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IP in ASEAN— Australia—New Zealand FTA

Having entered into force on January 1, 2010, the Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand Free Trade Agreement (AANZFTA) aims to liberalize and facilitate trade in goods, services, and investment between Australia and New Zealand and Southeast Asia. The AANZFTA is quite comprehensive and wide in scope, covering such issues as trade in goods and services, competition, e-commerce, investment, and intellectual property (IP). Chapter 13 of the AANZFTA contains a number of specific obligations on IP protection, with the goal of reinforcing the World Trade Organization TRIPS obligations and achieving a higher level of IP protection beyond the minimum standards under the TRIPS Agreement.

Protection of Patents, Trademarks, and Copyrights

The agreement requires its parties to adhere to non-TRIPS IP treaties, including the Patent Cooperation Treaty (PCT), the Patent Law Treaty, and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977).

The incorporation of substantive PCT provisions will establish an international filing system for patent applications in ASEAN countries and will lead to better coordination in regard to international patent searches. The accession to the PCT will also extend the time period required to file a patent application (i.e., from the 12-month priority date for patent applications under the Paris Convention, to up to 30 months under the PCT).

With all the parties seeking accession to, and implementation of, the WIPO Patent Law Treaty, the AANZFTA will harmonize, to a certain degree, patent laws in regard to patentability criteria, patentable subject matters, procedures for obtaining and maintaining patents, and other patent matters.

ASEAN members, most of which are not parties to the Budapest Treaty, are also encouraged to seek accession to this multilateral patent convention. Accession to the Budapest Treaty will facilitate the patent-granting process for biotechnology patent applications.

The provision on trademarks and geographical indications (GI) simply requires parties to make available, on the Internet, databases listing all pending and registered trademark rights in their respective jurisdictions. The AANZFTA, in line with Australia's and New Zealand's position in multilateral trade negotiations, relies on trademark and unfair competition law for the protection of GI. The AANZFTA also requires each party to protect trademarks that predate GIs in its jurisdiction.

While Australia and New Zealand gain when GIs are protected as trademarks, the use of trademarks for GIs may inhibit the attempts of some ASEAN countries (e.g., Thailand, which has enacted comprehensive legislation on the protection of GIs) to extend the protection of wines and spirits to all products, and to use GIs as a tool for the promotion of their quality products.

For copyright protection, TRIPS requires criminal proceedings to take place for cases involving willful copyright piracy for commercial advantage or financial gain. The AANZFTA extends this obligation to cases where a person willfully commits a significant infringement of copyright that is not committed for commercial advantage or financial gain, but which has a “substantial prejudicial impact” on the owner of the copyright. Each party is also required to foster the establishment of appropriate bodies to permit the collective management of copyrights.

The AANZFTA parties have agreed to increase the level of protection for digital technologies by providing adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors and related rights holders apply to protect their content. Effective legal remedies against the circumvention of technological measures are already incorporated in legislation in Australia and New Zealand, but they have not been incorporated in the legislation of most ASEAN countries. This obligation will persuade ASEAN countries to reform their existing copyright regimes by extending the conventional economic rights of the author to the right to use and distribute circumventing devices. This will enable the copyright owners to extend control over access to, and distribution of, digital works.

The AANZFTA provides a guarantee to the software owners that, not only will their copyrights over software be highly protected, but also they will have exclusive rights to sell their products to national government agencies.

Protection of Genetic Resources, Traditional Knowledge, and Folklore

The AANZFTA recognizes the significance of protecting informal knowledge and cultural property and provides that “each party may establish appropriate measures to protect genetic resources, traditional knowledge and folklore.” The inclusion of these issues (which are still being discussed multilaterally in this regional FTA) is not surprising given that ASEAN, Australia, and New Zealand are known for possessing great wealth in terms of cultural and natural heritage.

Transparency and Cooperation

The AANZFTA requires parties to implement a number of measures that will enhance transparency and improve the management of IP rights. This includes the requirement for making IP laws and regulations, and final judicial decisions and administrative rulings, publicly available on the Internet and in English. This requirement will foster greater transparency and predictability in relation to IP enforcement and will lead to a more open, predictable, and transparent business environment, which will in turn create greater confidence in the market.

Implications

As the ASEAN Economic Community comes into effect in 2015, a unified and borderless ASEAN economic entity will present greater business challenges and opportunities for enterprises and investors from Australia and New Zealand. Compared to the FTAs that were negotiated and signed by the United States and the European Union, the IP chapter under the AANZFTA is relatively simple and straightforward, and will raise fewer questionable implications than those of the US and the EU. Once the IP provisions are implemented, the AANZFTA will not only give Australia's and New Zealand's exporters and investors greater access to these lucrative and integrated markets, but will also provide a high degree of protection for their valuable intellectual assets. 🐼