Intellectual Property Initiatives in the proposed Free Trade Area of the Americas {FTAA]

The Free Trade Area of the Americas [FTAA] ministerial meeting was held in Belo Horizonte, Minas Gerais, Brazil in May 1997. One of the areas under consideration in FTAA is expanded coordination of intellectual property protection standards; however, recent developments appear to make it unlikely that intellectual property initiatives will be a major part of future negotiations toward creation of this $13 trillion market of 800 million people.

Following upon acceptance of the North American Free Trade Agreement [NAFTA] by Canada, Mexico, and the United States in late 1993, rapid developments in cooperation among the Andean Pact countries, and the successful establishment of the common market of the southern cone [MERCOSUR] between Argentina, Brazil, Paraguay, and Uruguay, focus of attention among trade officials shifted to expanding the depth and scope of international economic relations between a greater number of the countries of the Western Hemisphere, consistent with the obligations of these countries under Article XXIV of the GATT Agreement and Article V of the GATS Agreement. Intellectual property became one of the central issues in negotiating broader multilateral trade cooperation between the United States and a greater number of countries in the South and Central American region. This culminated in negotiations between the United States and a number of other countries in the Western Hemisphere toward closer economic integration through the Free Trade Area of the Americas. Intellectual property rights [IPR] were originally one of the key areas for negotiation of the FTAA. One purpose of the FTAA negotiations was to maximize the openness of markets through high levels of compliance with the existing agreements (such as the TRIPs Agreement) regarding intellectual property rights and their creation, maintenance, and protection and eventual adoption of "TRIPs-plus" or even "NAFTA-level-plus" protection of IPRs throughout the Western Hemisphere.

In December 1995, the Office of the United States Trade Representative [USTR] promulgated "proposed terms of reference" for action by a Working Group on Intellectual Property including the following recommendations:

- [to] create an inventory of intellectual property agreements, treaties, and arrangements that exist in the region, including all international conventions (e.g., Berne, Paris, Geneva Phonograms, WIPO, etc.) to which countries are parties;

- compile in the most efficient manner possible an inventory of intellectual property protection laws, practices, and remedies in the region and, on the basis of this information, identify areas of commonality and make specific recommendations in a accordance with the goal of establishing a high and effective level of protection throughout the Hemisphere and of ensuring that standards of protection are not eroded by advances in technology;

- recommend methods to promote understanding of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and recommend measures for the effective and prompt implementation of that Agreement;

- Identify measures to eliminate possible restrictions on the market access of intellectual property-related products and services throughout the Hemisphere, including through electronic transmission;

- identify measures to improve the administration of intellectual property rights, such as by facilitating the application for and grant of intellectual property rights;

- identify needs for training and technical assistance, involving both the substantive levels of intellectual property protection and the effective enforcement of intellectual property rights; and

- recommend methods to promote greater public understanding of the nature and importance of intellectual property protection throughout the Hemisphere.

The above proposed "terms of reference" were presented to the March 1996 Second Ministerial Trade Meeting at Cartagena, Columbia.. There, they were revised, under the chairmanship of Honduras, to the following six:

- [to] create an inventory of the intellectual property agreements, treaties, and arrangements that exist in the Hemisphere, including all international conventions which countries are parties;

- compile, in the most efficient manner, an inventory of intellectual property protection laws, regulations and enforcement measures in the Hemisphere and, on the basis of this information, identify areas of commonality and divergence;

- recommend methods to promote the understanding and effective implementation of the TRIPs Agreement;

- identify possible areas for technical assistance, which countries may request, involving both the administration and enforcement of intellectual property rights;

- analyze the implications of emerging technologies for intellectual property rights protection in the FTAA.

The Cartagena Ministerial Meeting also requested progress reports from the working group on smaller economies to recommend measures, including technical assistance, to facilitate the integration of smaller economies into the FTAA. The Inter-American Development Bank [IDB] is to set up a multilateral investment fund as a principal way of stimulating the development of intellectual property rights in Latin American countries.

At the Belo Horizonte meeting in May of this year, in the face of continued inability of the U.S. to obtain Congressional approval for "fast-track" authority for U.S. negotiators, Brazil's influence in the shape of any future FTAA has grown. Brazil's support for the concept of FTAA as a merger of smaller regional trade agreements, with NAFTA and MERCOSUR as the anchors, rather than an agreement between trading nations themselves, is the most likely course. This may delay Brazil's opening its markets to North American intellectual property owners and will not be conducive to maintaining intellectual property as a central focus of an eventual FTAA agreement. Strengthening intellectual property rights is not as high on Brazil's agenda for FTAA negotiations as it is for the U.S. Delay in "fast-track" authority in the U.S. makes the likelihood of "TRIPS-plus" or "NAFTA-level-plus" standards of protection in an eventual FTAA more and more unlikely.