THE IMPACT OF REGIONAL TRADE AREAS ON INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS

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I. INTRODUCTION

This paper seeks to explore the impact of Free Trade Areas ("FTA"s) and Customs Unions (collectively referred to as Regional Trade Areas, or "RTA"s) on both the developing world's intellectual property ("IP") concerns and on the principle of Most Favored Nation ("MFN") status. The aim of the General Agreement on Tariffs and Trade ("GATT") and its intellectual property specific sub-agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), is to facilitate free trade throughout the international economic community.[1] Both GATT and TRIPS call for National Treatment of signatory countries' goods and, even more importantly, MFN status for all signatory countries.[2] GATT and TRIPS have, for the most part, facilitated free trade through their requirements for national treatment and MFN, but there are exceptions created within each of those agreements that have proven to hinder free trade. For GATT, the largest exception is found in GATT Article XXIV ("Article XXIV"). Article XXIV creates exceptions for the requirements of MFN when a free trade area or customs union is created.[3]

By using the mechanism created in Article XXIV, GATT signatory countries are able to form RTAs that bestow benefits to other members of the RTA that are not given to non-members of the RTA, creating the clear possibility of abuse. Similarly, TRIPS contains an exception for MFN treatment contained in Article 4(d) of TRIPS ("Article 4(d)").[4] That provision states that there is an exemption from TRIPS's MFN requirements if there is a benefit

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1 Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS]; General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT 1947].

2 TRIPS, *supra* note 1, art. 4; GATT 1947, *supra* note 1, art. I(1).

3 GATT 1947, *supra* note 1, art. XXIV(5).

4 TRIPS, *supra* note 1, art. 4(d).

> deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.[5]

This "grandfather" provision, as explained below, allows countries that had a hand in drafting TRIPS to ensure that they could enjoy the benefits of TRIPS while circumventing MFN requirements if they were a party to a pre-existing agreement that dealt with intellectual property rights.

The question at hand, therefore, is well-summarized by Susy Frankel in her article, *WTO Application of "The Customary Rules of Interpretation of Public International Law" to Intellectual Property*, where she questions "whether third parties can use the multilateral MFN principle to obtain MFN status in relation to FTA obligations."[6] By examining various RTAs such as the North American Free Trade Agreement ("NAFTA") and the upcoming Free Trade Agreement of the Americas (the "FTAA"), this paper seeks to show that RTAs are undermining the principles of the Agreements of which they are a part by refusing to apply MFN principles and by forcing unfair intellectual property protections upon developing countries.

II. THE ESTABLISHMENT OF MFN PRINCIPLES

A. GATT Article I

GATT 1947, Article I(1), the backbone of modern MFN principles and of the WTO itself, requires signatory countries not to bestow any benefit upon the goods of one country without bestowing it upon all signatory countries.[7] That section states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and un-*

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5 *Id.*

6 Susy Frankel, *WTO Application of "The Customary Rules of Interpretation of Public International Law" to Intellectual Property*, 46 VA. J. INT'L L. 365, 417 (2006).

7 GATT 1947, *supra* note 1, art. I(1).

> *conditionally to the like product originating in or destined for the territories of all other contracting parties.*[8]

This language demonstrates that the clear intention of GATT 1947 is to have shared MFN benefits with all signatory countries.

To share MFN benefits, GATT seeks to lower international trade barriers and increase the free flow of goods between member countries. One trade barrier that GATT seeks to rectify is insufficient intellectual property protections, which discourage investment and the sale of goods to such countries.[9] Conversely, another barrier is stringent intellectual property protections. For instance, during the Uruguay Round of negotiation for GATT 1994, third world countries were afraid that TRIPS would create a "knowledge blockade," making it even more difficult to gain access to modern technology.[10] It is against this backdrop that these RTAs both create trade and divert it by misapplication of MFN principles.

