

THE AUSTRALIA-CHINA FREE TRADE AGREEMENT: IMPLICATIONS FOR INTELLECTUAL PROPERTY LAW

Jane Ogge-Cowan

INTRODUCTION

Intellectual property is not usually the first thing that people think of when they talk about the Australia-China Free Trade Agreement¹ (FTA) – an FTA is about ‘trade’: market access for agricultural products and manufactured goods, banking and educational services, easier access for Chinese investors and workers into Australia – the significance of intellectual property to trade is not foremost in most peoples’ minds. But when you ask Australian business people what they think about doing business in China, a great number in many fields are concerned about whether their innovative work will be protected – this is true for architects, manufacturers and educational software designers. And for innovative Chinese companies, whether they are domestically or internationally focussed, intellectual property is an increasingly important issue.

Perhaps the first thing to say about this topic is that we don’t know what the actual implications of the FTA on intellectual property regulation will be. The FTA negotiations are concluded as a single undertaking – one whole agreement – and a key principle of that, is that nothing is agreed until everything is agreed. Therefore in this regard it can be confidently said at this point, that nothing has yet been agreed, and that

¹ Note that at the time of writing, the Australia-China Free Trade Agreement negotiations are still ongoing. For more information see <<http://www.dfat.gov.au/geo/china/fta>> 25 January 2008.

certainly applies to the intellectual property component of the negotiations.

The following chapter will examine the implications of the proposed Australia-China FTA on intellectual property law. In particular, the chapter will consider key issues, such as why Australia believes it is important to include a separate chapter on intellectual property in the Australia-China FTA. Finally, the chapter will conclude by drawing some conclusions on what implications the Australia-China FTA might have on intellectual property regulation.

WHY IS INTELLECTUAL PROPERTY IMPORTANT IN AN FREE TRADE AGREEMENT?

Australia advocates a sensible balance in the protection of intellectual property. Australia's believe this balance is well-reflected in Article 7 of World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).² Article 7 essentially provides that intellectual property protection should serve the greater public good by promoting innovation through rewarding the innovator.³ Intellectual property protection is a balance established in the granting of monopoly rights that are limited in time and scope. The security of those rights, and the appropriate limitations on those rights, are an active debate, including in Australia.

Not all of you will know that Australia is a net importer of intellectual property, that is, we pay more to overseas intellectual property owners than we receive, not unlike most developing countries. And yet, in Australia we are conscientious in protecting intellectual property rights because we believe doing so is vital to maintaining our standard of living, and the international competitiveness of Australian companies. Australia's intellectual property regime encourages innovation, which is critical to the maintenance of commercial competitive advantage, and

² See <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> 25 January 2008.

³ Ibid.

vital to the development of, and access to, new products, particularly as we move to the so-called knowledge economy.

When it comes to bilateral trade with other countries, Australia believes that if both countries recognise and protect intellectual property rights in the same way, this will help trade and investment grow. Including a chapter on intellectual property in the FTA should provide more consistency between the Australian and Chinese jurisdictions and that should help both countries trading relationship to grow and diversify.

AN INTELLECTUAL PROPERTY CHAPTER SPECIFIC TO THE AUSTRALIA-CHINA RELATIONSHIP

A key objective in the FTA negotiations is to make commitments that will deliver practical and commercially significant outcomes. In this context, the main purpose of an intellectual property chapter is to address intellectual property concerns specific to trade between the FTA partners. Australia has an Intellectual Property Chapter in all of its FTAs, with the exception of our FTA with New Zealand. That FTA was negotiated before intellectual property became the important issue it is today in bilateral trade. All of the chapters on intellectual property in Australia's FTAs with Thailand, Singapore and the United States are different; each reflects the nature of the different bilateral trade relationships. For both Australia and China our trade interests differ from one bilateral trade relationship to another. Therefore a standard approach to FTAs in general, and intellectual property in particular, would not suit either Australia or China.

Accordingly, in preparing a draft text for the FTA, Australia has tailored the proposed intellectual property provisions specifically to the Australia-China trade relationship. To the extent that there may be similarities with other Intellectual Property Chapters, those similarities merely reflects Australia's experience with what works in relation to a particular issue or technology. Both Australia and China will continue to learn through experience, and we expect that some of the lessons from the Australia-China FTA will be reflected in our future FTAs with other countries.

So what does the Intellectual Property Chapter cover? For the most part, it addresses specific intellectual property issues or matters of concern which currently affect our bilateral trading relationship. It also provides methods of addressing these issues in a way that Australia hopes will strengthen our trading relationship. For example, many Australian business people have expressed concern about the enforcement of intellectual property rights in China. Specific issues include processes for the registration of intellectual property rights, the scope of intellectual property rights available in China and whether industry can have confidence in intellectual property rights that have already been granted. In the FTA Australia will seek a commitment to maintain an effective intellectual property regime consistent with international standards, such as those articulated in the World Trade Organization TRIPS Agreement and core World Intellectual Property Organization (WIPO) treaties. All of the provisions in Australia's proposed Intellectual Property Chapter reflect this commitment to identify and address intellectual property issues in our trading relationship.

