RECONCILING THE FTAA AND TRIPS: CAN A FREE TRADE AREA OF THE AMERICAS BE A FAIR TRADE AREA OF THE AMERICAS? IMPLICATIONS OF A HEMISPHERIC INTELLECTUAL PROPERTY AGENDA.

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Introduction

Information is undoubtedly valuable. The increasing value of information has led innovators to withhold reinvesting the fruits of their labor into society until they can reap the benefits of its value. Of course, some say that genuine scholars let the later world discover their work, rather than promulgate and profit from it themselves.[1] But much of our theories on scholarship and innovation have swayed far from the idea of "genuine scholars." Quite acceptably, the modern world has devised a solution to catalyze the dissemination of information with incentives. These incentives are more commonly known as intellectual property (IP) rights, which work by granting exclusive monopolies to those who expand the depth of knowledge to ensure constant innovation.

Allocating IP rights involves the weighing of social benefits of increased incentives for innovation against the social cost of the monopoly granted to the holders of those rights. However these interests often become unbalanced and the social costs of monopolization begin to circumvent the social benefits of innovation. Of course, it is not expected that these interests be permanently balanced, considering the rate of change in our developing world. However, the globalization of trade has exploited this problem in a new manner. Rather than examine and correct the problem, many have threatened to turn a blind eye to this balance in the name of globalization and the prospect of free trade. Because of this neglect, consumer groups and others are concerned that international dealings in intellectual property are biased toward the interests of a handful of large entities and corporations capable of lobbying national and international governments.[2] More specifically, there is a particular concern with patents, because a high volume of patents is concentrated in countries with economies strong enough to promote research and development. Thus, patents pose a

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[1] WILLIAM P. ALFROD, TO STEAL A BOOK IS AN ELEGANT OFFENSE 28-29 (1995).

[2] *See* Susan K. Sell, *Post-TRIPs Developments: The Tensions Between Commercial and Social Agendas in the Context of Intellectual Property,* 14 FLA. J. INT'L L. 193, 194 (2002).

particular problem in the international forum.

Patents can result in an exclusive monopoly and usually involve critical technologies and improvements.[3] A patent holder may hold the key to the future, but may nonetheless refuse to make an invention available to the public, "in order that the fruit of his genius and skill may not be reaped by another without his will and consent; and that, if he enjoyed some prerogative concerning this, he would open up what he is hiding, and would disclose it to all."[4] This is essentially the concept of United States' (US) patent law, as other countries often require compulsory licensing of patented technologies, not leaving the decision up to the inventor.[5]

On a national level, the US focuses on an incentivized approach to patent rights embodied in Article I, section 8 of the Constitution "to promote the progress of Science and the useful Arts."[6] Arguably, the preamble of the IP Clause, as it is called, has been interpreted to primarily allow Congress to create incentives for inventors for the diffusion of useful knowledge, thus recognizing the social value of proprietary knowledge.[7] In the forum of trade, however, many believe that the US takes a rather unbalanced approach to these rights. More specifically, the US emphasizes the self-interest of its own IP rights holders, and consequently puts the global progress of science and social welfare in the backseat. Although global progress might not be required by the IP clause, the globalization of trade and the linking of global economies make a broader reading and application of the clause much more attractive.

Internationally, patent protection and enforcement have become key issues in the negotiation of trade agreements. The ongoing Free Trade Area of the Americas (FTAA) agreement negotiations present new opportunities to weigh the IP rights balance once again. This note will explore the role of IP rights in the Free Trade Area of the Americas agreement. Specifically, this note will explore IP rights and trade policy, prior IP rights agreements in relation to the FTAA, the ethical controversy of certain patents in developing nations, and possible enhancements to reconcile the differences among negotiating countries, specifically in IP rights and trade policy.

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[3] Patent Laws vary from country to country In the US, the main source of patent law is Title 35 of the United States Code. Patents are granted to whoever invents any "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101 (1952).

[4] Owen Lippert, *One Trip to the Dentists is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 241, 249 (1998) (citing BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 17 (Public Affairs Press 1968)).

[5] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs].

[6] U.S. Const. art. I, §8, cl. 8.

[7] Lippert, *supra* note 4, at 252.

IP Rights and International Trade Policy

The protection of IP rights abroad can be a critical issue in the development of a nation's economy. Lack of this protection can result in the loss of millions of dollars in profits as a result of international piracy. Piracy of US owned intellectual property has been, and continues to be, a serious problem in many countries.[8] The most notable industries affected by such piracy are media and entertainment, which rely on copyright laws to protect investments. As markets expand, more crucial industries such as software and biomedical technologies begin to have a noticeable impact on international economies. However, one of the most historically controversial IP industries is the "patent-dependent" US pharmaceutical industry.[9]

The US is constantly the source of new and innovative life-saving drugs. Conveniently, the US patent system allows for pharmaceutical prosperity by assuring the protection of pharmaceutical investments through exclusive monopolies. Pharmaceutical companies enjoy this because of the high-cost associated with developing drugs. For example, a new pharmaceutical product usually requires millions of dollars of research and development funds.[10] Without an incentive drafted to ensure that pharmaceutical companies will have the chance to re-capture the costs of development, investors will refrain from entering such a high-risk venture. Therefore, protection of pharmaceuticals becomes a fundamental national interest, and the US pushes patents to the top of its agenda in negotiating with other countries.