B. TRIPS's MFN Provision: Article 4

TRIPS, as Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization ("WTO"), also contains an Article devoted to MFN treatment for all intellectual property provisions—TRIPS Article 4. MFN provisions are a relatively new concept in international intellectual property.[11] One justification for copyright protection, for instance, "might be to encourage creativity and innovation, but this differs from the overall objective of liberalizing trade."[12] MFN, however, has a different role in the area of intellectual property. As explained above, the goal of GATT and the WTO is to eliminate tariffs and non-tariff trade barriers, while TRIPS is a minimum legal standard treaty.[13] In the TRIPS context, "MFN requires that if a member provides a higher level of protection than that which the TRIPS Agreement mandates, a possibility that it endorses, then that member must provide that protection to all people from all members who seek protection of its intellectual property laws."[14]

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8 *Id.* (emphasis added).

9 Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate its Development*?, 16 B.U. INT'L L.J. 165, 185(1998).

10 *Id.* at 188–89.

11 Frankel, *supra* note 6, at 380–81.

12 *Id.* at 391.

13 *Id.*

14 *Id.* at 382–83.

"The governing thought behind the TRIPS Agreement is that it should take account of existing intellectual property regimes, rather than exist in a theoretical vacuum."[15] Article 2(2) of TRIPS specifically states that nothing in the first four parts of TRIPS shall change any existing obligation Member countries have towards one another under both Berne and Rome Conventions,[16] which has led to TRIPS protection being referred to as "Berne-Plus" protection.[17] While TRIPS is a minimum standards agreement, it does allow for a greater level of protection, which is referred to as "TRIPS-plus" protection.[18] TRIPS-plus protection allows developed countries, through their disparate bargaining power, to force greater IP protections upon developing countries, and to simultaneously decide when to apply MFN principles to extend this TRIPS-Plus protection to the countries that would actually benefit from the higher standards.[19]

III. GATT ARTICLE XXIV: EXEMPTING REGIONAL TRADE AREAS FROM APPLICATION OF MOST FAVORED NATION STATUS PRINCIPLES

Initially, GATT Article XXIV was created as a compromise "between globalist ideals and regionalist realities," with the idea that these regional arrangements would facilitate, and not undermine, global trade.[20] Article XXIV(4) states the policy reason behind creating such exceptions for RTAs:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.[21]

By 2004, more than half of all global trade was being performed through the use of RTAs.[22] Many feel that these RTAs are extremely discriminatory to poorer countries and "attack[] the [MFN] principle, which is the backbone of the multi-

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15 Caviedes, *supra* note 9, at 198.

16 TRIPS, *supra* note 1, art. 2(2).

17 Caviedes, *supra* note 9, at 199.

18 Frankel, *supra* note 6, at 383–84.

19 *See* Susan K. Sell, *TRIPS and the Access to Medicines Campaign*, 20 WIS. INT'L L.J. 481, 497 (2002).

20 Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39, 48 (2006).

21 GATT 1947, *supra* note 1, art. XXIV(4).

22 Cho, *supra* note 20, at 40–41.

lateral trading system . . . [and] tend to hijack the current WTO Doha Round negotiation by depriving poorer WTO Members of deserved attention and limited resources."[23]

In *The Customs Union Issue*, Jacob Viner surmises that Customs Unions and other RTAs have two effects on global trade: (1) an integrationist effect that ultimately creates trade; and (2) a disintegrationist effect which diverts global trade, the notion being that an RTA is good for the multilateral trading system when it has an integrationist effect and bad when it has a disintegrationist effect.[24] The WTO Secretariat described the boom in RTAs since 1994:

> The number of [RTAs] being negotiated has increased exponentially and their scope as well as their geographical reach have both broadened and expanded. The resilience of this trend is likely to intensify further as the few remaining countries traditionally favoring multilateral-only trade liberalization have initiated—or are actively considering—negotiations of several RTAs.[25]

It should also be noted that "[n]o RTA has ever been rejected for violating Article XXIV" of GATT.[26] Similarly, once an RTA passes the requirements of Article XXIV and is formed, there is no regulatory body to govern its behavior, as Article XXIV concerns only the *formation* of the agreements.[27]

Generally, where an RTA provision relates to intellectual property law that is covered by the TRIPS agreement, "the national treatment principle will work so that a third party national seeking intellectual property protection in one of the FTA party states has the benefit of the FTA protection, provided that the state in question gives that level of protection to its own nationals."[28] As Frankel explains, "[w]here part of the FTA relates to a matter beyond the coverage of the TRIPS Agreement, there can be no TRIPS Agreement national treatment or MFN obligation."[29] Article XXIV of GATT is not mentioned in the TRIPS agreement, and GATT does not have a corresponding section in TRIPS creating an exception for Article 4 of TRIPS (MFN) for FTAs.[30] However, TRIPS is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, which includes GATT 1994, and the two agreements are read

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23 *Id.* at 41.

