



**A I P P I**

**ASSOCIATION INTERNATIONALE  
POUR LA PROTECTION DE LA PROPRIETE INTELLECTUELLE**

**INTERNATIONAL ASSOCIATION  
FOR THE PROTECTION OF INTELLECTUAL PROPERTY**

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# **Report**

## **Special Committee Q184**

**IP Issues of the Treaty for the Free Trade Area of the  
Americas (FTAA)**

**Questions en Propriété Intellectuelle du Traité de la Zone  
de libre-échange des Amériques**

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Freihandelszone des Amerikas**



## Report Q184

### IP issues of the Treaty for the Free Trade Area of the Americas (FTAA)

by Peter Dirk SIEMSEN (Brazil)

The idea of establishing a free trade area comprising the Americas and the Caribbean (except Cuba) is not a recent one. It was initially launched in the early nineties by the U.S.A. President, Mr. George Bush, having in mind creating a counterpart to the European Common market, but it did not develop until President Clinton revived it in the middle nineties. As a result, the first Summit of the Americas was held in Miami, U.S.A., in 1994, followed by the second and third summits in 1998 and 2001, in Santiago, Chile, and Quebec, Canada, respectively.

Simultaneously, besides these Summits, several ministerial meetings have taken place, the last one having occurred in Miami in November 2003.

However, to materialize that idea of creating a free trade area comprising 34 countries has proven to be a very difficult task. The main reasons are:

- the large number of countries with different levels of development, different cultures, different legislations;
- the vast number of areas covered by the agreement (market access, investments, services, government procurement, dispute settlement, agriculture, intellectual property, subsidies, antidumping and countervailing duties and competition policies);
- lack of definition on methods and modalities for the negotiations;
- lack of agreement on agricultural and anti-dumping issues;
- lack of agreement in relation to technical barriers;
- political instability in some Latin American countries;
- lack of interest of those countries that are negotiating or have already concluded bilateral agreements with the U.S.A., such as Chile, Colombia, Central America (CAFTA), the Dominican Republic and Peru, or like Mexico, which is already part of the NAFTA agreement.

The controversies and disagreements in many areas, specially the disappointing offer the U.S.A. made to Mercosur in the area of market access for goods, created a kind of polarization: on one side the U.S.A., and on the other the Mercosur, led by Brazil. To break this deadlock, during the Trade Negotiation Committee meeting in El Salvador in July 2003, the Mercosur presented a proposal for restructuring the FTAA negotiating process - the so-called "three-track proposal".

According to the three-track proposal, the negotiations should go on in three different levels or tracks: one covering market access (agricultural and non-agricultural goods), services and investments, to be discussed bilaterally between the Mercosur and the U.S.A.; a second one covering sensible matters such as a rules on services, investments, government procurement, intellectual property, subsidies to exports and anti-dumping, which should be discussed before the WTO; finally, there would be a third track comprising not so sensible issues, for example subsidies within the region, competition policies, institutional matters, hemispheric cooperation, etc., which would be discussed within the FTAA itself.

The U.S.A. did not accept the three-track proposal, and consequently the impasse continued until the Ministerial Meeting held in Miami in November 2003, where the Ministers decided to give the FTAA negotiations a different structure, expressed in the Miami Declaration of November 21, 2003. In short, the Declaration establishes that the Ministers shall develop a common set of obligations, to be accepted by the 34 countries, but each country may assume additional commitments, if it so wishes, by means of plurilateral negotiations. The common set of obligations shall include provisions in the nine pre-existing areas of negotiations, namely: market access; agriculture; services; investment; government procurement; intellectual property; competition policies; subsidies, antidumping and countervailing duties; dispute settlement.

The Miami ministerial meeting was followed by a Trade Negotiations Committee meeting in Puebla, Mexico, in February 2004, which, however, reached no concrete results. Another meeting of the Trade Negotiations Committee, originally scheduled for March, has been continually postponed, thus showing that the FTAA negotiations really face an impasse, mainly due to lack of agreement in the agricultural area.

As far as intellectual property is concerned, divergences are as frequent as in other areas, and the last draft text, dated November 21, 2003, is still full of brackets, thus showing the various proposals for each provision.

The intellectual property chapter of the FTAA comprises a large number of issues: an initial section on general issues such as the nature and scope of obligations, general principles and objectives, relation with other intellectual property agreements (adherence to certain international treaties such as the PCT, the Madrid Protocol, the Hague Agreement on the International Deposit of Industrial Designs (1999) and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980), and exhaustion of rights; a second section on substantive provisions, including national treatment, most-favored-nation treatment, transfer of technology and exercise of rights, and a third part with sections on trademarks, domain names, geographical indications, copyrights and related rights, protection of folklore, patents, utility models, industrial designs, plant varieties, undisclosed information, unfair competition, anti-competitive practices, enforcement, and final provisions on procedures and institutions.

The main difficulty in discussing the intellectual property chapter lies not only on the variety of issues and detailed provisions it comprises but mainly on the different positions defended by each country, based on their national laws and practices, which are very heterogeneous and sometimes go towards completely opposite directions, as for example the position of the common law countries such as the U.S.A. and that of the civil law countries such as Brazil and other South American countries.

For this reason, if the basic structure and text of the intellectual property chapter of the FTAA is maintained, it will certainly place an enormous burden on many countries, which will have to reluctantly adapt themselves to a new reality.

In view of all the difficulties which still have to be overcome, it is doubtful whether the FTAA negotiations will be concluded by January 2005 as originally planned.