The Politics and Outcomes of Preferential Trade Strategies: Evidence from TRIPS-Plus Provisions in US-Latin America Relations

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This article investigates the circumstances under which the agenda of intellectual property rights (IPRs) influences the decision of states to pursue preferential trade agreements (PTAs). Governments are often prone to negotiate PTAs due to distinctive pressures from IPR-intensive industries to disseminate TRIPS-Plus standards, which are particularly willing to capitalize on the advantages of preferential arrangements. To illustrate this argument, we examine the processes around the expansion of IPR provisions in the PTAs signed by the United States with Latin American countries, as enabled by the Trade Promotion Authority Act of 2002. We find that, while broad variations of TRIPS-Plus standards emerged across these PTAs, both governments and private sector tend to perceive gains from this setup, since PTAs are unlikely to undermine the IPR standards achieved by the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter 'TRIPS Agreement'), but still provide opportunity for the promotion of higher IPR standards in each individual market.

1 INTRODUCTION

Since the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter 'TRIPS Agreement') came into force within the World Trade Organization (WTO) framework in 1995, various attempts have been made to induce member states to progressively adopt the so-called 'TRIPS-Plus' provisions, which comprise more rigorous rules for the protection of intellectual property rights (IPRs) than required by that multilateral treaty. However, while each country may unilaterally set its IPR standards at such higher levels (provided they remain compatible with

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This research was partially funded by the São Paulo Research Foundation (FAPESP), Grant # 2013/10931-1. The authors acknowledge the comments and suggestions by Mary A. Clark, Feliciano Guimarães, Amâncio Oliveira, Janina Onuki, Michelle Sanchez-Badin, and Maybi Mota, as well as the various inputs received during the XXXIII Congress of the Latin American Studies Association (2015).

Tang, Yi Shin & Teodoro, João Paulo Hernandes. 'The Politics and Outcomes of Preferential Trade Strategies: Evidence from TRIPS-Plus Provisions in US-Latin America Relations'. *Journal of World Trade* 50, no. 6 (2016): 1061–1084.

the TRIPS Agreement),[1] a more difficult problem has emerged on whether and how to consistently increase them across multiple states.

In the course of these attempts, preferential trade agreements (PTAs) have strongly proliferated as an alternative to multilateral trade negotiations, arguably due to the successive stalemates faced during the Doha Round of the WTO. In this context, a great part of the literature has focused on the possible interactions between PTAs and the current multilateral trade system, especially with regard to whether such form of economic integration advances or hinders the goals of the WTO framework.[2] Yet these studies seem to overlook the role of PTAs on the specific issue of trade-related aspects of IPRs, as they mostly discuss these interactions from the perspective of free movement of goods and services, which are hardly applicable to the *sui generis* nature of IPRs within the global trade system.

This article explores the argument that the decision of states to pursue preferential strategies follows a different rationale with regard to the protection of IPRs, as compared to other agendas in the WTO.[3] The consequences of this difference are mainly twofold. First, governments become particularly prone to negotiate PTAs due to the specific demands of domestic actors (namely IPR-intensive industries), which are more willing to capitalize on the advantages of preferential arrangements in order to disseminate higher standards of IPR protection and enforcement. Second, the fragmented nature of PTAs expectedly results in broad variations of TRIPS-Plus standards across the preferential areas. However, both governments and the private sector will still favour this setup because, as PTAs tend to induce Most Favoured Nation (MFN) effects consistent with the TRIPS Agreement, they are unlikely to undermine the IPR protection requirements already achieved at the multilateral level but still leave room for the promotion of higher standards in individual markets.

In order to illustrate these arguments, we focus on the process through which the United States engaged in a new policy of preferential trade relations with Latin American countries since the enactment of the US Trade Promotion Authority Act of 2002. For that purpose, the article begins by reviewing the theoretical underpinnings behind the proliferation of PTAs, and discusses how the rise of an

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1 TRIPS Agreement, Art. 1(1).

2 For a comprehensive review of this debate, *see* Alessandro Antimiani & Luca Salvatici, *Regionalism versus Multilateralism: The Case of the European Union Trade Policy*, 49(2) J. World Trade 253 (2015); L. E. Trakman, *The Proliferation of Free Trade Agreements: Bane or Beauty?* 42(2) J. World Trade 367 (2008).

3 For earlier perspectives on this argument, *see* Carsten Fink, *Intellectual Property Rights*, in *Preferential Trade Agreement Policies for Development: A Handbook* Ch. 18 (Jean-Pierre Chauffour & Jean-Christophe Mau eds, World Bank 2011); Ermias Biadgleng & Jean-Christophe Maur, *The Influence of Preferential Trade Agreements on the Implementation of Intellectual Property Rights in Developing Countries: A First Look*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 33 (Nov. 2011); Yi Shin Tang, *The International Trade Policy for Technology Transfers: Legal and Economic Dilemmas on Multilateralism versus Bilateralism* (Kluwer Law International 2009).

IPR agenda turned them distinctively appealing for a number of states. It then examines the domestic and international circumstances under which the United States eventually refocused its trade policy towards Latin American countries, by investigating the active role of the local IPR industries as well as its frustrated experiences in the WTO and in other regional initiatives. In the next section, we evaluate the outcomes of such strategy by examining the content of IPR provisions in the resulting PTAs. This is done through a comprehensive analysis between the IPR chapters of all US-Latin America PTAs, in order to assess the extent and variations to which those provisions achieved the TRIPS-Plus goals intended by the new US trade policy. Finally, the article concludes with some implications for US-Latin America relations and the understanding of preferential strategies.

2 THE IMPACT OF IPRS ON THE CHOICE OF PREFERENTIAL TRADE AGREEMENTS

While the motivations that have increasingly driven states to adopt PTAs are a matter of fierce debate in the literature, it is a fact that such instruments have been broadly tolerated by the WTO system since its inception. The first reason is that the General Agreement on Tariffs and Trade (GATT) has always authorized them under Article XXIV, provided that they effectively facilitate trade between their respective members and do not raise trade barriers with other WTO members.[4] The second is that the Committee on Regional Trade Agreements (CRTA), established by the WTO with a view to assess the consistency of PTAs with the conditions of Article XXIV,[5] has been unable to review the overwhelming majority of PTAs and has never opposed any of them, partly due to the lack of enthusiasm from WTO members to have any rigorous standards defined on this issue.[6]

Regardless of how the WTO system has evolved to become remarkably lenient on PTAs, different interpretations have emerged as to why states eventually decide to pursue them. These theories essentially comprise the following:

(1) subsequent stalemates in the Doha Round of negotiations have forced states to explore escape clauses from the WTO[7];

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4 GATT, Art. XXIV(4)(5).

5 WTO, Decision on the Committee on Regional Trade Agreements, WT/L/27 (7 Feb. 1996).

6 Petros C. Mavroidis, *WTO and PTAs: A Preference for Multilateralism?* 44(5) J. World Trade 1149 (2010).

7 Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 Intl. Org. 829, 831 (2001).