24 *Id.* at 48.

25 *Id.* at 54.

26 *Id.* at 66.

27 *Id.* at 70.

28 Frankel, *supra* note 6, at 417.

29 *Id.*

30 *Id.* at 418.

together with all signatory members of one agreement also being members of the other agreement.[31]

The U.S. has been no stranger to the recent boom in RTAs, demonstrated by the fact that since 2000, the United States formed FTAs with Jordan, Singapore, Chile, Australia, Central American Countries (including Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua), Morocco and Bahrain.[32] Similarly, the United States is pursuing FTAs with Panama, Peru, Colombia, Bolivia, Ecuador, Malaysia, Oman, Korea, Thailand, the United Arab Emirates and the Southern African Customs Union members.[33] The United States Trade Representative, Robert Zoellick, specifically stated that the United States would pursue trade agreements with "can do" countries and not "won't do" countries."[34]

IV. THE USE OF RTAS TO DENY THE USE OF COMPULSORY LICENSES FOR PATENTS NECESSARY TO PROTECT DEVELOPING COUNTRIES' HEALTH

RTAs are heavily favored by developed countries for several reasons, such as the ability to force TRIPS-Plus protection for intellectual property onto developing countries in exchange for access to the developed countries' markets and easier access to the developed countries' goods. RTAs have a substantial impact not only on developing countries' economic rights and access to technology, but also on their most basic health care rights.[35] Pharmaceutical products have illustrated the "social welfare cost" to poor and developing countries that find themselves in RTAs.[36] Certainly TRIPS provides for protection of these pharmaceuticals, but it creates exceptions for countries that need the use of the product in question by allowing "compulsory licensing."[37] These licenses traditionally allow signatory countries under TRIPS (and, therefore, WTO member states) to produce generic versions of patented drugs without the consent of the patent owner in the case of a national health crisis.[38] By the use of

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31 Caviedes, *supra* note 9, at 191.

32 Cho, *supra* note 20, at 55.

33 *Id.*

34 Robert B. Zoellick, Op-Ed., *America Will Not Wait for the Won't-Do Countries*, FIN. TIMES U.K., Sept. 22, 2003, at 23. *See* Cho, *supra* note 20, at 55–56.

35 Cho, *supra* note 20, at 73.

36 *Id.*

37 *Id.*

38 *Id.*

RTAs, however, more developed and powerful economic states such as the United States have found ways around these compulsory licenses to prevent generics from being produced.[39]

In the U.S.'s more recent RTAs with developing countries, it has essentially put a five-year shield on producing generics of pharmaceuticals by prohibiting generic producers in the developing countries from using pre-existing safety testing data and requiring those producers to conduct the same tests themselves before getting approved.[40] Similarly, in the FTA between the United States and Morocco, that agreement has an "ever-greening" clause that extends the patent life of pharmaceuticals if any kind of "new use" for those drugs is discovered.[41] This overprotection has created enormous profits for the pharmaceutical industry by forcing the poor countries to pay high prices for the drugs they need to protect their domestic health.[42] The World Health Organization estimates that one-third of the world lacks access to essential drugs, with that number rising above fifty percent in portions of Asia and Africa.[43] In the case of more expensive medication, such as treatment for HIV and AIDS, "fewer than 5 per cent of people in the developing world in need of anti-retroviral treatment receive it. In sub-Saharan Africa, the figure is only 1 per cent."[44] The WTO, in the *Declaration on the Trips Agreement and the Public Health* (the "Doha Declaration"), clarified Article 31 of TRIPS in Paragraph 5(b), which stated, "Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."[45] As RTAs grant TRIPS-Plus protection, however, developed countries are able to increase the amount of protection to patents through the RTAs.[46]

In a letter to Robert Zoellick, the United States Trade Representative, Doctors Without Borders ("DWB") voiced its concerns over the intellectual

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39 *Id.*

40 *Id.* at 73–74.

