

The impact of free trade on IP

Alan Adcock and **Clemence Gautier** of **Tilleke & Gibbins** consider the implications of freer Asean trade

The June 2010 World Economic Forum report – Enabling Trade in the Greater Asean Region – ranked 125 economies based on market access, border administration, transport and communication infrastructure and overall business environment. According to the report, one of the main factors for lower rankings of certain Asian countries lies with difficulties in moving goods around.

Enabling Trade Index

Rank 2010	Country	Score 2010	Rank 2009
1	Singapore	6.06	1
2	Hong Kong	5.70	2
25	Japan	4.80	23
27	South Korea	4.72	26
28	Taiwan	4.72	25
30	Malaysia	4.71	28
48	China	4.32	49
60	Thailand	4.13	50
68	Indonesia	3.97	62
71	Vietnam	3.96	89
84	India	3.81	76
92	Philippines	3.72	82
102	Cambodia	3.57	91

Source: World Economic Forum, *Enabling Trade in the Greater Asean Region*, June 2010

One of the Association of Southeast Asian Nations (Asean)'s stated objectives is to overcome such logistics issues and to implement policies and initiatives to allow for better circulation of goods under systems similar to those adopted by the European Union.

On August 8 1967, Asean was founded when the Bangkok Declaration was signed by the five original members (Asean-5) – Indonesia, Malaysia, the Philippines, Singapore, and Thailand. The association now

consists of 10 members, with Brunei Darussalam joining in 1984, Vietnam in 1995, Laos in 1997, Myanmar in 1997 and Cambodia in 1999. Its purposes, stated in the Asean Declaration, are to accelerate economic growth, social progress, and cultural development in the region and to promote regional peace and stability.

Asean Free Trade Area

At the 4th Asean Summit, held in Singapore in January 1992, Asean member heads of government agreed to establish an Asean Free Trade Area (AFTA), a comprehensive program of tariff reduction in the region. In drafting and signing the Singapore Declaration, the Asean members at that time, namely Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei (the Asean-6), committed to making AFTA fully enforceable by 2008. AFTA is aimed at eliminating intra-regional tariffs, attracting direct foreign investment and improving efficiency and competitiveness within Asean, while leaving members free to set their own tariff levels against non-members.

The AFTA agreement commits its members to reduce the tariff rate imposed on intra-Asean imports to no more than 5% through the Common Effective Preferential Tariff (CEPT) scheme. The CEPT scheme was introduced in 1993 to eliminate intra-Asean import tariffs and has been fully in place since January 1 2010. In line with the CEPT scheme, the Asean -6 have eliminated duties on all products since January 1 2010 except on the limited sensitive and highly sensitive unprocessed agricultural products which have been capped at 5%. Tariff reduction only applies to goods originating in Asean nations. The AFTA agreement also states that quantitative restrictions (import permits, quotas) and other non-tariff barriers among Asean member countries have to be eliminated.

If Asean were a single country, it would rank only in 9th place among the world's largest economies in terms of nominal GDP. Cross border trade within the block accounts for a mere 20% of all overall exports and im-

ports. Impressive recoveries from the global recession this year, however, have seen Asean economies gain remarkable rebounds with expected collective growth this year to average out to 6.4%. Even though many trade barriers were removed before January 1 2010, greater integration with the two major economies of Asia has been seen as necessary to enable Asean to compete more strategically in an ever-expanding economy.

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China-Asean Free Trade Agreement

In November 2001, China and the 10 Asean members began negotiating the setting up of a free trade area. On January 1 2010, the China-Asean Free Trade Agreement (CAFTA) came into force. CAFTA covers goods (agricultural and manufactured), investments, and services. In terms of economic value, this is the third-largest regional agreement, after the EU and NAFTA. In terms of population, the agreement covers the world's largest free trade zone with a combined population of just over 2 billion people.

Since 2001, China and the six veteran Asean members (Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei) have incrementally reduced their tariff levels, typically at 5% per annum. On January 1 2010, 7000 products, or 90% of the commodities exchanged between these countries, had their tariff rates reduced to zero. The newest members of Asean (Cambodia, Laos, Myanmar, and Vietnam) are scheduled to follow suit with most of their intra-Asean tariffs eliminated by 2015. The average tariff applied to those goods imported from Asean member states still under some tariff controls has been cut from 9.8% to 0.1%. Meanwhile the average tariff rate applied to imported Chinese goods still under some tax is now only 0.6%, as

compared with 12.8% before CAFTA. However, each country may list dozens of sensitive products where tariffs can still apply, from port services fees to cars to chemical products to popcorn. Thus, the scope of this free trade agreement remains relatively restrained compared to the one applied to the NAFTA or EU zones where the integration rate is higher. However, by 2015, duties must be cut to no more than 50% on highly sensitive items, including ambulances in Brunei, popcorn in Indonesia, snowboard shoes in Thailand and toilet paper in China (among some of the more notable goods and services).