In regards to international negotiations, the US is known for its hard-line stance for patents and other intellectual property agendas. With more specific language about US foreign IP policy, United States Trade Representatives (USTRs) have mentioned, "We press countries hard. . .we put a lot of resources into pressing other countries to do more to protect intellectual property . . . one of our goals has been to get it and get it fast."[11] Eventually, the US received what they pressed for through the World Trade Organization (WTO) in its adoption of the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).

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[8] Peter N. Fowler & Alice T. Zalik, *Globalization's Impact on International Trade and Intellectual Property Law: a U.S. Government Perspective concerning the Agreement on the Trade-Related Aspects of Intellectual Property: Past, Present and Near Future*, 17 ST. JOHN'S J.L. COMM. 401, 402 (Spring, 2003) [hereinafter Fowler & Zalik].

[9] Hernan L. Bentolila, *Lessons from the United States Trade Policies to Convert a "Pirate": The Case of Pharmaceutical Patents in Argentina*, 5 YALE SYMP. L. & TECH. 1 (2002/2003).

[10] *See* Alan S. Gutterman, *The North South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89,125 (1993) (the costs associated with developing and obtaining market approval in 1990 was $231 million per single drug).

[11] Joseph Papovich, *NAFTA Revisted: NAFTA's Provisions Regarding Intellectual Property: Are They Working as Intended? – A U.S. Perspective*, 23 CAN.-U.S. L.J. 253, 257 (1997).

The Agreement on Trade Related Aspects of Intellectual Property

The General Agreement on Tariffs and Trade (GATT) negotiations began an era of international trade agreements. The initial purpose of GATT was to reduce trade barriers.[12] During the Uruguay Round of GATT negotiations, the attendees finalized the TRIPs agreement.[13] The same round of negotiations created the World Trade Organization (WTO), the successor to GATT, which would also serve as the organization monitoring compliance with the TRIPs "minimum" standard for IP rights and protection worldwide.[14]

Being a key negotiator in the agreement, the US approved TRIPs and began modification of domestic patent law in order to execute the United States' international obligations.[15] Essentially, the changes implemented were (1) expansion of the scope of infringement actions to include offers to sell, (2) the use of inventive activity abroad to satisfy the date of invention criteria for patent applications, (3) the extension of patent protection to a term of twenty years,[16] and (4) the publishing of patent applications 18 months after filing.[17] In comparison to measures that other countries might have been asked to adopt, the US hardly stretched for compliance. Countries with infantile patent systems, or no system at all, were asked to implement modern patent legislation within ten years of signing.[18] Essentially, they were asked to do in ten what the US took

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[12] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

[13] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994). The Punta del Este Declaration defined the scope of the Uruguay Round negotiations, which were aimed to "clarify GATT provisions and elaborate as appropriate new rules and disciplines on intellectual property rights." Considerable debate followed regarding the interpretation of the Punta del Este declaration, and thus also the scope of intellectual property to be included within the Uruguay Round negotiations. *See* Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 139-140 (1994).

[14] Currently, the WTO hosts 146 members. Of those 146, many countries are negotiating in the FTAA. Prominent ones include Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, The Dominican Republic, El-Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua and Panama. A list of all 146 countries can be located *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[15] *See generally* Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809,4814 (1994). *See also* Adam Isaac, Note, *Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization*, 25 B.C. INT'L & COMP. L. REV. 373, 381 (Spring, 2002).

[16] Specifically, 35 U.S.C. § 154 was amended to provide that the term of patent protection begins on the date of grant, and ends 20 years from the filing date of the application. 35 U.S.C. § 154.

[17] Isaac, *supra* note 15, at 381.

[18] TRIPs, *supra* note 5, at art. 65, 66. (No member is obliged to apply the provision before a period of one year, however, developing countries are entitled to delay for a further period of four years. Article 66 further qualifies this for so called "least-developed" countries by declaring "in view of the special needs and requirements of least-developed country Members . . . shall not be required to apply the provisions of this Agreement . . . for a period of 10 years from the date of application.")

hundreds of years to develop through common law in more favorable circumstances.

Although controversies concerning the TRIPs Agreement are not at the heart of this note, they play an important role in recognizing recurring problems in the attempt to harmonize IP rights. Therefore, it is important to briefly touch upon some provisions of TRIPs and the problems it presented.

The patent infringement provision of TRIPs is Article 28, which gives patent owners the right to prevent third parties not having the owner's consent from making, using, offering to sell, selling or importing patented products or processes.[19] This also includes products derived from the processes themselves.[20] Thus third parties in Argentina, Brazil, Canada and other prominent countries using generic drugs would be infringing the US patent for the same branded drug likely to be inaccessible due to high pricing. Problems occurred, obviously, when countries like Argentina did not believe pharmaceuticals should be patentable in the first place.[21] Therefore, many "least-developed" countries feared that patent holders in developed nations would overwhelmingly abuse Article 28.