41 *Id.*

42 *Id.* at 73.

43 Haochen Sun, *The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health*, 15 EUR. J. INT'L L. 123, 127 (2004).

44 *Id.*

45 World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

46 Sun, *supra* note 43, at 146 ("As of the time of writing this paper, the US is still aggressively pursuing TRIPS-plus agreements.").

property provisions in the proposed United States-Central American RTA ("CAFTA").[47] That letter stated, in part:

> [DWB] has good reason to believe that provisions in CAFTA related to intellectual property (IP) protection may result in needless suffering and death for our patients and millions of other people in the region with HIV/AIDS and other diseases, and undermine the historic World Trade Organization (WTO) Ministerial Declaration on the TRIPS Agreement and Public Health ("Doha Declaration").[48]

DWB explained in the letter that it was concerned mostly that the CAFTA would

> 1.Dramatically limit the circumstances under which compulsory licenses on pharmaceuticals may be issued;
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> 2.Extend patent terms on pharmaceuticals beyond the 20-year minimum in TRIPS;
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> 3.Confer abusive powers to regulatory authorities to enforce patents; and
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> 4.Grant exclusive rights over pharmaceutical data (data exclusivity).[49]

DWB stated that such limitations would greatly threaten the health and lives of large numbers of people in Central America, especially those suffering from HIV and AIDS.[50]

The United States is not the only trading power seeking TRIPS-plus protection for pharmaceutical patents in RTAs. Recently, the European Union's ("EU") European Free Trade Association, in its negotiations with the Southern African Customs Union ("SACU"),[51] pressured the SACU to accept TRIPS-plus provisions on public health measures.[52] The measures for which the EU was pushing included "'five- to ten-year data protection period for clinical test data' and 'five-year patent extensions to brand-name drugs.'"[53] The SACU, however,

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47 Cho, *supra* note 20, at 74; Open Letter from Nicolas de Torrente, Executive Director, Doctors Without Borders, to Robert Zoellick, Ambassador, Office of the U.S. Trade Representative (Oct. 15, 2003), *available at* http://www.doctorswithoutborders.org/publications/openletters/tozoellick_10-15-2003.cfm [hereinafter Torrente Letter].

48 Torrente Letter, *supra* note 47.

49 *Id.*

50 *Id.*

51 The SACU is the oldest Customs Union in Existence and consists of South Africa, Botswana, Lesotho, Namibia, and Swaziland. Department of Foreign Affairs Republic of South Africa, *Southern African Customs Union (SACU): History and Present Status*, http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm (last visited Sept. 14, 2007).

52 Cho, *supra* note 20, at 75.

53 *Id.*

rejected these measures, as it did with similar proposals from the United States in other FTA negotiations, on the grounds that the TRIPS-Plus protection would jeopardize the African countries' access to necessary medicines.[54]

Clearly, developed countries are using Article XXIV's RTA exception as a mechanism for granting TRIPS-plus protection of pharmaceuticals at the expense of the health and lives of those in the developing world. The windfalls that are reaped by the pharmaceutical companies in the U.S. and the EU are the benefits of RTAs that essentially institutionalize a system of human rights abuses and further the North-South divide. In this instance, RTAs have a global effect of creating abuses at the expense of the developing world for the benefit of multi-national corporations ("MNC"s) because of TRIPS-plus protection.