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Alan Adcock



Alan Adcock has practised IP law for 12 years, all of which has been devoted to Asian regional practice (particularly in China). After completing his law degree at Columbia University, Alan qualified in New York and New Jersey. In 2008, Alan joined Tilleke & Gibbins in Bangkok as deputy director of the firm's intellectual property department. He also practices in the firm's regulatory affairs group, which is responsible for product registrations and clinical trials/field trials with the Thai Food and Drug Administration and the Ministry of Agriculture.

Focusing primarily on the commercialisation of IP assets, Alan has extensive experience in IP acquisitions, strategic structuring, technology transfer, and negotiating and drafting IP licensing and securitisation agreements. He is also closely involved in Tilleke & Gibbins' leading patent and trade secret litigation practice, focusing mainly on the pharmaceutical, agrochemical and material science sectors. He handles local pre-litigation strategy and litigation management for infringement and invalidation matters and works regularly with external counsel globally when strategy or evidence collection/assessment issues reach outside Southeast Asia.

Since 2005, Alan has received recognition by *Asialaw Leading Lawyers* survey as one of Asia's leading business lawyers in the area of intellectual property. He was also recognised as one of the world's leading life sciences patent litigators by Intellectual Asset Management's *IAM Life Sciences 250*.

Asean-India Trade in Goods Agreement

After six years of negotiation, the Asean-India Trade in Goods Agreement (Asean-India TIG or Asean-India Free Trade Agreement – AIFTA) was signed on August 12 2009. On January 1 2010, the Asean-India TIG entered into force. It also creates one of the world's largest free trade areas. AIFTA will see tariff liberalisation of over 90% of products traded between the two dynamic regions, including designated special products, such as palm oil (crude and refined), coffee, black tea, and pepper. Tariffs on over 4000 additional categories

Clemence Gautier



Clemence Gautier is a consultant in the intellectual property and regulatory affairs groups of Tilleke & Gibbins in Bangkok. After completing her license and maitrise of business law with honors at the Institut Universitaire Professionnalise in Paris, she attended the University of Rennes, where she completed her LLM concentrating on international business law.

Clemence's practice focuses on regional IP law, registration of products with Food and Drug Administrations and Ministries of Agriculture in Southeast Asia and anti-corruption matters. In regard to intellectual property, Clemence works closely with pharmaceutical, agribusiness, and biotechnology companies on issues including trade mark and patent registration throughout Asean, enforcement, IP commercialisation and trade mark litigation. She has expertise in industry-specific issues such as data protection, product liability, clinical trials and labeling. She is among the lead external counsel to the Pharmaceutical Research and Manufacturers Association (PREMA), the research-based pharmaceutical industry group in Thailand.

Clemence is an active member of MARQUES and APRAM, as well as the Anti-Corruption Commission of the International Chamber of Commerce based in Paris.

bers have prioritised the improvement of product registration and marketing approval processes for pharmaceuticals and other regulated products such as food and agrochemicals. The implementation of the 2009 Asean Common Technical Requirements and Dossier on Quality, Safety and Efficacy, which provides guidelines on analytical and process validation, stability studies, and bioavailability/bioequivalence, reflects a desire for harmonisation with the most efficient regulatory practices worldwide. Despite these strides in the right direction, however,

of goods are slated to be eliminated by 2016. Fourth in size among the big free trade zones, AIFTA covers a consuming population of 1.9 billion people.

As of today, only goods from India, Malaysia, Singapore, and Thailand can benefit from the AIFTA tariff reduction. The other countries still have to implement their internal procedures for the ratification of AIFTA. An agreement on trade services and investments is still being discussed among the parties.

Asean has also concluded free trade agreements with South Korea, Japan, Australia, and New Zealand and is currently negotiating a free trade agreement with the European Union. US-Asean negotiations for a free trade agreement have been stalled for years as the US Congress is not necessarily a fan of such trade commitments. However, with Chinese trade and investment in the region doubling nearly year on year, interest from the United States may be rekindled.

Harmonisation

A 2008 World Bank report classified Asean in terms of household salaries into high income (Singapore, Brunei), upper middle income (Malaysia), lower middle income (Thailand, Indonesia, and the Philippines) and low income (Laos, Cambodia, Vietnam, and Myanmar). With the increase in foreign investment and increased domestic development of specific industries, certain businesses have begun to experience erratic and strained government regulatory hurdles. Asean mem-

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significant issues still remain in many of these countries, particularly in regard to government initiatives favoring cheaper access to medicines, pro-generic policies, faster drug registration processes for generics and the deprioritisation of IP rights owned by the originators/innovators of the drugs.

This was not Asean's first attempt to harmonise their various Food and Drug Administration (FDA) procedures. In 2003, members were able to agree on the Asean Harmonised Cosmetic Regulation Scheme, which set out two important objectives. First, the scheme is intended to enhance cooperation among member states

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in ensuring the safety, quality, and claimed benefits of all cosmetic products marketed in Asean. Second, it eliminates restrictions to trade of cosmetic products among member states through harmonisation of technical requirements. By virtue of the scheme, member states agreed to undertake the necessary measures to fully implement the Asean Cosmetic Directive by January 1 2008, including mutual recognition of product registration approvals.