(2) strong distributional problems began to take place among WTO members as gains from cooperation became gradually more unbalanced[8];
(3) trade powers such as the United States and the European Union (EU) benefit from asymmetric positions in PTAs, where they can advance their regulatory preferences in countries that are more vulnerable under bilateral negotiations[9];
(4) states regard PTAs as 'WTO facilitators': provided they are consistent with Article XXIV, PTAs are 'building blocks' that promote multilateral goals, by encouraging the extension of preferences to all other WTO members in the long run[10]; and
(5) PTAs provide enhanced trust by enabling credibility threats and direct retaliations.[11]

Whether any of these arguments prevail in explaining the rising influence of PTAs remains a subject of relentless investigations. However, a common approach among them is how they seem to overgeneralize the nature and complexity of trade liberalization agendas in their analyses. While most explanations have (legitimately) focused on problems arising out of negotiation standoffs, they are also excessively based on evidence from impacts on tariff reductions and on the free movement of goods and services.[12]

In contrast, the liberalization of trade-related aspects of IPRs cannot be easily measured by such impacts. Although a strong association between trade interests and the protection of IPRs has been enabled by the TRIPS Agreement and the single undertaking principle of the WTO in 1995, it was only from that moment that such a relationship became clearly established.[13] In fact, the rationale behind the liberalization of trade-related IPRs is notably different from the traditional GATT commitments: while the TRIPS Agreement aims at progressively expanding the scope of regulations under which IPRs can be protected from unauthorized

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8 Kamal Saggi & Halis Yildiz, *Bilateralism, Multilateralism, and the Quest for Global Free Trade*, 81(1) J. Intl. Econ. 26 (2010).
9 Jaime de Melo, *Regionalism and Developing Countries: A Primer*, 41(2) J. World Trade 351 (2007).
10 Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in *New Dimensions in Regional Integration* Ch. 2 (Jaime De Melo & Arvind Panagariya eds, Cambridge University Press 1993); Antimiani & Salvatici, *supra* n. 2.
11 Alan Winters & Maurice Schiff, *Regional Integration and Development* (Oxford University Press 2003).
12 Recent studies also suggest that 'deep integration' agendas have been increasingly responsible for PTAs, rather than tariff preferences. *See* Mavroidis, *supra* n. 6, at 1146; Henrik Horn, Petros C. Mavroidis & Andre Sapir, *Beyond the WTO: An Anatomy of the EU and US Preferential Trade Agreements*, 33(11) World Economy 1565–1588 (2010).
13 Donald P. Harris, *TRIPS' Rebound: An Historical Analysis of How the TRIPS Agreement Can Ricochet Back Against the United States*, 25 N.w. J. Intl. L. & Bus. 99, 104 (2005).

use, GATT concessions normally seek to eliminate as many tariffs and regulations as possible for the sake of free movement.[14]

Such an awkward position of IPRs in the trade liberalization agenda has significant implications for making PTAs a particularly valuable strategy as compared to other trade sectors. First, preferential concessions on IPRs tend to produce natural MFN effects, since the application of various IPR regimes according to the country of origin would be impracticable and economically costly for the conceding country.[15] Consequently, governments interested in protecting IPR-intensive industries in foreign markets perceive a significant advantage in PTAs, since they can more effectively obtain the objectives of multilateral liberalization, but with less negotiation costs and by exploiting bilateral asymmetries.[16] At the same time, states that are not IPR-intensive, namely developing and least-developed countries (LDCs), are unlikely to offer significant resistance on this agenda, since the economic benefits from the full package of PTA commitments would be sufficiently large to offset their IPR concessions.[17] For similar reasons, PTAs can also serve as enforcers of other multilateral obligations: for instance, as detailed at section 4.1 below, PTAs often require members to adopt other multilateral treaties not originally required by the TRIPS Agreement.

Second, PTAs are more effective in incorporating recent developments in IPR regulation, a critical issue in the context of constant technological and economic changes that require an offensive agenda for the protection of innovations.[18] As further examined at section 4.2, a large part of IPR provisions in PTAs concerned the protection of Post-TRIPS technologies that soon became economically important. Furthermore, because the uncharted nature of innovations precisely results in unforeseeable consequences from both social and economic perspectives, their regulation through IPRs frequently requires successive adjustments. PTAs, in this context, provide significant advantages for quickly disseminating legal amendments across other markets by making use of regular bilateral meetings.[19]

Finally, while enhanced credibility threats constitute a general advantage of PTAs, they seem to be particularly vital for IPRs in terms of enforcement

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[14] Arvind Panagariya, *TRIPS and the WTO: an Uneasy Marriage*, in *The WTO, Intellectual Property Rights and the Knowledge Economy* Ch. 2 (Keith Maskus ed., Edward Elgar Publishing 2004).

[15] Fink, *supra* n. 3, at 389; Biadgleng & Maur, *supra* n. 3, at 4.

[16] Tang, *supra* n. 3, at 169.

[17] Developing countries had actually followed this reasoning during the Uruguay Round of negotiations. *See* Jerome H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 Fordham Intell. Prop. Media & Ent. L.J. 171, 176 (1993).

[18] Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS, and Post-TRIPS Strategies*, 10 Cardozo J. Intl. & Comp. L. 79, 98 (2002).

[19] Biadgleng & Maur, *supra* n. 3, at 4.

measures. The reason is that, more vigorously than in other trade sectors, IPR owners actively seek to influence in the design of mechanisms they consider more adequate for safeguarding their economic interests.[20] It is often argued that IPR-intensive industries tend to be remarkably organized and cohesive in voicing their demands to their respective governments, so that these are more likely to pursue negotiation strategies that will satisfy the expectations of those sectors.[21] At the same time, the demands from IPR industries typically exceed the obligations of the TRIPS Agreement, including the expansion of private enforcement mechanisms, border control measures and the range of patentable subject matters. As a result, governments become more prone to negotiate PTAs, since they are regarded by IPR owners as the most aggressive drivers for pushing reforms in markets that historically lacked high levels of IPR enforcement.

The above considerations indicate that the frustrations from both IPR industries and their respective governments with the multilateral forum have jointly contributed to a growing belief in preferential strategies as a form of promoting TRIPS-Plus standards. In the following sections, these arguments are tested by looking at how the United States gradually expanded its preferential trade policies in Latin America.

3 PREFERENTIAL STRATEGIES AND TRIPS-PLUS AGENDA IN THE US TRADE POLICY

The domestic legal basis for a gradual shift of the United States towards PTAs was the Bipartisan Trade Promotion Authority Act of 2002 (hereinafter '2002 TPA'), enacted as part of the broader US Trade Act of 2002 during President G.W. Bush's term.[22] Previously (and still commonly) known as the 'fast track' authority, the 2002 TPA granted special powers to the President to promote trade agreements with other states, mainly executed by the Office of the United States Trade Representative (USTR). Among such powers, it was established that trade agreements negotiated and concluded by the President under the 2002 TPA could be fully approved or rejected by the Congress, but not amended or re-discussed.[23] Therefore, the 2002 TPA represented the Congress's commitment to legislate expeditiously on the implementation of trade agreements concluded by the

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[20] Paul C. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations & Special 301 Actions*, 13(1) UCLA Pac. Basin L.J. 87 (1995).

[21] Sell, *supra n.* 18, at 81.

[22] US Trade Act of 2002, Division B, ss 2102–2113.

[23] US Trade Act of 2002, s. 2105(a)(1). *See also* Joachim Becker & Wolfgang Blaas, *Conclusions: Doha Round and Forum-Switching in Strategic Arena Switching* in *International Trade Negotiations* Ch. 9, 275 (Joachim Becker & Wolfgang Blaas eds, Ashgate 2007).