For developing countries, Article 30 seemed to bring comfort to those nations who feared an abuse of patent rights by providing limited exceptions to members. The broad language of Article 30 creates exceptions where they do not unreasonably conflict with the normal exploitation of the patent, and do not unreasonably prejudice the legitimate interests of the patent owner.[22] However, the interpretation of Article 30 has been a major issue for TRIPs.[23] Specifically, the controversy stems from the interpretation of Article 30 as applied to export restrictions under TRIPs Article 31(f).[24] What is referred to as the "Paragraph 6 Problem" leaves countries lacking pharmaceutical manufacturing capabilities without a way to procure needed drugs from those that have well established pharmaceutical industries.[25] To address this problem, scholars and representatives have argued for a broad and authoritative interpretation of Article 30 to allow unchecked compulsory licensing in the face of Article 31.[26] The results of these arguments have yet to be observed.

Of course, the ongoing process of TRIPs compliance has many problems and

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[19] *Id.* at art. 28.

[20] *Id.*

[21] Bentolila, *supra* note 9.

[22] TRIPs, *supra* note 5, at art. 30.

[23] *See* Thomas A. Haag, *TRIPs Since Doha: How Far Will the WTO Go Toward Modifying The Terms for Compulsory Licensing?* 84 J. PATENT & TRADEMARK OFF. SOC'Y 945, 947 (2002).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 952.

challenges. For instance, the TRIPs implementation by underdeveloped members could have a devastating impact upon their future growth. In its promotion of patent right protection, TRIPs could make critical innovations, such as life-saving drugs or even new forms of energy more expensive in the countries that need them most. [27] Another concern is that TRIPs is an instrument of US policy to assert unilateral property claims, considering that products coming from third world countries will not meet the criteria for protection.[28] What might be a decade old technology in the US would be groundbreaking in some developing countries.[29] Even if such countries developed such a technology independently, the novelty requirement would not be satisfied for an international patent because of limited resources and lack of investment that would place those countries at a significant disadvantage to compete with US inventors. Also, there are suggestions that developing countries only agreed to TRIPs because they believed signing on would eliminate unilateral trade sanctions. Thus, many of the drawbacks were not entirely unforeseen, but rather a pressured choice.

TRIPs and "Special 301"—the "H bomb of Trade Policy"

For the US, TRIPs did not seem to be enough. Soon enough, it was becoming apparent that TRIPs was just another weapon in an army of laws. One such weapon is Special 301. Special 301 is known as the set of provisions under the Trade Act of 1974, which require the United States Trade Representatives to identify foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access for US companies that rely on intellectual property protection.[30] Under this provision, a country can be found to be providing inadequate and ineffective intellectual property protection even if it is in compliance with TRIPs.[31] Essentially, although TRIPs is a multilateral agreement in which IP rights standards were agreed upon by many countries, Special 301 has been interpreted to allow the threat of "unilateral retaliation" by the United States in order to persuade countries to raise their standards of protection in this field.[32] This was used, along with other measures, to pressure Argentina to raise its levels of intellectual property protection of pharmaceuticals.[33] Now, the same unilateral measures are

[27] Isaac, *supra* note 15, at 386.

[28] *Id.* at 385.

[29] Another ting to note, "lacking the scientific and financial infrastructure necessary to create patent-induced innovations, developing countries are far more interest in technology transfer than in the encouragement of domestic innovation. Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights,* 28 WAKE FOREST L. REV. 89, 121 (1993) *citing* Robert P. Merges, *Battle of Lateralisms: Intellectual Property and Trade,* 8 B.U. INT'L L.J. 239, 244 n. 9 (1990).

[30] Bentolila, *supra* note 9.

[31] *Id.*

[32] *Id.*

[33] *Id.*

being used to pressure FTAA negotiators to accept strong patent protection as the norm across the western hemisphere.

The FTAA is geared at mainly the Latin American countries, which hardly have economies developed enough to compete with patent producing powerhouses.[34] Moreover, many of the countries in FTAA negotiations are already bound by the TRIPs agreement.[35] The TRIPs agreement being a bare minimum standard, it is argued that the US is attempting to enforce a larger than TRIPs standard on certain "pirate" countries.[36] So how do the aforementioned TRIPs provisions affect the outcome of the FTAA? The FTAA proposes to adopt the TRIPs Agreement and grant even stronger patent rights to their present holders, thus manifesting a regional, self-executing "TRIPS plus."

