

Implications for intellectual property rights following Switzerland and India's new free trade agreement

On March 10 2024, Switzerland – together with fellow European Free Trade Association members Liechtenstein, Norway and Iceland – signed the 'Trade and Economic Partnership Agreement' (Free Trade Agreement, "FTA") with India. The negotiations to achieve this result took 16 years. Alongside core provisions on custom duties and investment opportunities, the FTA also contains various provisions on the protection of intellectual property rights that will influence trade between Swiss and Indian companies.

Published: 25 March 2024

Updated: 18 April 2024

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EXPERTISE	Intellectual Property Life Sciences and Healthcare	

16 years in the making, the FTA has a broad scope of application. It includes rules on market access for industrial and agricultural goods, as well as services. It sets out rules on investment promotion and cooperation, the elimination of technical barriers to trade, competition, dispute settlement, trade facilitation, sustainable development and government procurement.

Intellectual property rights are also comprehensively addressed. Under the FTA, all parties must provide adequate, effective and non-discriminatory protection and enforcement of intellectual property rights. These improved protections will bring significant advantages for Swiss companies trading with Indian counterparts. By increasing legal certainty, the new rules in the area of intellectual property protection serve to also facilitate entry of Swiss companies into the Indian market.

The FTA is an example of a so-called "TRIPS-plus" agreement. In principle, the level of protection corresponds to that of the WTO Agreement on Trade-Related Aspects of Intellectual Property

Rights ("TRIPS"). However, certain provisions of the FTA exceed the minimum level of protection that TRIPS affords. This may lead to certain changes in the future with respect to trade between Swiss and Indian companies.

Key elements covering intellectual property rights

Simplifying patent protections

The parties' different views on the scope of patent protection considerably delayed the signature of the FTA. India supplies 20% of the world's generic drugs, a large share of which is sold in developing countries. At the same time, originator pharmaceutical companies form the backbone of the Swiss pharmaceutical industry, making Switzerland one of the top exporters of medicinal products in the world.

After joining the WTO and implementing the TRIPS Agreement, India had already adapted its patent law and extended its patent term to 20 years. Nonetheless, India has been known for making use of many exemptions from patent protection, resulting in the perception that patent protection in India was below international standards.

The FTA eliminates certain legal uncertainties in the area of patent protection. A non-discrimination provision guarantees that products imported from Switzerland to India (and vice-versa) enjoy the same level of patent protection as those manufactured locally (art. 11 para. 1 Appendix 8.A FTA). The provision does not, however, prevent the possibility of granting compulsory licenses to the extent necessary for the purposes of production or export of a pharmaceutical product according to the TRIPS Agreement (art. 31bis TRIPS).

The FTA also provides for further positive changes in the area of patent proceedings. The FTA requires all parties to ensure that opposition proceedings are processed within a reasonable time and that obviously unfounded oppositions are swiftly rejected (art. 11 para. 7 Appendix 8.A FTA). In addition, the scope of disclosure obligations concerning the working of a patent (which are still mandatory in India) has been limited. According to the FTA, a patent owner can't be required to disclose such information more than every three years (art. 12 para. 1 Appendix 8.A FTA). Confidential information in such disclosures, meanwhile, may not be published.

With these provisions, the FTA improves access and reduces risk for Swiss companies, especially those in the pharmaceutical sector, when trading with Indian counterparts.

The protection of test data for pharmaceuticals, i.e. data that are also used for the marketing authorization of generic medicine, was a very controversial topic during negotiations due to India's position as a major distributor of generics. Eventually, test data protection was not strengthened in the FTA. In this regard, the previous level of protection under the TRIPS Agreement remains in place (art. 39 TRIPS).

Better protection for Swissness in trademarks

The FTA significantly improves the protection of 'Swissness', i.e. the use of the designation 'Switzerland' or 'Swiss' for goods and services. This is important for both agricultural (e.g. cheese)

and non-agricultural goods (e.g. watches, cosmetics).

With regard to geographical indications, the FTA provides that the use of such indications even in connection with expressions such as "kind", "type", or "style" is prohibited if the good does not originate in the place indicated (art. 9 para. 4 Appendix 8.A FTA). For example, it would no longer be possible to label a cheese as 'Swiss style' in India if the cheese did not actually originate from Switzerland. With this regulation, the FTA goes beyond the minimal rules of the TRIPS Agreement, which only provides additional protection for wines and spirits (art. 23 TRIPS).

Finally, a separate agreement specifically between Switzerland and India (Appendix 8.A.1) addresses the protection of country names as trademarks or as an element of a trademark application. No trademark containing the designation 'Swiss' or 'Switzerland' may be registered in India if it leads to confusion as to the true place of origin of the goods or services. The same rule also applies in reverse, namely if a trademark with a country designation relating to India is registered in Switzerland. The continued use or renewal of a trademark that has already been applied for or registered in good faith, however, is not prohibited by the new rules of the FTA.

As the designation 'Switzerland' or 'Swiss' is generally associated with a high level of quality, the improved protection of Swissness as part of trademarks is an important step that may considerably improve the position of Swiss manufacturers in India.

Looking ahead

The FTA may lead to significant improvements in the protection of intellectual property rights in trade between Swiss and Indian companies in the future. The FTA is subject to ratification by the Swiss parliament and, potentially, a referendum on the matter. Therefore, the FTA is not expected to enter into force prior to autumn 2025.

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