Executive Office, by adopting a procedure with strict deadlines, no amendments and very limited opportunity for debate.[24]

The central objective behind the 2002 TPA was to facilitate the conclusion of trade agreements by temporarily allowing the President and the USTR to negotiate them without depending on lengthy checks by the legislative branch. However, this mechanism was not meant to entirely neutralize congressional powers, as the 2002 TPA also established that the USTR was required to continuously consult with the Congress's committees (mainly through the bipartisan Congressional Oversight Group) and to report to them at major stages of negotiations.[25] More importantly, the Congress was not giving absolute discretion to the USTR on how to handle and determine the country's trade policy, given that this mandate was contingent on the Executive Office meeting certain statutory objectives.

The first aspect of this conditional power was that the 2002 TPA meticulously elaborated on the goals and contents that should be pursued by the USTR during the negotiation of trade agreements, and this is precisely how the agenda of a TRIPS-Plus framework became central for the new US trade policy. By acknowledging IPRs as one of the building blocks of the US economy, the 2002 TPA expressly mandated that trade agreements should be promoted in order to maximize opportunities in this area.[26] Accordingly, specific guidelines were stipulated for increasing the level of IPR protection across all markets, including: the full implementation of the TRIPS Agreement among all US partner countries; to ensure that trade agreements reflect a similar level of IPR protection than the one existing in the United States; to protect new and emerging technologies; to respect the Declaration on the TRIPS Agreement and Public Health[27]; and to ensure a strong enforcement of IPRs, namely through the use of 'accessible, expeditious, and effective civil, administrative, and criminal mechanisms'.[28]

The second aspect was that the adoption of preferential trade strategies became clearly recognized as a complementary, if not more important alternative to the current multilateral efforts. Under the 2002 TPA, the President was obliged to ensure that the provisions of 'any multilateral or bilateral trade agreement governing IPRs that is entered into by the US reflect a standard of protection similar to

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[24] Lenore Sek, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, CRS Issue Brief IB10084 (Washington, DC: United States Congressional Research Service, 14 Jan. 2003).

[25] US Trade Act of 2002, s. 2107. *See also* Susan Schwab et al., *The Proliferation of Regional Trade Agreements: (Re-)Shaping The Trade Landscape with Multilateralism on Pause*, 107 Proceedings of the Annual Meeting (American Society of International Law) 447, 461 (2013).

[26] US Trade Act of 2002, s. 2101(b)(2).

[27] *See* s. 3.1 *infra*.

[28] US Trade Act of 2002, s. 2102(a)(4)(A).

that found in US law'.[29] This seems to have been essentially worded so that the multilateral forum of the WTO, even if still considered a key avenue, was no longer exclusive nor necessarily a priority for the US trade policy in comparison with bilateral and regional strategies, since these could achieve similar or even better outcomes for the protection of IPRs.[30] The concrete circumstances under which the United States had increasingly reinforced this view, with fundamental consequences for its trade and IPR relations with Latin America, are detailed below.

3.1 Difficulties at multilateral level

While the position of IPRs in the WTO agenda has always been subject of significant controversy among its members,[31] the Doha Round marked an unprecedented period of division on this issue, not only between developing and developed countries, but also within these coalitions. Exacerbating this dispute, a stalemate on other sensitive topics, namely on agricultural subsidies and the so-called Singapore issues (i.e. government procurement, investments, competition rules and trade facilitation) greatly contributed to foster increasingly sceptical views from the United States on the future of the multilateral trade system.[32]

The United States was already holding very low expectations at the beginning of the Doha Round, where preserving the existing levels of IPR protection established by the TRIPS Agreement would be just considered a positive outcome.[33] However, even this stance had been fiercely opposed by developing countries, which intended to reinforce the flexibility and exceptions provided by that Agreement. The most important manoeuvering in this direction was the adoption of the Declaration on the TRIPS Agreement and Public Health in November 2001, and its final text became notably more aligned with the interests of developing countries than of the United States and other developed countries.[34] The Declaration stressed the right of WTO members to declare public health emergencies whenever deemed necessary, as well as the imposition of compulsory

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29 US Trade Act of 2002, s. 2102(b)(4)(A)(i)(II).

30 Fink, *supra* n. 3, at 390.

31 John J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* 130–131 (Cambridge University Press 2009).

32 Nitsan Chorev, *Political and Institutional Manoeuvres in International Trade Negotiations: The United States and the Doha Development Round*, in *Strategic Arena Switching in International Trade Negotiations* Ch. 2 (Joachim Becker & Wolfgang Blaas eds, Ashgate 2007).

33 *Ibid.*, at 34.

34 Susan K. Sell & Aseem Prakash, *Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights*, 48 Intl. Stud. Q. (2001).

licensing for patented medicines in these circumstances.[35] In addition, the Declaration urged WTO members to lay down technical solutions so that countries with insufficient manufacturing capacity in the pharmaceutical sector could benefit from those rights.[36] Finally, LDCs were exempted from implementing or applying the TRIPS Agreement's rules on patents of pharmaceutical products until 1 January 2016.[37]

The United States also had difficulties regarding other IPR aspects in the WTO. For instance, the United States (together with Japan and Switzerland) supported a proposal submitted by the EU to the TRIPS Council in 2005 to amend Article 51 of the TRIPS Agreement, which would extend its scope of application to goods in transit and allow their seizure for IPRs infringements, as well as to review enforcement measures in order to fight piracy and counterfeiting.[38] However, developing countries resisted these proposals and insisted on their need to take advantage of the existing flexibilities in the TRIPS Agreement, resulting in the eventual exclusion of the EU proposals from the Doha Agenda in 2008.[39] It is worth noting that the United States also had to deal with differences with other developed countries in the meantime: for example, the EU and the United States continuously disagreed on criteria for geographical indications, while Canada contrasted with most The Organisation for Economic Co-operation and Development (OECD) countries in arguing for some flexibility in the TRIPS Agreement.[40]

Frustrations with WTO negotiations reached their peak in the 2003 Cancun ministerial meetings and became a turning point for the United States to start considering PTAs as the primary strategy for avoiding the collective problems involving both developed and developing countries. This was particularly evidenced by statements from the US Trade Representative at that time, who repeatedly warned that the United States would start seeking institutional alternatives in order to achieve the objectives where the WTO failed.[41] In addition, the unsuccessful attempts to revise the WIPO Copyright Treaty (WCT) and the

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35 WTO, Declaration on the TRIPS Agreement and Public Health (DTAPH), WT/MIN(01)/DEC/2 (20 Nov. 2001), para. 4–5.

36 DTAPH, para. 6. *See also* WTO, Implementation of Para. 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (1 Sept. 2003).

37 DTAPH, para. 7.

38 Anna G. Micara, *TRIPS-Plus Border Measures and Access to Medicines*, 15 J. World Intell. Prop., 73, 89 (2012).

39 Carlos M. Correa, *The Push for Stronger Enforcement Rules: Implications for Developing Countries*, in *The Global Debate on the Enforcement of Intellectual Property Rights and Developing Countries* Part 2, 37 (Carsten Fink & Carlos M. Correa eds, ICTSD 2008).

40 Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* 115 (Oxford University Press 2009).