The FTAA Proposal on Patent Rights: TRIPs+ for the Western Hemisphere

Although it is considered a ground-breaking agreement, TRIPs is not an ideal document, partially because much of it is rather vaguely defined and complex.[37] However, TRIPs does propose that there be an international minimum standard for some IP rights. However, TRIPs should not be the definitive formula that new treaties and agreements are based on. As mentioned before, the signers have yet to sort out all the problems arising from domestic implementation of the TRIPs standards. Unfortunately, in the case of the FTAA, TRIPs is the foundation of the chapter on Intellectual Property, a strategy that seems to resemble the process of building structures when problems with the foundation have yet to be determined and repaired.

The second draft of the FTAA specifically requires parties to adopt Articles 9 through 40 of the TRIPs agreement. Of course, many provisions are also left out or even expanded upon, and will be part of this discussion.[38] It is also important to recognize that many of the problems discussed above are only reintroduced within the FTAA due to its blanket adoption of some of the TRIPs provisions.

In general, the FTAA provides that each party shall provide in its territory to the nationals of the other parties adequate and effective protection and

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[34] In 2001 alone, the United States granted 166,038 patents, 87,606 of those belonging to US residents. In comparison, Brazil issued 3,589 patents, and only 685 of those belonged to Brazilian residents. Mexico issued 5,476 patents, with a mere 118 belonging to Mexican residents. Other Latin American countries, such as Colombia and Honduras all registered less than 1,000 patents issued. *See* WIPO IP/STAT/2001/A, *available at* http://www.wipo.int/ipstats/en/publications/a/pdf/patents.pdf.

[35] *See supra* note 14.

[36] *See generally* Bentolila, *supra* note 9.

[37] Some argue that being vague is an advantage for developing countries. *See generally* J.H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation With the Developing Countries,* 32 CASE W. RES. J. INT'L L. 441 (2000).

[38] Free Trade Area of the Americas, Second Draft Agreement Chapter on Intellectual Property Rights, Part I, Article 5.2(e) [hereinafter FTAA].

enforcement of intellectual property rights.[39] What adequate and effective protection of IP rights is becomes a largely subjective determination. This creates a danger for those countries that are not used to the stringent standards of US patent law, and as a result, will need significant adjustment to reach that level. Another general provision of the FTAA dealing with IP rights is the most-favored nation treatment rule, where "any advantage, favor, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."[40] Under this policy, the US would be hesitant to implement a policy granting patent privileges to poorer countries. The same national treatment provisions were introduced in TRIPs under Article 3, however, with much more lenient language for application.[41] For instance, the most-favored nation treatment rule was met with exceptions provided in the Paris Convention, the Berne Convention, and the Rome Convention.[42]

Also, the threshold of patent protection proposed in the FTAA exactly mirrors that of TRIPs, which is very similar to US law. Article 1, Section 5 states that "each party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."[43] For purposes of Article 1, the terms "inventive step" and "capable of industrial application" are treated as being synonymous with the terms non-obvious and useful, respectively.[44] An issue raised within these provisions is the unwillingness of some countries to give protection to certain inventions that the US insists on enforcing. One example is pharmaceuticals, which Argentina asserted do not deserve patent protection (although the processes themselves were patentable).[45] On the other hand, the US is willing to patent "anything under the sun made by man."[46] Thus an essential dilemma is apparent: how do we handle countries not willing to grant exclusive monopolies for crucial technologies, or that believe that patents hold a higher threshold than "anything under the sun made by man?" Does setting a minimum standard of protection really mean a low threshold for patentability? The same dilemma has echoed itself throughout the TRIPs agreement, and again, without reconciliation, the same is being applied yet again through the FTAA.

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[39] *See id.*, at Part 1, art. 1.1.

[40] TRIPs, *supra* note 5, at art. 4.

[41] *Id.*, at art. 3

[42] *Id.*

[43] FTAA, *supra* note 38, at Part II, § 5 art. 1. *See also* 35 U.S.C. §101.

[44] *Id*.

[45] *See* Bentolila, *supra* note 9.

[46] *See* Diamond v. Chakrabarty, 447 US 303, 308 (1980) (holding that patentable subject matter includes "anything under the sun made by man").

With respect to rights conferred on FTAA patent holders, the proposed draft does adopt and apply Article 28 of the TRIPs agreement.[47] Importantly, the FTAA further qualifies Article 28 by claiming that each party may prohibit, regulate, or limit exploitation of patented inventions, and further solidifies this absolute right stating, "no provision of this chapter shall be construed in any other manner."[48] Again, this confers upon the patent holder the ultimate right to limit the uses of his innovation. Of course, logically, most of these holders will be US companies, as the patent systems in other countries are nowhere near as developed as the US.[49] Thus, the most likely scenario will involve US patent holders having the discretion to allow or inhibit the dissemination of knowledge to underprivileged societies. Subject to exceptions, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether the products are imported or locally produced.[50] Thus, the FTAA creates a broader scope of patent protection for signatories. And although some countries may disagree as to patentable subject matter, the qualification of Article 28 in the FTAA will limit the ability of concerned signatories to find any exceptions.

