

# One economic community

**Jakkrit Kuanpoth** of **Tilleke & Gibbins** looks at the ins and outs of the Free Trade Agreement that will bring Australia and New Zealand closer to their developing neighbours

**T**he Association of Southeast Asian Nations (ASEAN)-Australia-New Zealand Free Trade Agreement (FTA) was signed in Hua Hin, Thailand, on February 27 2009, and entered into force on January 1 2010 when eight of the 12 participating countries ratified it (ie Australia, New Zealand, Brunei, Burma, Malaysia, the Philippines, Singapore, and Vietnam). Before this FTA was signed, Australia and New Zealand had an FTA with each other, and each of them had FTAs with Thailand and Singapore. However, the two developed countries from the southern hemisphere did not have FTAs with Brunei, Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, and Vietnam. This FTA will liberalise and facilitate trade in goods, services, and investment between Australia and New Zealand with those Southeast Asian nations.

The FTA is quite comprehensive and wide in scope, covering various issues including trade in goods and services, competition, e-commerce, investment, and intellectual property. It generally aims to maximise market access and harmonise trade rules for the export of goods and services and investments between the two regions. The FTA reduces and eliminates duties and other non-tariff barriers in all participating countries and provides for government-to-government and investor-state dispute settlement mechanisms. This will allow investors, including the holders of intellectual property rights, to take action against governments that fail to treat investments in accordance with the standards of the FTA.

Chapter 13 of the FTA contains a number of specific obligations on the protection of IP rights. Most of the IP obligations build on the parties' existing rights and obligations under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), with the goal of reinforcing TRIPS obligations and achieving a higher level of IP protection beyond the minimum standards of the TRIPS

Agreement. The FTA includes provisions dealing with government use of software, protection of copyright, trade marks, geographical indications, traditional knowledge, and folklore. It also examines the detailed provisions for cooperation between the parties in the implementation of the IP provisions, including exchange of information on IP infringement, the promotion of efficiency and transparency in IP administration and registration systems, and the establishment of a Committee on Intellectual Property to monitor the implementation of the IP provisions. This article will provide an overview of some of these key provisions.

## General provisions

The objectives of the FTA (which will be used for interpreting treaty provisions) are not notably different from those laid out in TRIPS. The IP chapter commences by confirming each party's commitment to reducing impediments to trade and investment. However, it recognises the different levels of economic development and capacity and differences in national legal systems. It also recognises the traditional balance between right holders and the legitimate interests of users, which is the cornerstone of national IP systems.

Parties to the FTA have agreed to adhere to the National Treatment principle by providing non-discriminatory treatment to nationals of other parties in respect of all IP rights covered by the IP chapter. ASEAN countries have also agreed to ratify or take reasonable steps to ratify a number of international IP agreements, such as the International Convention for the Protection of New Varieties of Plants (1991) (UPOV), the Patent Law Treaty (2000), the Copyright Treaty (1996), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989), and the Patent Cooperation Treaty (1970) (PCT). Since Australia and New Zealand are already parties to these respective agreements, the FTA provision will essentially seek accession of their trade partners to those multilateral treaties.

### Patent, trade mark, and copyright provisions

There is no FTA provision that specifically mentions patents. The Agreement only requires its parties to adhere to non-TRIPS IP treaties, including the 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).

ASEAN members, most of which are not parties to the Budapest Treaty and the PCT, are encouraged to

## The requirement will foster greater transparency and predictability in IP enforcement

seek accession to these multilateral patent conventions. The accession to the Budapest Treaty will facilitate the patent granting process for biotechnology patent applications. The incorporation of substantive PCT provisions will establish a system of international filing of patent applications in ASEAN countries and will lead to better coordination of international patent searches. The accession to the PCT will also extend time periods for requesting a patent (from the 12-month priority date for patent applications of 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 FTA will harmonise to a certain extent patent laws in regard to patentability criteria, patentable subject matters, procedures for obtaining and maintaining patents, and other patent matters.

The IP chapter also contains a number of specific obligations on the protection of trade marks, geographical indications, and copyrights. The provision on trade marks and geographical indications simply requires parties to make available on internet databases all pending and registered trade mark rights in their respective jurisdictions. The FTA, in line with Australia's and New Zealand's position in multilateral trade negotiations, relies on trade mark and unfair competition law for the protection of geographical indications (GI). It also requires each party to protect trade marks that predate, in its jurisdiction, GIs. While Australia and New Zealand gain when GIs are protected as trade marks, the use of trade marks for GIs may inhibit attempts of some ASEAN countries (such as 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 of willful copyright piracy for commercial advantage or financial gain. The

FTA 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 for the collective management of copyright. They must also encourage such bodies to operate in a manner that is efficient, publicly transparent, and accountable to their members. This establishment could be useful for a number of participating countries that are looking at better exploiting their cultural industries.