41 Chorev, *supra* n. 32, at 34–35.

WIPO Performances and Phonograms Treaty (WPPT) (both from 1996) seem to have also contributed to motivate the US' strategy towards PTAs: as the World Intellectual Property Organization (WIPO) had shown little success in revising these treaties, the United States believed that PTAs could serve to build momentum for future rounds of negotiations in this and all other IPR multilateral forums.[42]

In sum, PTAs became increasingly valued by the United States for their potential to minimize the influence of developing countries in multilateral negotiations. By inserting IPRs chapters in preferential treaties, it aimed at expanding the level of IPR protection originally set forth by the TRIPS Agreement, thus effectively identifying PTAs as a mechanism for inducing TRIPS-Plus standards. The United States hoped to achieve this objective by, among other measures, limiting potential exclusions from patentability, obtaining patents for new applications of known compounds, patent term extensions, preventing parallel importation, limiting the grounds for compulsory licenses, and allowing prosecution for claims related to non-violation nullification or impairment of benefits granted by the TRIPS Agreement.[43]

3.2 Lessons from previous regional efforts

The decision of the United States to focus its trade policy in favour of PTAs also derived from its previous experiences with regionalization, from which it learned that it could not only be difficult to find a common ground with developing countries but, most importantly, directly confronting regional powers (especially those aspiring to be so) might also be a fatal strategy.

The negotiation of the Free Trade Area of the Americas (FTAA) was perhaps the most important lesson taken in that context. This treaty, which aimed at gathering all countries of the Americas except Cuba, fell apart after excruciating negotiations between 1994 and 2005. While the initial ambitions of the FTAA were to cover a broad range of trade topics without the multilateral costs of the WTO, the Brazilian government headed an intense effort to undermine its negotiations, by pushing for a framework that would exclude IPRs, services, investment and public procurement.[44] Reflecting these hindrances, FTAA

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42 Álvaro Díaz, *América Latina y el Caribe: La Propiedad Intelectual Después de los Tratados de Libre Comercio* 89 (United Nations 2008).

43 Pedro Roffe, *Intellectual Property and the New Generation of Free Trade Agreements: The Agreement Between Chile and the United States of America*, in *Knowledge Generation and Protection* Ch. 4, 85 (Jorge M. Martínez-Piva ed., Springer 2010).

44 Rubens Antonio Barbosa, *The Free Trade Area of the Americas and Brazil*, 27(4) Fordham Intl. L. J. 1017 (2003).

negotiations completely stalled and the United States was compelled to accept a narrower agenda in the Eighth FTAA Ministerial Meeting in 2003.

The United States, frustrated with the prospects of a watered-down agreement, virtually ceased any further negotiations of the FTAA in 2005. However, even if an agreement at a continental level proved as much unfeasible as in the WTO, the United States also realized that the original objectives of the FTAA could still be achieved it they were sought with even fewer states and by avoiding any player that could represent a significant threat to its conclusion. This perception triggered specific foreign trade actions by the USTR in the Andes, the Central American countries and the Caribbean,[45] resulting in PTAs that closely resemble the original framework of the FTAA and even provide express references to its objectives.[46]

Other initiatives allowed the United States to learn that regional negotiations would only work under very low collective costs, more aligned interests than those found in the FTAA, and by introducing specific legal mechanisms that could progressively expand its membership. For instance, the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) in 2011 seems to have been much more successful since it not only restricted the number of members, but these were mostly composed of developed countries,[47] as well as of a narrower subject aimed at setting higher benchmarks for IPR enforcement.[48] The ACTA also represented a new strategy by making use of an accession mechanism, in which other states were allowed to join later on a voluntary basis, thus avoiding the difficulties of negotiating a treaty with higher standards of IPR protection through multilateral forums.[49]

3.3 Market access and pressures from the domestic industry

Given that the United States had historically held a negative balance of trade with Europe and East Asia, there was a growing perception that the USTR should seek to compensate these losses with surpluses in other regions. This became an important drive for the United States to pursue greater influence in markets where it already maintained strong positions, namely in Latin American countries.[50] Consequently,

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45 Chorev, *supra* n. 32, at 51.

46 In the US-Panama Trade Promotion Agreement (*see infra* n. 61), for example, it is stated in its Preamble that the treaty aims to 'contribute to hemispheric integration and provide an impetus toward establishing the Free Trade Area of the Americas'.

47 *See Anti-Counterfeiting Trade Agreement* (1 Oct. 2011), https://www.ipi.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html (accessed 15 July 2016).

48 Micara, *supra* n. 38, at 117. *See also* ACTA, *supra* n. 47, at Preamble.

49 Deere, *supra* n. 40, at 117.

50 Becker & Blaas, *supra* n. 23, at 274.

the USTR displayed a particular impulse to obtain preferential treatments in these markets, in order to secure even more privileged access for US businesses.

It is true that industry associations and individual companies have long maintained a strong influence in the US trade policy, especially by being allowed to directly petition the USTR to take trade actions against foreign governments.[51] However, the pressures from the private sector to preserve and expand their positions in developing markets were particularly intense for the case of IPR-related industries. The level of organization and influence exerted by this sector on the USTR was first evidenced during the negotiations of the Declaration on the TRIPS Agreement and Public Health, where the views of major pharmaceutical businesses were vigorously voiced by US diplomats.[52] However, such complicity became even more explicit during the negotiations of PTAs with Latin American countries.[53] In fact, one of the committees that assisted the USTR specifically comprised representatives from pharmaceutical, biotechnology, entertainment, publishing and software companies, which categorically mandated the USTR to pursue TRIPS-plus standards in those PTAs.[54] Evidence also suggests that donations from pharmaceutical companies to US political parties strongly influenced the choices made by the USTR during the negotiations of IPRs provisions in PTAs with Latin American countries.[55]

3.4 Inconsistent IPR practices among Latin American countries

Finally, the USTR was particularly concerned with the level of obsoleteness and inconsistency among certain IPR practices of most Latin American states. While administrative, judicial and civil procedures devoted to the protection of IPRs were generally present in those countries, they were largely deemed inefficient and to be displaying various degrees of conformity with the ongoing developments in digital technology. As a consequence, the USTR not only aimed at using PTAs as a strategy to reduce transaction costs and achieve greater procedural predictability for its IPR industries in Latin American markets, but especially to prevent them from adopting other regulatory models that were still developing for such new technologies. The provisions on compliance and effective technological measures (ETMs), detailed at section 4.2[b] below, clearly illustrate this situation. Since ETM provisions are not directly covered by the WIPO or the TRIPS agreements,

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51 US Trade Act of 1974, s. 301. *See also* Sell, *supra* n. 18, at 82.
52 Chorev, *supra* n. 32, at 41.
53 Díaz, *supra* n. 42, at 89.
54 Susan K. Sell, *TRIPS-Plus Free Trade Agreements and Access to Medicines*, 28 Liverpool L. Rev. 41, 42 (2007).
55 *Ibid*., at 52.

the United States intended to maximize their presence through PTAs, as well as to ensure that they were as much similar as possible to the US standards.[56] In fact, among all IPRs chapters in US-Latin America PTAs reviewed for this article, nearly half of them were focused on compliance and ETM provisions.