In comparison, the same FTAA allows developing countries only a one-year grace period to apply its provisions. More stunning, if a developing country has problems with applying the provisions, they may be granted an extra two years.[51] TRIPs offered a much more relaxed term of adjustment. Pursuant to Article 65, developing members were entitled to delay TRIPs implementation for four years.[52] In the case of the least developed members, application of TRIPs is delayed for ten years.[53] This lenient application allowed a developing country an opportunity to adapt and expand its economy prior to compliance.[54] The extra time given to the developing TRIPs members was a compromise to assure that the underdeveloped economies would not be suppressed. However, this balance did not seem to work out, as several developing nations that were required to be in full compliance by 2000 indicated that they were not able to implement their TRIPs obligations as required.[55] If some members could not do this within ten years, what does the FTAA seek to accomplish by shortening that period? Perhaps TRIPs was really aimed at harmonizing IP laws in strong patent countries, and perhaps the US was not as concerned with the adaptation of the standard in less innovative countries. Instead, the focus of the FTAA seems to be

[47] FTAA, *supra* note 38, at Part II, §5, Article 3.1. *See also* TRIPs, *supra* note 5, at Art. 28.

[48] *Id.*, at Article 1.3.

[49] *See supra* note 34.

[50] FTAA, *supra* note 38, at Part III, § 5, art. 1.3.

[51] FTAA, *supra* note 38, at Part V, art. 1.

[52] TRIPs, *supra* note 5 at art. 65.

[53] *Id.* at art. 66.

[54] Isaac, *supra* note 15, at 378.

[55] *Id.* at 385.

enforcement, and requiring countries to implement the provisions within two years will most certainly solidify US intentions of pursuing patent "pirates" in the eyes of the countries who host them.

Yet another mechanism the FTAA fails to adopt from TRIPs is the concept of the WTO's Dispute Settlement Mechanism (DSM).[56] Under TRIPs, developed nations could not unilaterally impose trade sanctions against countries utilizing the DSM even if they did not adhere to the agreement.[57] Instead, a Special 301 type proceeding was to be used TRIPs nations to bring troublesome signatories before the WTO. However, as of yet, the FTAA draft does not provide this forum for alternative resolutions to IP rights problems. Notably, many of the FTAA negotiating countries are already part of the WTO, therefore they might be successful in bringing complaints under the WTO's DSM, however, it is questionable whether FTAA complaints may be brought under the WTO, because the WTO does not oversee that agreement.

Nonetheless, not all of the FTAA's provisions are negative. As a result of negotiations, certain provisions have been included to enhance the development of developing nations signing on to the agreement. One such chapter is the Chapter on Technical Cooperation.[58] For example, parties are required to offer to companies and institutions in its territories "incentives designed to promote and encourage the transfer of technology and know how to other parties in order to enable them to establish a solid, competitive and viable technological base."[59] Moreover, those parties shall report each year to the Committee on Intellectual Property the technical cooperation that they have entered into with other parties, in particular, with those parties with smaller economies.[60] Quite noticeably, however, those are the only provisions that positively reinforce incentives to help developing nations. It is also worth mentioning that the same tech provisions in TRIPs have yet to be utilized.[61] Nonetheless, the Chapter on Technical Cooperation is promising to the extent that countries actually enforce and utilize those provisions.

Also, in adopting Article 40 of TRIPS, the FTAA recognizes that some licensing practices or conditions pertaining to IP rights that restrain competition may have adverse effects on trade and may impede the transfer and

[56] Dr. Ron Corbett, *The Judicial of Intellectual Property Rights in Argentina - Is Society Being Served?* 10 CURRENTS INT'L TRADE L.J. 3, 11 (Winter 2001).

[57] *Id*.

[58] FTAA, *supra* note 38 at Part IV.

[59] *Id.* at Part IV, art. 1.4.

[60] *Id.* at Part IV, art. 1.5.

[61] In the case of designated "Least-Developed Country Members", TRIPs Article 66 requires developed members to provide "incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed members in order to enable them to create a sound and viable technological base. TRIPs, *supra* note 12, at art. 66.

dissemination of technology.[62] Members may adopt appropriate measures to prevent or control such practices, which may include exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that member.[63] However, many developing countries will lack the negotiation power to prevent the "abuse" of IP licensing. In fact, many countries will not have the capacity to adopt any measure to prevent such practices, considering the high need for critical information. Essentially Article 40 establishes a forum of complaint, but requires full and sympathetic consideration to the rights of IP holders.

FTAA: Fair Trade Area of the Americas

There are three major concerns for developing countries in the face of the strong IP protection fostered by the FTAA. Losses would stem from (1) the inability to copy patented products cheaply and easily, (2) the lack of access to the latest technology, and the dependency on developing countries, and (3) unfair market abuse by patent holders.[64]

James Love, an economist at the Center for Study of Responsive Law (CSRL), explains that the CSRL is "concerned that United States foreign trade officials are advocating international rules for intellectual property that are inappropriate for both less developed and more developed countries, including the United States itself.[65]

Of course, it is constantly argued that free trade remains the dominant policy to improve the welfare of individuals in the world.[66] While not incorrect, this statement is also not complete. Free trade needs to be coupled with fair trading practices. Essentially, those legislating IP rights need to consider antitrust laws dealing with monopolies before agreeing on a set standard of protection and enforcement. Moreover, what is trade if it is done unilaterally? If monopolies drive out competition, wouldn't international trade be administered solely by the Microsofts of the world?

