engaging in a BIT, Developing Countries are automatically raising the level of protection of IPR in their territories for free in relation to all other countries besides the one with which they are negotiating. Supposedly, they are instead receiving a price from the Developed Country partner in the BIT, but even with this latter, there are reasons to doubt that the price received offsets the costs arising from allowing

¹⁹ Correa, C. (2004).

²⁰For the distinction between relative and absolute standards see UNCTAD, (1996), p. 182.

higher protection to IPR. There is contradictory empirical evidence of the long-term gains (due to higher flows of investments) and the short-term gains (due to losing the flexibilities granted in the TRIPS and the Doha Declaration). This is of special concern with the import and production of generic medicines (Public Health costs) and the expanding scope and duration of patents for chemical and pharmaceutical products. But it is clear at least that for Least Developed Countries (hereinafter LDCs) the losses are greater than the gains)²¹. Each time that the European Union or the U.S. negotiate and set a new higher standard, by effect of the MFN Clause, the other will obtain the same level, therefore spreading and setting new higher standards.

- c. The effect on the Cost Benefit Analysis: each country, when performing its own Cost Benefit Analysis, shall take into account not only the effects of the MFN clause negotiated with the contracting party in the specific Agreement (BIT, FTA or RTA). Furthermore, if that country is member of the WTO, the MFN Clause regarding the TRIPS Agreement has not other limitations than the one regarding previous Agreements. However, the concessions received regarding Trade of Goods, could be subject to the limitations of Article XXIV of the GATT Agreement. All these important aspects matter when assessing the gains and losses of BITs, FTAs and RTAs.
- d. Regarding Rules on Pharmaceuticals: another interesting economic effect of the MFN in TRIPs and BITs is that which refers to a Treaty such as the U.S.-Morocco FTA, which provides extensive marketing exclusivity rights and in practice benefit Pharmaceutical Companies. By effect of the MFN principle of TRIPS, all the same privileges shall be extended to countries such as Japan, Europe, China and India. But the real effect has to be understood in terms of the capacities of the Companies in each State. While U.S. and European companies are in most of cases originators, Indian and Chinese companies tend to be efficient producers of generic drugs. The outcome of such a rule could be to block Indian and Chinese generics to enter into the Moroccan

²¹ See Maskus, K. (2004).

market. This has been described as a potential facially neutral measure or a disguised trade barrier²². India and China might be suffering a *de facto* MFN discrimination as a consequence of the new rules. The counter-argument could be that the TRIPS Agreement permits Members to adopt higher standards of protection (and these will be TRIPS-consistent). The question in such cases, is whether a measure pursues a legitimate and proportionate regulatory aim or if it unjustifiable discriminatory.

3. Fair and Equitable Treatment: Some BITs include this standard, which is also ambiguous and could be interpreted in different ways. It is an absolute standard of protection, as opposed to the MFN principle.

- a. Two different ways of interpret the meaning: one is the plain meaning approach, which consists on a straightforward assessment regarding if a particular treatment complies with the "fair" and "equitable" requirements. Fair is a treatment free from bias, fraud, injustice and equitable. The other possible interpretation is the international minimum standard, which suggests instead that fair and equitable is synonymous with the concept of minimum standards applied in International Law²³. To interpret these standards, the TRIPS Agreement and the WIPO Treaties could be the relevant benchmark. According to the same author, the interpretation of this standard might affect the protection of IPRs, because it would mean a transfer of standards of treatment in IPRs Agreements into BITs commitments. But in some cases, the minimum standard is not even the benchmark, but the highest international standards explained below, which are supposed to be even higher.
- b. Interpretation: as already mentioned, the interpretation should ultimately clarify which is the right approach. Historically, this standard was understood to be breached when the State conduct was of "an egregious and shocking nature". Lately it has been applied to conduct taken in good faith, when investor's expectations are frustrated by State Action (Cosbe, Mann, Peterson and Van

²² Abott, F. (2005)

²³ Vivas, D. (2003).

Moltke, 2004, p. 11-12)²⁴. It has been argued, that this standard could be for instance invoked to challenge National IPRs laws consistent with the TRIPS Agreement²⁵. Another possible interpretation is that the standard only permits to challenge laws that are discriminatory, and that a difference should be made between differentiation and discrimination will be prohibited²⁶.

- c. Recent Interpretations: In the investment chapters of recently signed FTAs, the Canada model and the 2004 Model BIT of the U.S., the fair and equitable treatment is provided with a link with international minimum standards. This could be read as an effort to establish a universal minimum standard, against which all the standards of treatment are not permitted to fall. Also Canada and the U.S. see the standard as part of the evolution of the international minimum standards. The UNCTAD opinion about this is that is paying insufficient regard to the substantial debate in international law²⁷. When applied to IPRs, it has been suggested that this principle is applicable to enforcement but not as a standard of treatment, because of the TRIPS flexibilities. From a Law and Economics perspective, elimination of the TRIPS flexibilities, by the use of this or other provisions in BITS could be interpreted as curtailing the economic need for some scope for renegotiations. The trend is also leading to a further harmonization or standards which convenience should be analyzed in economic terms, but is out of the scope of this paper.
- d. Economically: the broadened use of this standard and other standards mentioned below could lead to the paradox of compensation, mentioned in the Law and Economics literature of Property Rights. If overcompensation is likely to occur, because it goes beyond the optimal point, then we could be promoting not socially valuable investment (over-investment). The possible application of this theory shall be tested empirically and subject to the interpretation of these standards.