Other agreements have been signed among the member states, such as the Asean Framework Agreement on Intellectual Property Cooperation in December 1995 which aimed to set up a regional patent and trade mark

office. Subsequent action plans have called for the establishment of an IP database of local laws, application forms, etc, as well as the establishment of an electronic information network and greater cooperation in cross border IP infringement enforcement. Initiatives are well underway in terms facilitating Asean business establishments within the region and for the easing on investment restrictions.

While harmonisation of the rules to get products registered at Asean FDAs, MoAs (ministries of agriculture which are normally responsible for chemical product control), and intellectual property offices is intended to help Asean members get their products to these markets faster and with less administrative hassle, critics forewarn of a likely misuse of streamlined procedures, particularly by unfair competitors or infringers seeking to acquire competing rights to sell and distribute within Asean or to use Asean as a safe harbour base in order to conduct wrongful trade in other jurisdictions. A fear resonates within some industries in particular that increasing registration efficiency will see a faster spread of illegitimate goods not only throughout the region, but globally as well given Asean's propensity to exports.

Since CAFTA in January 2010, Hong Kong and Vietnam have wasted little time plugging loopholes in their company regulations to make it more difficult to use their jurisdictions as safe harbours for the conduct of illegal business, particularly when using another's trade mark or trade name when applying for company registrations.

In Hong Kong, the term *shadow company* refers to the unscrupulous use of another party's well-known trade mark in the registered name of a business, often for the purpose of conducting trade in illegitimate goods and services. In China, these companies are known as unauthorised business enterprise name registrations. Concerted efforts by IP owners, trade associations and IP lawyers in both jurisdictions have led to successful actions against such trade mark infringements. Moreover, in July 2010, the Hong Kong legislative council passed the Companies (Amendment) Bill 2010 which, when implemented, will empower the companies registry to strike off these shadow companies. This legislation should prove advantageous for legitimate business owners seeking to protect their trade names and trade marks from unscrupulous use.

While China and Hong Kong take action against these shadow companies, Asean is seeing a marked increase in the use of well-known trade names and trade marks in business name registrations. To deal with

these registrations, Vietnam introduced a decree that came into effect on June 1 2010. The Vietnamese government recently passed Decree 43/2010-ND-CP on Enterprise Registration (Decree 43), Article 17 of which prohibits the use of a protected trade name, trade mark, or geographical indication of another organisation or individual in the name of a business. Decree 43 gives IP owners the right to file a request to the relevant business registration body or authority (usually the provincial department of planning and investment) to require a business to change an infringing name.

Elsewhere in Asean, the same fast-track business establishment systems implemented to encourage more corporate establishment are being used to inappropriate means and Asean members are having to acknowledge this. The rest of Asean currently takes an approach similar to that of Thailand, where there seems little the company registration departments can proactively do to counter such unauthorised registrations until the rel-

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evant enabling legislation changes to empower officials to reject applications for business names using the trade marks or trade names of others. Because of this, shadow company registrations in Thailand have increased significantly in the past 12 months.

Logistics and distribution

Increase in trade will facilitate increases in technology transfer and with an expanded understanding of the value of technology, more of it will be created which will be eventually sold or licensed. Current competition within Asean will likely evolve into cooperation as companies with not-so-different starting points learn that by cooperating together, they may be able to compete more efficiently and distinguish themselves more conspicuously from China and India. Technology transfer in Asean is increasingly effected by way of traditional acquisitions. Thai companies are currently on a strong spending spree overseas with notable recent acquisitions of foreign businesses in such sectors as frozen food systems, petrochemicals, banking and lending and white goods.

But as channels increase to share technology, so too will routes for the carriage of counterfeit and illegitimate goods. With the East-West Corridor (China-funded) linking the Greater Mekong Area with Yunnan

Province in China going forward, expect increases in counterfeits travelling mostly from the North (China again) to throughout Asean and of course, beyond. Further afield, easier distribution between Asean members and India should see increased bulk API import for formulation in Asean pharmaceutical industries.

Customs authorities, while better trained and more cooperative in terms of assisting with cross border investigations, information sharing, and inspections, are already becoming significantly burdened by massive increases in container traffic. By opening the gates, Customs will face an overflow of goods especially from China and inspections and seizures will be random at best early on until more effective and in-

novative means are implemented. One of the risks of large free trade areas, particularly those with demonstrable pricing and wage gaps, is the threat of parallel imports, which is largely unregulated in Asia (price harmonisation may well be on the cards for Asean in the future). Stronger customs authorities such as Thailand will be forced to counterbalance less-developed customs regimes in countries such as Myanmar, Laos, and Cambodia. IP-intensive businesses should begin now to identify coming customs overloads and work quickly to develop effective relationships (normally by way of training events) in order to focus customs on specific product concerns before these officers become overwhelmed.



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