The FTA 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 part of Australia's and New Zealand's legislation, but they have not been incorporated into the legislation of most ASEAN countries. This obligation will persuade ASEAN countries to reform their existing copyright regime 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 FTA provides a guarantee to the software owners not only that their copyrights over software will be highly protected, but also that they will have exclusive rights to sell their products to national government agencies. Under the FTA, each party confirms its "commitment to maintain appropriate laws, regulations and policies that make provisions for its central government agencies to use only legitimate computer software and to encourage its respective regional and local governments to maintain or adopt similar measures".

### Genetic resources, traditional knowledge, and folklore

The FTA recognises the significance of protecting informal knowledge and cultural property. It 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 into this regional FTA) is not surprising given that ASEAN, Australia, and New Zealand are known for possessing great wealth in cultural and natural heritages. Although the FTA explicitly acknowledges the importance of these subjects, it fails to ensure their protection in concrete ways. The FTA

provision neither mentions specific forms of protection for these novel areas, nor refers to the Convention on Biological Diversity and the Food and Agriculture Organization (FAO) International Treaty on Plant and Genetic Resources for Food and Agriculture (ITPGR-FA), which are the most comprehensive regimes of protection of genetic resources and traditional knowledge to date.

The FTA's provision on genetic resources, traditional knowledge, and folklore seems to reflect the perspective of the parties that this issue is being negotiated in multilateral fora and should be kept that way. However, the FTA provisions seem contradictory. While the FTA gives parties the freedom to establish their own system of traditional knowledge protection, it demands that each party seek accession to the UPOV Convention 1991. Some ASEAN countries, such as Thailand and Indonesia, have flexibly implemented the *sui generis* system for plant variety protection. Their national legislation has incorporated requirements to disclose prior informed consent and demonstrate equitable benefit sharing. Acceding to UPOV 1991 as required by the FTA, those ASEAN countries will no longer maintain the alternative rights systems that offer rights for the local community, restrict access to genetic resources, and provide sharing of benefits derived from their valuable resources and traditional knowledge.

### Transparency and cooperation

On transparency, the FTA 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. The requirement will foster greater transparency and predictability in IP enforcement and will lead to a more open, predictable, and transparent business environment, creating greater confidence in the market.

The FTA also contains detailed provisions for cooperation between parties to assist in improving the efficiency of IP rights enforcement and in the implementation of IP provisions. These provisions include: the exchange of information on infringement of IP rights; the promotion of efficiency and transparency in IP administration and registration systems; and, the establishment of a Committee on Intellectual Property to monitor the implementation of the FTA's IP provisions.

### Implications

From the perspective of Australia and New Zealand, the FTA is essential because ASEAN is their largest

trading partner and third-largest export market. Since ASEAN countries have raised their ambitious vision of becoming one economic community in 2015, a unified and borderless economic entity of ASEAN will present greater business challenges and opportunities for enterprises and investors from Australia and New Zealand. Compared to the FTAs negotiated and signed by the United States and the European Union, the IP chapter under the FTA is rel-

## The FTA recognises the significance of protecting informal knowledge and cultural property

atively simple and straightforward, and will bring up fewer questionable implications than those of the US and the EU. Once the IP provisions are implemented, the FTA will not only give Australia's and New Zealand's exporters and investors greater access to such lucrative integrated markets, but will also provide a high degree of protection for their valuable intellectual assets.

### Jakkrit Kuanpoth



Jakkrit Kuanpoth, counsel in the Tilleke & Gibbins intellectual property group in Bangkok, is an esteemed expert on IP rights and other related global issues. Jakkrit's knowledge and advice has been sought by organisations such as the

World Intellectual Property Organization, the World Health Organization, the Ford Foundation, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), and the International Centre on Trade and Sustainable Development (ICTSD). He has also sat on various parliamentary and national committees at the request of the Thai government. Jakkrit has completed the barrister-at-law requirements of the Institute of Legal Education, Thai Bar Association.

Jakkrit is both a legal practitioner and an academic, with continuing teaching responsibilities in intellectual property law at the University of Wollongong in Australia. He has written authoritative texts on patent rights in pharmaceuticals, patent rights in developing countries, TRIPS and intellectual property, TRIPS and free trade, biotechnology, globalisation, economic development, and geographical indications.



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