V. UNITED STATES, CANADA AND MEXICO: NAFTA ADVANTAGES BESTOWED ON MEMBERS NOT BESTOWED ON NON-SIGNATORIES

NAFTA has been controversial, with job gains and losses disbursed throughout the agreement's territories, but as a result there has been an undeniable increase in trade between the U.S., Mexico and Canada.[55] Article 101 of NAFTA provides, "consistent with Article XXIV of [GATT]"[56] the parties establish a free trade agreement that, pursuant to Article 102, pursues the objectives of "national treatment, most-favored-nation treatment and transparency."[57] Under NAFTA, "tariffs between Canada and the [U.S.] were completely eliminated in 1998, and Mexico has lowered its average tariffs [for NAFTA countries] from 10% to 2%."[58] Similarly, the United States has dropped its tariffs on Mexican imports from 2 percent to 0.6 percent.[59] Canada is the U.S.'s largest trading partner and, in 1998, U.S. trade with Mexico reached $174 billion, replacing Japan with Mexico as the U.S.'s second largest trading partner.[60] The United States has benefited substantially from NAFTA with 32 percent of its exports heading to Canada and Mexico.[61]

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54 *Id.*

55 Michael C. McClintock, *Sunrise Mexico; Sunset NAFTA-Centric FTAA—What Next and Why?*, 7 SW. J. L. & TRADE AM. 1, 75–77 (2000).

56 North American Free Trade Agreement, U.S.-Can.-Mex., art. 101, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

57 *Id.* at art. 102.

58 McClintock, *supra* note 55, at 75.

59 *Id.*

60 *Id.*

61 *Id.*

This is not a one-way street, however, as Canada sends 81 percent of its exports to the United States and Mexico sends 94 percent of its exports to the United States.[62] Similarly, as Michael C. McClintock notes in his article, *Sunrise Mexico; Sunset NAFTA-Centric FTAA—What Next and Why?*, since NAFTA was implemented the "U.S.['s] direct foreign investment in Canada has tripled to $32.6 billion" and "Canada's cumulative investment in the United States has reached $64.0 billion."[63] Mexico, meanwhile "experienced an average annual foreign direct investment increase of $10 billion annually" with 67 percent of that increase coming from its NAFTA trading partners and 16 percent coming from the EU, a percentage that is expected to jump as a result of a forthcoming Mexico-EU FTA.[64]

McClintock further explains, "NAFTA confers greater protections for intellectual property rights . . . than even the TRIPS provisions of the 1995 WTO/GATT," therefore favoring TRIPS-plus protection.[65] NAFTA contains the broadest possible coverage for copyrights, patents and trademarks, as well as trade secrets.[66] This is particularly true in the copyright sphere, where "NAFTA requires . . . mandatory enforcement measures against infringement, piracy and counterfeiting."[67] "NAFTA's . . . provisions are likely to have a substantial impact on the development of international IP norms."[68] Indeed, both the U.S. and Canada now use NAFTA's TRIPS-Plus provisions as a model in their own bilateral IP agreements.[69]

As Mindahi Bastida-Munoz and Geraldine Patrick explain in their article, *Traditional Knowledge and Intellectual Property Rights: Beyond TRIPS Agreements and Intellectual Property Chapters of FTAs*, NAFTA's intellectual property provision (Chapter 17) is divided into four parts:

> 1) articles 1701 to 1704 on general dispositions of existing agreements regarding intellectual property . . . 2) articles 1705 to 1713 refer to the obligations of establishing intellectual property norms . . . 3) articles 1714 to 1718 stipulate norms for the defense of the intellectual property rights within the territory of

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62 *Id.* at 76.

63 *Id.*

64 *Id.*

65 *Id.* at 48.

66 *Id.*

67 *Id.*

68 Allen Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 284 (1997).

69 *Id.*

> each Party . . . and 4) articles 1719 to 1721 relate to technical cooperation, protection of existing affairs and definitions of commonly used terms.[70]

NAFTA's MFN protection, however, only applies to countries "in like circumstances," allowing NAFTA countries to offer lesser protection for countries that do not have the same level of TRIPS-Plus protection.[71] NAFTA also requires mandatory provisions against piracy and counterfeiting, and "[n]ot only are literary and artistic works, distinguished trade names or symbols and inventions protected, but so are cutting edge information technologies and other unique scientific developments in which the United States leads the world."[72]