4 KEY LEGAL IMPLICATIONS IN US-LATIN AMERICA PREFERENTIAL TRADE AGREEMENTS

Although the US Congress originally intended the 2002 TPA to remain in force only until July 2005, an extension was granted for two additional years by request of the Executive Office.[57] As a result, the USTR, then controlled by Republican President G.W. Bush, achieved the negotiation of PTAs with the following countries: Chile, Laos and Singapore in 2003[58]; Australia, Bahrein, Morocco and the CAFTA-DR in 2004[59]; Colombia, Oman and Peru in 2006[60]; and South Korea and Panama in 2007.[61] Therefore, among the eighteen states that established PTAs with the United States during the fast track authority, a large majority is from Latin America (ten countries) while only three (Australia, Singapore and South Korea) are indisputably considered developed countries in the WTO.

The initial expectation was that all these treaties would be swiftly ratified by the Congress, thus reflecting the ongoing orientation of the USTR in favour of high TRIPS-Plus standards. However, the US midterm elections in 2006 resulted in a large victory of the Democratic Party in both houses of the Congress, leading to a halt to the trade deals pursued by the USTR. Consequently, in May 2007, the new Congress successfully forced the Executive to jointly review all trade agreements that were still pending ratification (i.e. with Peru and Colombia), as well as several items of other trade agreements that were still under negotiation (i.e. with Panama and South Korea).

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56 Díaz, *supra* n. 42, at 100, 167.

57 US Trade Act of 2002, ss 2103(a)(1)(A) and 2103(c). *See also* US Congress House of Representatives, Request for an Extension of Trade Promotion Authority Procedures (5 Apr. 2005).

58 US-Chile Free Trade Agreement [US-Chile FTA] (6 June 2003); Lao-US Trade Relations Agreement (1 Sept. 2003); US-Singapore Free Trade Agreement (6 May 2003).

59 US-Australia Free Trade Agreement (18 May 2004); US-Bahrain Free Trade Agreement (14 Sept. 2004); US-Dominican Republic-Central America Free Trade Agreement [CAFTA-DR] (28 May 2004). The CAFTA-DR comprises the following members: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic, and the US.

60 US-Colombia Trade Promotion Agreement [US-Colombia TPA] (22 Nov. 2006); US-Oman Free Trade Agreement (19 Jan. 2006); US-Peru Trade Promotion Agreement [US-Peru TPA] (12 Apr. 2006).

61 US-South Korea Free Trade Agreement (30 Jun 2007); US-Panama Trade Promotion Agreement (28 June 2007) [US-Panama TPA].

The most important impact of such revisions involved some relaxation of the IPR obligations.[62] In particular, the Democrats-controlled Congress finally embraced the discourse of the Declaration on the TRIPS Agreement and Public Health of 2001, thus pushing the USTR to give more concessions on public health and access to medicines. In fact, the Congress stressed that any PTAs pursued by the United States should now ensure that developing countries 'are able to achieve an appropriate balance between fostering innovation in, and promoting access to, life-saving medicines'.[63] Therefore, these changes had to include more flexible rules on the protection of pharmaceutical test data, on the processing of patent and marketing approval applications, and on the enforcement of patent infringement provisions.[64]

Consequently, the complex interactions between the United States domestic political processes and its negotiations with other states – particularly with Latin American countries – have jointly contributed to a varied insertion of IPR rules among the resulting PTAs, indicating that different degrees of TRIPS-Plus standards have arisen out of the preferential trade strategies adopted by the United States. In the following subsections, we explore the nature and extent of those variations by comparing the IPR chapters of all PTAs between United States and Latin American countries signed during the fast track authority, and which are currently in force.[65] In order to assess the degree to which they amount to TRIPS-Plus standards, we adopt the TRIPS Agreement as a comparative reference and evaluate each PTA according to the extent to which they exceed the minimum requirements set forth by that multilateral treaty.

4.1 Obligations on collateral IPR agreements

All analysed PTAs contain clauses requiring its members to ratify seven additional treaties on IPRs: the Patent Cooperation Treaty (PCT) (1970, as amended in 1979); the Convention Relating to the Distribution of Programme-Carrying

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[62] The agreements with Peru and Colombia were amended in 2007. The agreements with Panama and South Korea were only concluded after achieving the modifications demanded by the US Congress.

[63] USTR, *Bipartisan Agreement on Trade Policy* (10 May 2007), at 3, http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf (accessed 15 July 2016).

[64] *Ibid*., at 3.

[65] In addition to those PTAs, the US concluded twenty-seven Trade and Investment Framework Agreements (TIFAs) during the 2002 TPA, which are merely strategic frameworks for further dialogue on trade and investment issues, with no binding obligations but which may eventually lead to full PTAs. The US also concluded a Bilateral Investment Treaty with Uruguay in 2005, which merely contains general references to IPRs and the TRIPS Agreement. *See* UNCTAD, *International Investment Agreements Database*, http://investmentpolicyhub.unctad.org/IIA (accessed 15 July 2016). Finally, the Trans-Pacific Partnership (TPP Agreement) was negotiated under a new fast track authority (the Bipartisan Congressional Trade Priorities and Accountability Act of 2015) and signed in Feb. 2016 with Chile, Peru and Mexico (among other countries in the Pacific area). However, the TPP is still not ratified and not yet in force, making it open for substantive changes similar to those that previously occurred in PTAs with Colombia, Peru and Panama.

Signals Transmitted by Satellite ('Satellites Convention') (1974); the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure ('Budapest Treaty') (1977, as amended in 1980); the International Convention for the Protection of New Varieties of Plants (UPOV) (1961, as amended in 1991); the Trademark Law Treaty (TLT) (1994); the WCT (1996); and the WPPT (1996).[66]

While the United States has always been party to all these collateral agreements, such clauses suggest an important harmonization effect among its Latin American counterparts, since the majority of them have also become members. In particular, almost all Latin American countries that joined the PCT, the Budapest Treaty and the TLT only did so after signing their respective PTAs. Some countries experienced a particularly strong impact: for instance, only after joining the CAFTA-DR the Dominican Republic became a member of all those treaties (except the Satellites Convention). The Table 1 summarizes these accessions by country and indicates whether they took place after a PTA was signed with the United States.

Table 1 US-Latin America PTAs: Dates of Accessions to Collateral IPR Treaties

	PCT	*Satellites Convention*	*Budapest Treaty*	*UPOV*	*TLT*	*WCT*	*WPPT*
Chile[67]	Mar/09★	Mar/11★	May/11★	-	May/11★	Apr/01	Apr/01
Colombia	Nov/00	Dec/13★	Feb/12★	-	Jan/12★	Nov/00	Nov/00
Costa Rica	May/99	Mar/99	Jun/08★	Dec/08★	Jul/08★	May/00	May/00
Dominican Republic	Feb/07★	-	Apr/07★	May/07★	Sep/11★	Oct/05★	Oct/05★
El Salvador	May/06★	Apr/08★	May/06★	-	Aug/08★	Oct/98	Oct/98
Guatemala	Jul/06★	-	Jul/06★	-	-	Nov/02	Oct/02
Honduras	Mar/06★	Jan/08★	Mar/06★	-	Jan/08★	Feb/02	Feb/02
Nicaragua	Dec/02	Dec/75	May/06★	-	Jun/09★	Dec/02	Dec/02
Panama	Jun/12★	Jun/85	Jun/12★	Oct/12★	Jun/12★	Mar/99	Mar/99
Peru	Mar/09★	May/85	Oct/08★	Jul/11★	Aug/09★	Jul/01	Apr/02
US	Nov/75	Dec/84	Sep/79	Jan/99	May/00	Sep/99	Sep/99

★ Acceded after Signing a PTA with the US.