It is not suggested that developing countries maintain the lowest standard of protecting both foreign and domestic patent rights, but rather, that the international treaties recognize the need for justice by creating incentives for

[62] FTAA, *supra* note 38, at art. 1.3. "Each party shall apply Article 40 of the TRIPS Agreement."

[63] *Id.*

[64] *See* Free Trade Area of the Americas, Seventh Meeting of Ministers of Trade, Ministerial Declaration: General Instructions (Quito, Ecuador, November 1, 2002).

[65] James Packard Love, *A Free Trade Area for the Americas: A Consumer Perspective on Proposals As They Relate to Rules Regarding Intellectual Property*, Comments for the Working Group on Intellectual Property Rights, Third Trade Ministerial and Americas Business Forum (Belo Horizonte, Brazil, May 13-16,1997). *Available at* http://www.cptech.org/pharm/belopaper.html.

[66] Lippert, *supra* note 4, at 269.

developed countries and their patent holders to ease restrictions, while also creating incentives for developing countries to foster competition.

In relating the FTAA with TRIPs, the developing members were contending that the stringent protection of IP would impede their development, and believed that TRIPs would result in a loss of their sovereignty and increased dependence on more developed members.[67] The reason for even entering negotiations, however, was that potential gains from free trade were irresistible when compared to the dependency of other IP abundant nations. The problem of enforcing patent rights in smaller and less developed economies has become a barrier to many trade negotiations. The FTAA has essentially substantiated this fear.

On the other hand, many theories have been advanced promoting stronger IP protection in developing countries. Some use a "prospect theory" to argue that government can use creative measures such as patent buy-outs to ensure the rapid diffusion of technology and knowledge. One author continues by recognizing that in 1839 the French government purchased the patent on the Daguerreotype process and placed it in the public domain, which allowed France to lead the world in creative development of photography during the subsequent century. [68] The example, however, is inappropriate for two reasons in the face of the FTAA. First, the example is archaic. In 1839, the value of intellectual property, and the focus of patents were not as market driven as it is today. The strength of intellectual property rights has undoubtedly changed within the last two centuries, and IP rights have become a method for strategic investment and development. Second, France was nowhere near the threshold of "underdeveloped" in 1839. Developing nations today are not financially capable of spending such money for patent buy-outs. The governments of the less powerful countries of the Western Hemisphere must deal with many more issues before deciding to spend millions of dollars they might not even have to buy-out one patent.

In summary, some argue that the FTAA should negotiate a higher than TRIPS level of IP rights protection. Specifically, "both developed and developing nations will benefit from the resulting further entrenchment of property rights, the expansion of free trade, the shaping of a global optimal standard, and the settling of the intellectual property debate at least in the short term." [69] This is incorrect. Free trade without fair trade does not foster competition and the development of poor nations. Rather, it creates the ultimate right for innovators in prosperous countries to be the gatekeepers of development for underdeveloped countries.

[67] Isaac, *supra* note 15, at 378.

[68] Lippert, *supra* note 4, at 269.

[69] *Id.* at 275.

FTAA As a Strategic Means of Implementing US Patent Policy

Huge portions of TRIPs are incorporated into the FTAA agreement by reference; however, these standards do not have enforcement provisions. US IP rights holders in particular, especially the pharmaceutical industries, wanted to latch on enforcement provisions that ensured maximum profitability from international trade.[70] This type of policy is seemingly evident in the North American Free Trade Agreement (NAFTA), where certain software piracy was decriminalized. However, US software industries did not sit quietly, and, of course, the US went back to negotiations with Mexico over the decriminalization of such software.[71] This was done without consulting Mexican software industries.[72] This problem has been dealt with in advance under the FTAA, as the second draft inherently creates criminal provisions for many types of infringement. For instance, a party may provide criminal procedures and penalties to be applied in cases of infringement of patents where they are committed willfully and on a commercial scale.[73] This provision goes far above and beyond both TRIPs and US patent law. In comparison, willful infringement by US commercial entities only provides for civil penalties, the most severe being treble damages.[74] This type of selective policy should be tested towards other nations, considering the "most-favored nation treatment" rule, and the US should at the very least enforce the same punishment for its own offenders, as it is willing to pursue against violators in a foreign country.

As demonstrated above, the US's intent behind IP negotiations in the FTAA is easily recognizable. The United States has long been attempting to achieve higher than TRIPs protection in pirate countries such as Argentina, while focusing more on harmonization with more developed countries. The subregional trading bloc, Common Market of the South (MERCOSUR) loosely joined the markets of Argentina, Brazil, Uruguay and Paraguay in 1995.[75] Importantly, MERCOSUR does not offer a region wide standard of intellectual

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[70] Papovich, *supra* note 11, at 257. *See also generally* Donald L. Dubuque, *The Implication of NAFTA to Intellectual Property Protection in the U.S. and Mexico and the Extraterritoriality of U.S. Intellectual Property Laws*, 5 J. INT'L L. & PRAC. 139 (1996).