With NAFTA providing such heightened intellectual property protections throughout the territory covered by the treaty—for example, with the U.S. providing heightened protection for copyrighted material coming out of Mexico—one would think that the principles of MFN should apply since the U.S. and Mexico are both signatory countries of GATT.[73] Regular application of GATT/WTO principles would necessitate that a third party country should be able to receive the same treatment as Mexico, provided it is a WTO member country.[74] Because of Article XXIV, however, this protection, since it goes beyond the minimum standards of TRIPS, is not subject to the MFN provision as an RTA, meaning the third party is in effect denied the MFN entitlement it would otherwise be expecting under GATT.[75]

VI. THE PROPOSED FREE TRADE AREA OF THE AMERICAS: TRIPS-PLUS PROTECTION FOR AN ENTIRE HEMISPHERE

There is an even larger RTA on the horizon for the United States, and essentially the entire Western Hemisphere: the Free Trade Area of the Americas

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70 Mindahi Crescencio Bastida-Munoz & Geraldine A. Patrick, *Traditional Knowledge and Intellectual Property Rights: Beyond TRIPS Agreements and Intellectual Property Chapters of FTAs*, 14 MICH. ST. J. INT'L L. 259, 287 (2006); *see also* NAFTA, *supra* note 56, arts. 1701–21.

71 Carlos M. Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, 26 MICH. J. INT'L L. 331, 343 (2004).

72 McClintock, *supra* note 55, at 48.

73 *Cf. id.* at 76.

74 J.H. Reichman, *Universal Minimal Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 348 (1995).

75 GATT 1947, *supra* note 1, art. XXIV.

("FTAA").[76] "Negotiations for the [FTAA] began in 1994 at a meeting known as the First Summit of the Americas."[77] The FTAA will include every nation in the Western Hemisphere except for Cuba.[78] Throughout the Western Hemisphere, it originally was thought to be an extension of NAFTA, but recent negotiations have sought to harmonize NAFTA's policies with that of another RTA—the Southern Common Market, or "Mercosur," consisting of Argentina, Brazil, Paraguay and Uruguay.[79]

The U.S., which has an economy that is close to 100 times larger than all of the Caribbean and Central American nations' economies combined, has dominated negotiations, and no other nation in the FTAA negotiations is in a position to truly challenge the United States' bargaining power.[80] As Robert Zoellick stated to the Council of the Americas in 2001, "If the Americas are strong, the United States will be better positioned to pursue its aims around the world."[81] Zoellick also stated that there would be great benefit to the developing countries of the Western Hemisphere as the FTAA could provide opportunities for "tangible economic benefits and equally important political assistance," as well as security and "improvements in education."[82] Brazil has attempted to achieve its own agenda in the FTAA negotiations, but it "is aware that non-participation in a successful FTAA would cause severe consequences in foreign trade. The United Stated would gain market-share by exporting to Latin America, while Brazil would lose this market-share. . . ."[83]

In the 2003 draft version of the FTAA, Article 2.1 of Chapter XX, Section B, states, "With regard to the protection [and enjoyment] of intellectual property, any advantage, favour, privilege or immunity granted by a Party to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Parties."[84] This MFN section of the FTAA cre-

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76 *See generally* Free Trade Area of the Americas, Third Draft Agreement, Nov. 21, 2003, http://www.ftaa-alca.org/FTAADraft03/Index_e.asp [hereinafter FTAA] (referring to the draft version of the upcoming American trade agreement).

77 Sara Catherine Smith, *The Free Trade Area of the Americas: Is There Still a Place for the World Trade Organization?*, 13 TULSA J. COMP. & INT'L L. 321, 334 (2006).

78 *Id.*

79 *Id.* at 335.

80 *Id.* at 337–38.

81 Robert B. Zoellick, Ambassador, Office of the U.S. Trade Representative, Remarks at the Council of the Americas (May 7, 2001), *available at* http://www.ustr.gov/assets/Docment_Library/USTR_Speeches/2001/asset_upload_file236_4283.pdf).

82 *Id.*

83 Smith, *supra* note 77, at 346.

84 FTAA, *supra* note 76, ch. XX, sec. B, art. 2.1.

ates a trading system that rivals the WTO, very nearly encompassing the entire Western Hemisphere as one RTA that is not forced to grant that same MFN principle to any country in the Eastern Hemisphere because of GATT Article XXIV.