[66] US-Chile FTA, Art. 17.1; CAFTA-DR, Art. 15.1; US-Colombia TPA, Art. 16.1; US-Peru TPA, Art. 16.1; US-Panama TPA, Art. 15.1.

[67] Chile joined the Budapest Treaty, WCT and WPPT, but was not obliged to do so under its PTA. *See* US-Chile FTA, Art. 17.1.

As seen above, it is true that several countries were already party to some collateral treaties before signing PTAs, which would indicate a certain redundancy of those clauses. Yet this type of obligation can be clearly regarded as a significant TRIPS-Plus measure. First, because they obliged members to accede to additional IPR treaties that are not referenced in the TRIPS Agreement.[68] Second, a termination or non-compliance with any of those treaties now also characterizes a violation of the respective PTA, thus creating an additional deterrence and legal cause for retaliation from other members and, particularly, from the United States.

4.2 Post-trips technologies

By the time it entered into force, the TRIPS Agreement did not explicitly address a number of recently developed technologies that would soon become disseminated and economically important. For this reason, US-Latin America PTAs took a central interest in covering these technologies with specific provisions that largely exceeded the standards provided in the WTO, as follows.

4.2[a] *Internet*

All PTAs have generally extended the scope of IPR provisions to digital contents. Although their most urgent goal was to make an express reference to the Internet, their provisions went further, particularly by establishing specific rights and obligations for Internet Service Providers (ISPs). For instance, while ISPs would not be held liable for unauthorized exchange and storage of protected content, they were obliged to build sufficient structure for receiving notifications of illegal content in their network and to eventually remove it.[69] ISPs should also provide the opportunity to hear persons accused of sharing illegal content, inform their identity to IPR owners, and to remove accounts of reoffenders.[70] Moreover, ISPs may be compelled by judicial order to delete specific domains or strive to block their access. In all cases, disputes involving copyrights and related rights shall be settled by the court where the ISP's headquarters are located.[71]

Another Internet-related issue regulated by those PTAs involves domain names, with the purpose of preventing trademark infringements. For this purpose, the parties agreed that disputes regarding Internet domain addresses must be settled

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[68] The following treaties are referenced in Art. 2 of the TRIPS Agreement: Paris Convention for the Protection of Industrial Property (1883), Berne Convention for the Protection of Literary and Artistic Works (1886); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961); and Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

[69] US-Chile FTA, Art. 17.11(23).

[70] CAFTA-DR, Art. 15.11(27).

[71] US-Peru TPA, Side letter on ISP (12 Apr 2006).

by their national technical bodies, based on procedures set forth by the Uniform Domain-Name Dispute-Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN).[72] Moreover, all PTAs require members to create databases with contact information of the registrars of Internet addresses.[73] Finally, these agreements prohibit the online retransmission of television signals without authorization of the IPR holder or its original broadcaster.[74]

4.2[b] *Effective Technological Measures*

ETMs are 'any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright'.[75] All PTAs have criminalized any activities that render such ETMs ineffective.[76] However, Chile's PTA provides an important exception by mandating that states shall consider whether the offence was motivated by specific scientific or educational purposes[77]; this seems to be a measure to allow lighter penalties or even their complete exemption.

4.2[c] *Rights Management Information*

Rights management information (RMI) is any information that identifies a work, performance, or phonogram, with specific details about their owner, author, performer or producer. RMI also informs the rights and conditions for the legal uses of such products. In this context, US-Latin America PTAs establish that unauthorized removals of RMI attached to the copy of a product protected by copyrights or related rights constitute criminal offences. The same applies to information displayed during public exhibitions.[78]

4.2[d] *Encrypted Satellite Transmissions and Television Signals*

All PTAs have criminalized the reception and sending of encrypted satellite signals without the broadcaster's authorization, and broadcasters affected by such offences

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72 E.g. US-Chile FTA, Art. 17.3(1); US-Panama TPA, Art. 15.4(1).
73 US-Colombia TPA, Art. 16.4(2).
74 E.g. US-Panama TPA, Art. 15.5(10). Chile is the only exception. *See* US-Chile FTA, Arts 17.5 and 17.6.
75 CAFTA-DR, Art. 15.5(7).
76 E.g. US-Peru TPA, Art. 16.7(4); US-Colombia TPA, Art. 16.7(4).
77 US-Chile FTA, Art. 17.7(5).
78 US-Peru TPA, Art. 16.7(5).

may initiate civil actions against offenders.[79] In particular, the Dominican Republic made even more specific commitments, such as to adopt measures to completely interrupt a given illegal broadcast by request of the IPR owner and prevent it from occurring again in the future, as well as to regularly report to the United States on measures taken to prevent unauthorized broadcasts.[80]

4.3 Copyrights and related rights

Copyrights usually refer to the rights of authors in literary and artistic works, while related rights are the rights of performers, producers of phonograms and broadcasting organizations.[81] Although the TRIPS Agreement extensively covers these aspects, US-Latin America PTAs are widely seen as a form of TRIPS-Plus measures due to their determination of significantly longer terms of protection. While the TRIPS generally establishes such period as the author's lifetime plus fifty years,[82] the PTAs define the protection of a copyright or related right as normally lasting the author's lifetime plus seventy years.[83] Moreover, all PTAs extend the protection of copyrights and related rights to contents that can be accessed by the public at specific time and locations,[84] indicating an awareness of the growing importance of content accessed through the Internet and portable devices.

Although the general pattern among these PTAs is the promotion of TRIPS-Plus standards, some peculiar features can be identified according to each negotiating country. For instance, Chile's PTA specifies the applicability of reciprocity rules in relation to the use of sound recordings in open and analogue radio broadcasting.[85] Peru and Colombia have also acknowledged the right to apply reciprocal treatment to foreign artists and publishers.[86]

Nevertheless, such variations have also resulted in occasional resistances against TRIPS-Plus standards. In this context, Colombia is the only country to reserve the right to ensure that audiovisual content produced in the country is readily available to Colombian consumers, when they are distributed through interactive audio and

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79 E.g. US-Colombia TPA, Art. 16.8(1); US-Panama TPA, Art.15.8(2).

80 CAFTA-DR, Annex 15.11. *See also* CAFTA-DR, US-Dominican Republic Letter on IPRs Procedures (5 Aug. 2004).

81 WIPO, *Understanding Copyright and Related Rights*, WIPO Publication No. 909(E) (2009), at 4, 16.

82 TRIPS Agreement, Art. 12.

83 CAFTA-DR, Art.15.5(4); US-Panama TPA, Art.15.5(4). An exception is found in Chile's PTA, which seems to limit the protection of related rights only to the author's lifetime. *See* US-Chile FTA, Art. 17.6(7). Chile's PTA is also the only treaty not specifying the minimum term for trademark protection (*see* Art. 17.2). In other PTAs, the minimum period is ten years (*see* CAFTA-DR, Art. 15.2 (9)), three more than the TRIPS Agreement (*see* TRIPS Agreement, Art. 18).