[71] *Id.*

[72] *Id.*

[73] FTAA, *supra* note 38, at § 12, art. 4.2.

[74] *See* 35 U.S.C § 281 ("A patentee shall have remedy by civil action for infringement of his patent"). *See also* 35 U.S.C § 284 ("the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.." and " the court may increase the damages up to three times the amount found or assessed"). For a history of treble damages in US Patent law, *see* Matthew Powers and Steven Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 SYRACUSE L. REV. 53 (2001).

[75] Wendy S. Vicente, *Questionable Victory for Coerced Argentine Pharmaceutical Patent Legislation*, 19 U.PA. J. INT'L ECON. L. 1101, 1102 (Winter, 1998).

property protection.[76] These nations have long rejected integrating their patent protection standards, and MERCOSUR has no developed member nation that insists on a high level of IP protection. Rather than be satisfied on sub-regional agreements, the US plans to use the FTAA to achieve a greater than TRIPs protection with MERCOSUR nations by offering a "comprehensive package."[77] Negotiating countries will be so overwhelmed by the prospect of free trade, and so blinded by US intentions that IP rights will become the extra baggage lost in the process. Thus, the negotiation power of the US in this context is overwhelming, especially with TRIPs and a Special 301 army backing it.

Pharmaceuticals: Problems and Solutions

When it comes to weighing the social costs and incentives of IP rights, pharmaceutical patent holders are the most easily criticized. Easily enough, granting monopolies to large corporations that seemingly have the power to deny life in some cases is of major concern for US consumers. The US is a powerhouse for pharmaceutical drug research. Consequently, the US holds, and will probably continue to hold the most pharmaceutical patents, and currently represents at least 18 percent of the worldwide pharmaceutical market.[78] Of course, these same companies spend millions of dollars researching and developing their products.[79] Thus, proposing no protection at all, as proposed by Argentina, is a futile endeavor. On a national level, US consumers are concerned about the cost of healthcare and the ability to buy cheaper drugs. This problem is only further magnified on the international level, where certain consumers are concerned about receiving healthcare in the first place, and pharmaceutical companies are seen as having the power to deny life merely because they are not happy with profits. However, the Pharmaceutical Research and Manufacturer's Association (PhRMA) argues that the significant levels of investment into pharmaceuticals cannot be sustained unless foreign markets, including those in developing countries, are available to help recoup costs.[80] However, developing countries resist this type of pressure, and resistance to the implementation of patent protection for pharmaceuticals becomes an issue of "national sovereignty."[81]

US policy towards the pharmaceutical problem in Argentina puts this problem into an alarming perspective. US State Department officials have claimed that they received nearly all their information regarding the Argentina

[76] *Id.*

[77] *Id.* at 1112.

[78] Gutterman, *supra* note 29, at 127. Patents & Sales.

[79] *See* Gutterman, Supra note 29, at 125. (citing Thomas Mesevage, *The Carrot and the Stick: Protecting U.S. Intellectual Property in Developing Countries,* 17 RUTGERS COMPUTER & TECH L.J. 421,426 (1991)).

[80] Gutterman, *supra* note 29, at 125.

[81] *Id.*

pharmaceutical patent dispute from the Pharmaceutical Research and Manufacturing Association (PhRMA).[82] Thus, the decisions were based on policy put forth by one, clearly interested source. Moreover, the same officials were unaware of proposals to use compulsory licenses to control excessive prices for pharmaceutical drugs.[83] Parallel imports were another issue, and although the practice is permitted in a couple of European Union Countries, the US is extremely aggressive to ban the practice in South America. One State Department official said he wanted Argentina to be "more Catholic than the Pope" with respect to intellectual property policies.[84] Thus, the attitude of US representatives toward Latin American countries on issues of IP is apparent.

Some solutions to balance these problems are starting to surface. For instance, Professor Lawrence Lessig of Stanford University has suggested that "price discrimination" is a way to solve these problems, which would allow these industries to tailor the pricing of drugs for certain developing countries.[85] Of course, if companies are going to consider charging less to developing countries, they are going to require displacing those lost profits by charging more in the developed countries that can afford to pay more for those drugs.[86] This is especially true in the US's patent system, which forces drug companies to set a semi-standard price across the board, essentially denying medicine to those who need it most.[87] Although price discrimination can favor developing countries, the doctrine of exhaustion is beginning to discourage this practice as free trade agreements such as the FTAA open the doors to cross-market transactions. Thus, patents can quickly lose their value once free trade allows consumers to buy from the cheapest market. This is more commonly known as parallel importing.