The United States has understandably been pushing for very strong intellectual property protections since "U.S. industr[ies] claim[] copyright losses in Brazil [are] more than $800 million a year, highest in the hemisphere and among the highest in the world."[85] Brazil is not alone in its copyright violations. As of 1988, U.S. companies lost $12.4 billion due to piracy of copyrights, with Latin American countries accounting for 20 percent of this loss.[86] Indeed, several of these Mercosur countries (namely Brazil, Paraguay and Argentina) were placed on a "Priority Watch List" by the Office of the United States Trade Representative, and are now expected to adhere to stringent TRIPS-Plus standards, if the FTAA is agreed upon.[87] As McClintock notes, IP "protection is not a priority for most Latin American countries who undoubtedly will delay enactment of TRIPS' sufficient provisions into their domestic law and later procrastinate without taking truly effective enforcement actions to stop piracy and other illegal infringements."[88]

Another issue in the development of IP provisions for the FTAA is the protection of patents. DWB noted in its open letter,

> As we have related in earlier correspondences, [DWB] has called upon all countries in the Americas to exclude IP provisions from the FTAA agreement altogether, as this will be the only way to guarantee that countries in the region can uphold the commitment they made in Doha to ensure the protection of public health and the promotion of access to medicines for all.[89]

While DWB's approach may not be realistic because protection of intellectual property is a sticking point for the U.S. in FTAA negotiations, its criticism is meritorious nonetheless.[90] As explained above, the use of TRIPS-Plus provisions in the U.S.'s RTAs has had a huge human cost as developing countries

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85 McClintock, *supra* note 55, at 50 (quoting *U.S. Officials Warn Brazil, As Brazil Highlights U.S. Trade Barriers*, INSIDE U.S. TRADE, Oct. 29, 1999, at 9).

86 *Id.* at 48–49.

87 *Id.* at 49–50.

88 *Id.* at 50.

89 Torrente Letter, *supra* note 47.

90 *See* Jean Frederic Morin, *The FTAA Chapter on Intellectual Property Rights: A North/South Struggle over Genetic Material*, Unisféra International Centre, 1 (Nov. 2003), http://www.unisfera.org/IMG/pdf/Morin_-_IPR_FTAA_-_Nov_2003.pdf (noting that the United States may result to threatening sanctions to increase the intellectual property provisions in the FTAA).

have their hands tied to issue compulsory licenses necessary to protect human life.[91] DWB's concern is illustrative of the idea that, under the FTAA, U.S. and Canadian pharmaceutical corporations may be able to have an essentially compulsory license-free Western Hemisphere.

In her article *The Free Trade Area of the Americas: Is there Still a Place for the World Trade Organization?*, Sara Catherine Smith predicts that "the FTAA will ultimately lead to the erosion of the WTO as it pursues its own goals and objectives," and states that article XXIV of GATT "continues to support exceptions [to MFN principles] that will benefit the members of the FTAA, providing nearly an entire hemisphere with special and deferential treatment."[92] Smith's prediction shows just how meaningless GATT's MFN principles have become. Because of GATT Article XXIV, under the FTAA the Western Hemisphere will essentially be able to deny MFN treatment to the entire Eastern Hemisphere, even though most of these countries are both "contracting parties" to GATT as well as WTO members.[93]

VII. TRIPS ARTICLE 4(D): PREEXISTING INTERNATIONAL AGREEMENTS

Article 4 of TRIPS, as noted above, contains the Agreement's MFN provisions, but also contains TRIPS' exceptions for MFN principles.[94] The meatiest of these provisions (measured as creating the largest number of exceptions) is 4(d), the "grandfather provision," which exempts existing intellectual property agreements at the time of the enactment of TRIPS in 1994.[95] Article 4(d) has been called the "most notable exemption" to MFN principles because, as long as the existing agreement is cleared with the TRIPS Council and does not constitute "an unjustifiable discrimination against nationals of other [Member states]," then it qualifies under Article 4(d).[96]

Under this exemption from TRIPS, major economic powers were exempted from granting MFN status to other countries.[97] Since "the EC Treaty is an 'international agreement related to the protection of intellectual property,'" the EU may be able to deny most favored nation status to copyrights from non-

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91 *See supra* Part II.