84 E.g. US-Peru TPA, arts. 16.5(4) and 16.6(6)(a).

85 US-Chile FTA, Art. 17.1(6).

86 US-Peru TPA, Annex II (schedule of Peru); US-Colombia TPA, Annex II (schedule of Colombia).

video services operated in its territory. However, whenever such measures imply discrimination against foreign companies, consent from their home state is required, together with trade-liberalizing compensation measures.[87] Some countries have also reserved the possibility to derogate the MFN principle in cases of international cultural cooperation.[88]

4.4 Test data and patentable subject matter on pharmaceuticals and agricultural chemicals

Test data is the technical information on the safety, effectiveness and quality of pharmaceuticals and agricultural chemicals that are being considered for marketing approval, as legally required by national health authorities.[89] Consequently, such information is highly valuable, due to the scientific and regulatory costs for obtaining them, as well as the opportunities they allow for accessing foreign markets.

Unlike the TRIPS Agreement,[90] US-Latin America PTAs provide detailed requirements for allowing the commercialization of products that depend on the use of proprietary test data, meaning that, without the data provider's consent, such products cannot be marketed. For instance, they establish that the period of exclusivity for the use of test data on agricultural chemical products must be of at least ten years.[91] Moreover, the agreements grant exclusive marketing rights to the original data providers located abroad,[92] although these might be required to actively request such rights.[93]

The PTAs have also established a compromise between public health and patent protection objectives. In this context, they allow the subject matter of a subsisting patent to be used for supporting applications to pharmaceutical marketing approvals, provided that such disclosure is strictly made to obtain such approvals. Therefore, products manufactured on the basis of such information cannot be introduced into the market, even if already approved by health

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87 US-Colombia TPA, Annex II (schedule of Colombia), at 14.

88 E.g. US-Chile FTA, Annex II (Chilean measures); US-Peru TPA, Annex II (Schedule of Peru).

89 Valbona Muzaka, *The Politics of Intellectual Property Rights and Access to Medicines* 114, 117 (Palgrave Macmillan 2011).

90 The TRIPS Agreement establishes that test data regarding agriculture chemicals and pharmaceuticals shall be protected against unfair commercial use, without any further details. *See* TRIPS Agreement, Art. 39(3).

91 E.g. CAFTA-DR, Art. 15.10(1); US-Peru TPA, Art. 16.10(1). Except for Colombia's and Peru's, all PTAs state that, if parties already have laws granting protection to such products for a period shorter than the defined by the treaties, the domestic rules can be maintained. *See* e.g. Chile FTA, Art. 17.10 (1).

92 E.g. CAFTA-DR, Art. 15.10(2); US-Colombia TPA, Art. 16.10(2).

93 US-Panama TPA, Art. 15.10(1).

authorities.[94] Moreover, whenever the subject matter is used for obtaining such approval, the original developer must be informed of the applicant's identity.[95]

The rules on the patentable subject matter for pharmaceutical products, as described above, were essentially devised in order to allow Latin American countries to accelerate the introduction of generic drugs into the market, as soon as the term of protection to the original medicine expires. Otherwise, a manufacturer would have to wait until the patent expiration to begin the production of a generic version of the original drug and only then start a lengthy approval by health authorities.[96] In contrast, Chile's agreement is uniquely restrictive, since it only allows pharmaceutical marketing approvals if the patent on the product has effectively expired.[97] Thus, not even authorization to market the product can be obtained while a patent is in force, which may delay the introduction of generic products into the Chilean market.

Notwithstanding the issues above, it is worth noting that a few PTAs also support the possibility of knowledge transfers between member states. In this sense, Peru's and Colombia's PTAs contain specific rules on cooperative projects of scientific research, which encourage partnerships between industries and research institutions. In order to facilitate the implementation and monitoring of these projects, members have each established national contact points.[98]

4.5 Variations resulting from public health issues

Although one of the purposes of the USTR in pursuing preferential treaties was to provide a balance against the Declaration on the TRIPS Agreement and Public Health, all Latin American countries have somewhat reaffirmed it in their respective PTAs.[99] For instance, all PTAs provide that members must adjust their obligations if the TRIPS Agreement becomes amended by effect of the Declaration, while reasserting that they may adopt measures to ensure access to medicines by their population.[100] However, none of such PTAs provides any clear guidelines for invoking this exception, so that any decision to apply it will likely rely on direct negotiations between its members.

Perhaps more importantly, the domestic factors in the United States also seem to have contributed to create important variations among the PTAs with Latin American countries. Namely, the agreements with Peru, Colombia and Panama

94 E.g. US-Colombia TPA, Art. 16.9(5); CAFTA-DR, Art. 15.9(5).
95 E.g. US-Peru TPA, Art. 16.10(4).
96 Roffe, *supra* n. 43, at 92.
97 US-Chile FTA, Art. 17.10(2).
98 US-Peru TPA, Art. 16.12; US-Colombia TPA, Art. 16.12.
99 E.g. US-Chile FTA, Ch. 17 (Preamble).
100 E.g. CAFTA-DR, Understanding Regarding Certain Public Health Measures (5 Aug. 2004).

present significant differences from Chile's and CAFTA-DR's treaties, probably as a consequence of the revisions demanded by the US Congress to the USTR in 2007.[101] For instance, while Chile's and CAFTA-DR's agreements set a specific protection period of five years for pharmaceutical test data, the agreements with Peru, Colombia and Panama were revised so that the period shall 'normally' be of five years.[102] This change is related to the US Congress' demand for a protection period not exceeding the one existing in the United States, and for the implementation of exceptions in developing countries when necessary to protect public health.[103] Likewise, only the PTAs with Peru, Colombia and Panama state that, in case of test data imported from a PTA member, market exclusivity periods granted to the importer shall be counted from date of the original license issued abroad rather than from the importing country.[104] Therefore, the actual protection period can be significantly reduced in those three countries.

All PTAs provide that patent holders shall be compensated for any delays in having their patents issued.[105] However, Peru's, Colombia's and Panama's agreements do not apply this rule to pharmaceuticals, due to the US Congress' demand that PTAs with developing countries shall be flexible on such delays.[106] Moreover, these three countries have not committed to extending the period of pharmaceutical patents due to delays in issuing marketing approvals.[107]

4.6 Genetic resources and traditional knowledge

The patenting over genetic resources and traditional knowledge is not generally forbidden by PTAs, but important conditions have been established in most of them. Peru's and Colombia's agreements provide that member states' authorities must always be consulted on patents that cover genetic resources, and shall create databases containing information affecting the patenting of inventions based on genetic resources and traditional knowledge.[108] Panama's PTA establishes that parties shall cooperate with WIPO on topics related to traditional knowledge and genetic resources, and shall consult with each other if any of them enters into an agreement on genetic resources or traditional knowledge with a third

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101 *See* s. 4 *supra*.
102 E.g. compare CAFTA-DR, Art. 15.10(1) with US-Peru TPA, Art. 16.10(2).
103 USTR, Bipartisan Agreement on Trade Policy, *supra* n. 63, at 3.
104 E.g. US-Colombia TPA, Art. 16.10(2).
105 US-Chile FTA, Art. 17.9(6); CAFTA-DR, Art.15.9(6).
106 E.g. US-Panama TPA, Art. 15.9(6).
107 E.g. US-Peru TPA, Art. 16.10(2).
108 US-Peru TPA, Understanding Regarding Biodiversity and Traditional Knowledge (12 Apr. 2006); US-Colombia TPA, Understandings Regarding Biodiversity and Traditional Knowledge (22 Nov. 2006).