²⁴ Correa, C. (2004).

²⁵ Ibid.

²⁶ Ibid.

²⁷ For an extensive analysis see South Centre (May 2005), p. 11-12.

4. Highest International Standards: Some of these Treaties refer to adequate and effective protection for IPRs in conformity with the highest international standards. This concept is vague, since there is not such thing in International Law as a clear standard, and therefore, multiple interpretations can arise, either as contained in International Treaties or CIL. In the area of IPRs, at least there is a multilateral framework under the TRIPS Agreement and other IPRs Agreements, but in the Investment area, there is not such an Agreement²⁸.

A possibility that should not be ignored is that by a continuous raise of the IPRs levels of protection through BITs and other Agreements, the interpretation leads to establish that level of protection as the highest international standards. It is also foreseeable that a new multilateral Treaty in accordance with those new and higher standards will be proposed and a CIL will be claimed on the base of these higher levels of protection.

5. Enforcement and right to sue the State: BITs introduce a clearly new feature to International Regulation of IPRs, when they allow individuals and private companies to sue the State that is infringing a right established in those Treaties. Therefore, there is not need for them to have their Governments claiming before the WTO, as it is the case under the TRIPS. In terms of enforcement a clear benefit is given to private agents (presumably Producers that are the right holders). BITs usually adopt an Arbitration clause and therefore States give up their jurisdictional power in order to submit the claims arising from these Treaties to International Arbitration Centers. An important issue regarding the Arbitration processes is that of publicity, since the decisions are in most cases privately managed and therefore the benefits arising from transparency of publications are lost.

The consequences of this direct right for private actors to seek protection for their rights without needing the intervention of their government to bring a Dispute has

²⁸ Only a limited number of rules in the Trade Related Investment Measures (TRIMS), within the WTO Agreement. There was a failure to reach a Multilateral Agreement on Investment (MAI), and within the Cancun Ministerial Conference there was strong opposition from Developing Countries to initiate negotiations on this subject.

important consequences in terms of incentives and the exchanges that take place when negotiating a BIT. Some suggestions, mentioned below, of the reasons why BITs are being used more frequently to regulate IPR could be then deducted out of Public Choice theories in the lobbying of interest groups (pharmaceutical industries and Software Companies to pursue this protection).

6. Transaction Costs: The concept of Transaction Costs encompasses different types of costs: search costs, information costs, negotiation costs and enforcement costs. Each one of these varies when comparing Bilateral²⁹ versus Multilateral framework. It is argued, for instance that negotiating Multilateral Agreement is more costly in terms of number of parties involved and also the costs go higher as more issues are incorporated within those Treaties (as in the WTO Agreements). However, there are costs of negotiating different BITs with almost the same content instead of having one Multilateral Treaty with that same content.

IV. SOME PROPOSALS AND RECOMMENDATIONS:

1. **Regional Integration Agreements (South-South):** could be favorable frameworks for Developing Countries in order to deal with the high cost of Negotiation of BITS and other FTAs and RTAs with North Countries. The issue of difference in bargaining power, although most of the times is not considered to be detrimental in economic terms (because it broadens the scope for gains from trade out of different comparative advantages) can be balanced when South countries negotiate as a group and not isolated. The idea is that Developing countries have constraints to the use of flexibilities contained in the TRIPS Agreement. Specifically, they need resources in the form of technical inputs. They could achieve access to these resources through Regional mechanisms that complement the National efforts³⁰. This idea is based on solutions founded on a common purpose, cooperation and collaboration. This study refers to

²⁹ For the purposes of this paper we use bilateral to encompass all Agreements of the North-South type, even those FTAs and RTAs as CAFTA where a Developed Country and a Developing Country or group of Developing countries (not organized in a Regional institutional framework) are involved.

³⁰ Musungu and Villanueva (2004).

collective action as a basic feature and in order to overcome the potential "collective" action problem in economic terms (not having enough incentive to act individually and instead trying to free-ride) a political collective regional position is important. An institutional approach is needed not only to overcome this problem but also to avoid duplication of efforts at a National and Regional level. Possible benefits could be obtained from pooling of resources to lower information costs. In this way, Developing Countries could more easily deal with the challenges that they face within this "new bilateral" trend. Some Integration Frameworks among South Countries could facilitate the necessary capacity in order to better assess and calculate the costs and benefits of these Agreements.

2. **Multilateral Negotiations:** the most relevant argument in favor of the multilateral negotiations seems to be the lack of transparency in the Bilateral negotiations and the problem of Asymmetric Information that can lead Developing Countries to assume commitments that are not beneficial in those forums. High costs of information and even unavailability of the necessary information can also preclude a Cost Benefit Analysis in order to assess if the potential benefits from the Treaties offset the potential losses. Institutional Economics suggests some explanation about the inconvenience of the Bilateral Agreements, which are not circumscribed and therefore do not benefit from the institutional positive aspects of other negotiation Forums (such as the WTO or other Regional Institutions). Enforcement Costs are also a very important feature, and BITs specifically take a completely different approach when granting to private persons the right to sue the State before Arbitration Centers. The analysis of Transaction Costs including the costs arisen from strategic behavior has to be taken into account when comparing the Bilateral and the Multilateral Forum. However, the use of Forum shifting mechanisms, seems to suggest that even the multilateral achievements by Developing Countries can be lost if there is not a clearly political compromise and a strategic position of these countries as a group.

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