92 Smith, *supra* note 77, at 354.

93 GATT 1947, *supra* note 1, art. XXIV; *see also supra* Part I (b).

94 TRIPS, *supra* note 1, art. 4.

95 J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 636 (1996).

96 Caviedes, *supra* note 9, at 196.

97 TRIPS, *supra* note 1, art. 4.

EU signatories of GATT and TRIPS.[98] Indeed, according to Alexander Caviedes in his article, *International Copyright Law: Should the European Union Dictate its Development?*, the EU may be able to prevent "third-country nationals from benefiting from higher standards which govern copyright relations between EU nationals" as an exemption under 4(d).[99] This major exception to GATT's most basic principle is yet another example of how developed countries are able to dictate their own fate and choose when they want to grant MFN and when they do not. By granting higher copyright standards only to EU member countries, the EU is able to circumvent MFN principles not by invoking Article XXIV of GATT, but by invoking Article 4(d) of TRIPS—another loophole used to ensure that developed countries can choose when to apply MFN to the rest of the world.

VIII. HAS THE MFN PRINCIPLE BEEN IRREPARABLY DAMAGED?

RTAs have seriously damaged and weakened the MFN principle throughout the international community, and severely diminished the importance of the WTO.[100] With more than half of world trade passing through the Article XXIV exception (through RTAs), and massive RTAs such as the FTAA on the horizon, it seems a new system of regional-based trade is on its way, as well. While many would question the developing world's power in establishing the WTO, the developing countries had a forum in which they could all lobby for change together, aggregating their individually insignificant voices into a more powerful voice. Regional trade agreements have, and will continue, to adopt a "divide and conquer" mentality, forcing developing countries to be a part of the RTA to gain freer access to the markets of the developed world, all the while being forced to accept IP standards for copyrights and patents above the standards mandated by TRIPS. As shown above, RTAs can have huge consequences for human life, negating standards that the WTO established rules to govern. Since RTAs are outside of the governing power of the WTO, and since there are no rules covering the behavior of an RTA once formed, regional trading blocks can operate and create rules outside of the multilateral system.

While RTAs have not done away with the multilateral trading system entirely, the agreements have mortally wounded the WTO and its power. Because it is has no control over these agreements, the WTO is without the means to enforce the MFN principles that GATT establishes.

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98 Caviedes, *supra* note 9, at 227 (citation omitted).

99 *Id.*

100 *See* Cho, *supra* note 20, at 88.

IX. CONCLUSION

Both Free Trade Areas and Customs Unions have given the developed world a chance to essentially pick and choose when and how to apply MFN principles mandated in GATT Article I and TRIPS article 4. RTAs, however, still have benefits. NAFTA, for instance, has shown that RTAs can bring a developed country a much larger share of international markets, increase foreign direct investment into poorer countries and increase the number of exports to developed countries. Such opportunity often comes at a price, however, with developed economic powers like the EU and the U.S. requiring higher TRIPS-Plus protection for intellectual property, which has, in some instances, denied developing countries the right to compulsory licenses necessary to preserve human health.

Similarly, these RTAs have also allowed the developed economies of the world to decide to whom TRIPS-Plus protection is extended. This clearly flies in the face of the MFN principle upon which the WTO system is based. Article XXIV of GATT (and to a lesser degree Article 4(d) of TRIPS) has allowed the developed economies to force TRIPS-Plus protection for its own products upon the developing economies of the world, while denying that same TRIPS-Plus protection in its own territories for competitive countries outside the RTA.

These institutional loopholes have mortally wounded the multilateral trading system founded in GATT 1947. Further, with more than half of the world's trade already flowing through RTAs, and that number expected to rise with the advent of even larger RTAs, the exploitation of these institutional loopholes appears to be here to stay. A regional-based international trading system is on its way, with the developed world able to use whatever standards for intellectual property it deems appropriate, even if at the expense of the developing world.