country.[109] The CAFTA-DR does not establish any specific commitments on this topic, but recognizes the parties' right to preserve their genetic resources, even if they have committed to signing the UPOV.[110]

4.7 Enforcement of IPR provisions

Perhaps the most striking imprint of a TRIPS-Plus approach in US-Latin America PTAs is that a large part of their IPRs chapters exhaustively elaborates on enforcement measures. The first aspect of such measures was the introduction of several private enforcement mechanisms. For instance, Peru and Colombia's agreements explicitly provide IPR owners with the ultimate power to decide upon the destruction of pirated or counterfeit goods.[111] In the TRIPS Agreement, there seems to be a greater discretion to courts in determining such measure.[112] The PTAs also innovate by establishing that offenders must disclose the identity of other persons acting in the infringement as well as the distribution channels of illegal goods and services they are aware of, which shall all be informed to the respective IPR owners.[113] Chile's agreement is the only exception, as it does not require the disclosed information to be passed on to IPR holders.[114]

Second, customs authorities also acquired important responsibilities. Under the PTAs, members must allow their authorities to initiate border measures *ex officio* with respect to illegal merchandise, without the need for a formal complaint from a private party or right holder. Thus, authorities gained the discretion to suspend the exportation of counterfeit or pirated goods, or to refuse other customs procedures.[115] More importantly, each PTA member must ensure that its IPR-related customs regulations will also apply to goods in transit in its territory.[116] This provision is clearly more restrictive than the TRIPS Agreement: although the latter obliges customs authorities to order the destruction of seized counterfeit or pirated goods, it does not cover goods in transit.[117] Finally, the PTAs (except for Chile's) entitle courts to take preventive steps by ordering the cessation of activities that may result in IPR infringement even before they are concluded, including both domestic and cross-border activities.[118]

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[109] US-Panama TPA, Letter on Traditional Knowledge (28 June 2007).
[110] CAFTA-DR, Art. 15.1(5).
[111] US-Peru TPA, Art. 16.11(11); US-Colombia TPA, Art. 16.11(11).
[112] TRIPS Agreement, Art. 61.
[113] E.g. CAFTA-DR, Art. 15.11(12).
[114] US-Chile FTA, Art. 17.11(13).
[115] E.g. US-Colombia TPA, Art. 16.11(24); US-Peru TPA, Art. 16.11(24).
[116] E.g. Chile FTA, Art. 17.11(20); US-Panama TPA, Art. 15.11(23).
[117] TRIPS Agreement, Arts 51(fn. 13) and 59.
[118] E.g. US-Colombia TPA, Art. 16.11(16).

Third, the violation of copyrights and related rights (as well as trademarks on a commercial scale, even if the infringement was not for profit) became generally treated as criminal offences under all PTAs, thus allowing authorities to take *ex officio* actions including the imposition of fines or imprisonment.[119] However, Chile's, Panama's and CAFTA-DR's agreements exclude infringing activities with no significant financial harm from criminal investigation and from the obligation to pay compensatory damages.[120]

Finally, some PTAs provide more specific measures concerning technical enforcement cooperation between developed and developing countries, in furtherance of Article 67 of the TRIPS Agreement. Colombia committed to accelerate the analysis of pending patent requests by increasing the number and training of technical staff,[121] while the Dominican Republic has committed to speeding up the resolution of criminal offences concerning copyrights.[122] Chile's agreement provides unique cooperation measures, namely: educational projects on the use of IPRs; information exchange between the members' IPR offices; and the development and implementation of electronic systems for IPR management.[123]

5 CONCLUSION

The circumstances under which the United States had pursued preferential strategies since the demise of the Doha Round of the WTO are consistent with the argument that states, in order to sustain a viable cooperation on international trade issues, will seek to increasingly control the number of participants in trade-related institutions. Reflecting such perceptions, the United States went through intense domestic debates that culminated in the enactment of the 2002 TPA, which firmly mandated the USTR to consider the use of preferential negotiations in order to more effectively achieve market access and other liberalization objectives for its strategic industries. At the same time, the collapse of the FTAA negotiations seems to have directly influenced in consolidating the United States stance in favour of even smaller preferential arrangements with Latin American countries.

More importantly, the need to secure a greater protection of IPRs was a decisive factor for the United States to embrace PTAs as the leading strategy of its trade policy. The discussions on how to expand and reform IPR rules at the WTO level became an insurmountable point of contention among developed and developing countries,

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[119] E.g. US-Peru TPA, Art. 16.11(27).
[120] US-Chile FTA, Art. 17.11(22)(fn. 34); US-Panama TPA, Art. 15.11(26); CAFTA-DR, Art. 15.11 (26).
[121] US-Colombia TPA, Side Letter Concerning Patents and Certain Regulated Products (22 Nov. 2006).
[122] CAFTA-DR, Side letter on IPRs Procedures (5 Aug. 2004).
[123] US-Chile FTA, Art. 17.1(14).

especially in the aftermath of the Declaration on the TRIPS Agreement and Public Health in 2001. Consequently, one of the specific mandates of the 2002 TPA was that the USTR should seek trade agreements that would achieve more extended and specified prerogatives to its IPR-related industries. In fact, these sectors became one of the most consulted by the USTR during the negotiation of PTAs.

The resulting legal outcomes of these processes were examined at section 4 of this article, which have all but evidenced a successful use of PTAs as a strategy for promoting TRIPS-Plus standards among Latin American countries. The commitments undertaken under all US-Latin America PTAs have displayed either a clear TRIPS-Plus content or, at least, a complementary effect to the obligations of the TRIPS Agreement, including substantive rules on new technologies, copyrights and related rights, as well as on pharmaceutical and agricultural chemical products. Enforcement mechanisms were also a central issue in all PTAs, corroborating the explanations that preferential strategies are perceived as a more effective avenue for enhanced IPR protection.

Due to the fragmented nature of preferential trade interactions, certain differences emerged between the IPR chapters of the analysed PTAs, which were mostly related to the extent of the TRIPS-Plus measures, as well as to the public health exceptions claimed by some Latin American governments and the US Congress. However, such variations do not seem to undermine the TRIPS-Plus objectives intended by the United States. First, such PTAs are expected to facilitate further progress at the multilateral level: as detailed at section 2, countries already committed to PTAs are less likely to oppose future attempts to replicate similar standards in the WTO. Second, PTAs have also displayed significant harmonization effects, as they induce Latin American countries to adopt several other multilateral IPR agreements not originally required by the TRIPS Agreement (as seen at section 4.1 above). Finally, IPR provisions have a distinctive capacity to generate MFN effects, even if they are governed by PTAs: because IPR domestic legislation does not normally discriminate among IPR holders within its territory, nationals of all countries benefit from higher standards specified in PTAs.

TRIPS-Plus provisions are increasingly becoming a pervasive aspect of most PTAs.[124] However, while it is early to conclude that these instruments produce similar effects on other trade issues than IPRs, there is little doubt that they are now established as the most important drivers of market access for trade powers. The recent signature of the Trans-Pacific Partnership (TPP), even if not yet ratified among its partner countries, clearly reflects the trending belief that a comprehensive liberalization agenda is still a feasible ambition, but that will progressively shift its discussions from multilateral to preferential forums.

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[124] *See also* Biadgleng & Maur, *supra* n. 3, at 2.