The practice of parallel imports is not entirely outlawed. The parallel import concept, premised on a "first sale" right of the patent holder, allows consumers to shop the world market for the lowest price of a patented good, and import it to their host country.[88] This practice has been admitted in many countries, developed and underdeveloped alike. The doctrine of regional exhaustion of rights is enforced across the European Communities (EC). Once a patented product has been sold in an EC country, it can be legally resold in any other member country.[89] Importantly, TRIPs does not address the same issue,

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[82] Love, *supra* note 65, at 10.

[83] *Id.*

[84] *Id.*

[85] Lawrence Lessig, *Stop Making Pills Political Prisoners: Want Drugs to Reach Developing Nations? You'll Pay the Price*, WIRED, Feb. 2004, at 83.

[86] *Id.*

[87] *Id.*

[88] Carlos M. Correa, *Public Health and Patent Legislation in Developing Countries*, 3 TUL. J. TECH. & INTELL. PROP. 1, 36 (Spring, 2001).

[89] *Id.* at 38-39.

therefore, neither does the FTAA.

Another way to disseminate information while allowing countries to develop and remain competitive with large pharmaceutical companies is to create an experimental use exception. Such experimental use exceptions can foster technological growth based on "inventing around" or improving prior inventions.[90] Thus allowing the dissemination of the information before the patent expires gives more time to develop generic drugs, which in turn would create more competition in the industry and correspondingly, more affordable drugs.[91] Even outside the realm of pharmaceuticals, a broad experimental use exception can foster technological growth to the point of steady competition in a multinational environment while ensuring proprietary rights are not abused.

Although these concepts originate in the context of pharmaceuticals, they could be easily applied to other goods. Crucial technologies are becoming just as important to developing countries as is health. By creating investment, this backbone of economical growth could spring third world countries out of overwhelming poverty levels.

"Non-Violation" Complaints and TRIPs Article 8

Proposed in 2002, some recommendations to the negotiations that were reached by consensus were to adopt positions that will facilitate the transfer of technology towards less developed countries in order to reduce the asymmetries in the economies of the hemisphere. This language was completely missing in the second draft of the FTAA, and hopefully, the negotiators will come to realize the inherent need for adopting such a measure. In fact, the same measure was included in the TRIPs agreement.[92]

Article 8 of the TRIPs agreement expressly states that Members may adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided the measures are consistent with the provisions of the Agreement.[93] As Fowler and Zalik put forth, "It would be a poor lawyer indeed or a particularly malevolent government that could not devise a TRIPs consistent way to accomplish its objectives related to any of those policy areas. In any non-violation case, therefore, the party accused could in addition to the precedents provided by prior GATT/WTO cases, raise Article

[90] *Id.* at 34.

[91] *Id.*

[92] FTAA – Committee of Government Representatives on the Participation of Civil Society Contribution in Response to the Open and Ongoing Invitation: Intellectual Property Rights Workshop: Conclusions (January 24, 2002), *available at* http://www.ftaa-alca.org/spcomm/soc/2Quito_e.asp.

[93] TRIPs, *supra* note 5, at art. 8.

8 as authorizing the action it had taken."[94] I propose that the same policy be adopted in the FTAA, and further, for the FTAA to encourage its use and adoption by certain less-developed governments. Although not likely to be applied with the same breadth that Fowler and Zalik foretell, a non-violation forum would give signatories the opportunity to make an equitable case. Why not allow these provisions into the FTAA, if patent law harmonization is the overall goal? This would possibly create a DSM type forum where developing countries could voice their concerns over unfair trading practices, or abuse of rights.

Finally, another policy based alternative mechanism is to provide foreign aid to Latin American research & development. Such an investment would surely result in competition for US companies. However, at the same time, promoting research and development would jumpstart innovation in those countries, which would become interested in enforcing effective intellectual property protection.[95] Some of the "technical cooperation" measures included in the FTAA can be utilized for their full value, but only if legislatures, private entities, and industries as a whole take the initiative to help. Although companies may cringe at the idea of helping create a future competitor, competition for US companies could enhance the global marketplace and create a more efficient market at home.

Conclusion

This note uses pharmaceuticals as an example; however, other developments and innovations in technology have become just as critical to developing nations. Thus, the implications of IP rights in the FTAA are far beyond pharmaceuticals. The central issue is really fair trade of proprietary knowledge. Fair trade will only become a reality if IP holders begin promoting global progress in science and becoming aware of global welfare problems. Perhaps a reason the FTAA is in danger of not being enacted is because of its inability to reconcile many interests. IP rights serve an invaluable role in the US to ensure that innovation is constant. In fact, the US system of IP rights is one of the keys to the technological prosperity it has seen for centuries. However, it is necessary to recognize that certain nations are not prepared for the same system. Developing nations might one day have economies strong enough to maintain a US IP rights agenda. Until then, however, placing pressure upon those countries to swiftly adopt the FTAA and TRIPs, as well as threatening sanctions and other proceedings, can fracture the ice under the prospect of free trade.

[94] Fowler & Zalik, *supra* note 8, at 412-413.

[95] Bentolila, *supra* note 9, at 14.