THE INTELLECTUAL PROPERTY CHAPTER NEEDS TO RESPOND TO TECHNOLOGICAL CHANGE

But of course, an approach that deals only with existing problems would be too static and rigid for a chapter on intellectual property. Intellectual property is anything but static and intellectual property rights are the backbone of the knowledge economy and the driver of innovation. Accordingly, intellectual property rights regulation must respond to developments in technology. To be effective, an intellectual property chapter in an FTA needs to be a 'living document' able to accommodate change.

One of the key technological developments since the TRIPS Agreement has, of course, been the growth of the Internet. The growth of the Internet has had major implications for the treatment and protection of copyright material. This has been recognised by the development of the WIPO Internet Treaties – which will enter in to force for both Australia and China over the next two months.

Technological developments have made copyright material easier to reproduce, and more difficult to protect. One response by copyright owners has been to develop technological measures to protect their material. However, these measures are of course vulnerable to technological circumvention. Article 11 of the WIPO Copyright Treaty requires 'adequate legal protection and effective legal remedies' against circumvention. Australia and China have the opportunity in the FTA negotiations to consider appropriate regulatory responses to this type of challenge. The results of such exchanges could feature in the Intellectual Property Chapter, or they may filter through to legislative reform in both countries in advance of the FTA's completion. Whatever the outcome, the fact that both countries have had detailed, considered exchanges about how to accommodate technological change within their respective intellectual property regimes is itself a positive development. It demonstrates good will, and ensures that important issues are properly considered from a range of perspectives.

IMPORTANCE OF HIGH STANDARDS OF PROTECTION AND ENFORCEMENT

Another important issue concerning Intellectual Property Chapters in FTAs is how to achieve high standards of intellectual property protection and enforcement. High standards encourage trade and investment in materials which have intellectual property protection. Industry and business need to be confident that their intellectual property can be effectively protected and enforced whenever they enter overseas markets. Australia's interests are to ensure that, as far as possible, key trading partners apply similar copyright protection and enforcement measures. This issue is becoming more significant because trade in copyright materials across borders and over the Internet has significantly increased and emerging technologies have made it easier for problems such as piracy to flourish.

Australia believes a proper international strategy to address emerging copyright issues cannot be successful unless they are properly addressed in both multilateral fora and in bilateral discussions between key trading partners. That is why Australia has been active in Asia-Pacific Economic

Cooperation and in trade agreement negotiations in promoting such standards.

To properly address copyright issues, FTA partners should, as a first step, commit to implement commonly accepted international treaty obligations such as the World Trade Organization TRIPS Agreement and the WIPO Internet Treaties. This will ensure that copyright laws are up-to-date and more effective in dealing with emerging copyright issues posed by advances in technology. It will also ensure that there are effective civil and criminal remedies available against copyright infringement.

THE IP CHAPTER PROVIDES AN OPPORTUNITY TO SHOWCASE SOME OF THE POSITIVE DEVELOPMENTS IN CHINA'S IP REGIME.

A further element of the draft Chapter on intellectual property in the FTA is what people in government like to call 'advocacy'. The Intellectual Property Chapter has two advocacy roles: one is to showcase the positive developments in China's intellectual property regime and the other is to send useful messages to interested parties.

In relation to the first role, an Intellectual Property Chapter in the FTA not only describes the commitments the parties have made to enhancing bilateral trade, it can also be used to highlight positive developments that are already facilitating bilateral trade. In this context, Australia has identified a range of areas in which China has developed mechanisms, guidelines or practices of a high standard that many interested parties in Australia may not be aware of. Examples of this include transparency in intellectual property regulation and the granting of intellectual property rights. Similarly, China's existing commitments in relation to the use of legitimate software demonstrate the strong support of the Chinese Government for the use of such software, and its progress toward achieving that goal. This contrasts with some of the perceptions about the protection of software in China.

The second advocacy role for the Intellectual Property Chapter is to send useful messages to a range of interested parties. For example,

repeating specific provisions from agreements both countries are parties to, such as the TRIPS Agreement, can demonstrate and underscore the commitment of the parties to the objective of those provisions.

Including a list of key international treaties, and giving an in-principle undertaking to join other new international treaties also sends strong and positive messages about the commitment of the parties to particular intellectual property issues. Treaties such as the Patent Law Treaty⁴ (2000) and the Singapore Treaty on the Law of Trademarks⁵ (2006) demonstrate that the parties are working towards international best practice in the registration of intellectual property rights. Those treaties also provide a basis for modest steps in harmonising patent and trademark office practices, resulting in savings to industry, and increased business confidence.

Of course, there are sometimes tensions between the interests of different groups. For example, the interests of copyright users such as universities (who may also be copyright owners in their own right) are sometimes at odds with the interests of those who want increased copyright protection. Similar tensions can exist between industrial property stakeholders (for example, in some differences in approach to patent issues between generic and patent pharmaceutical manufacturers).

ENHANCED ECONOMIC INTEGRATION

A further broad benefit of including an Intellectual Property Chapter in the FTA is the contribution it can make to economic integration. This is achieved by reducing the barriers to trade, and encouraging trade-related activities where possible. In this context, even modest steps towards harmonisation of intellectual property regulations can help encourage business people from one of the parties to operate in the jurisdiction of the other. Lack of familiarity with practices and requirements are often cited as impediments to bilateral trade. This is especially so in relation to intellectual property, where the intellectual property rights need to

⁴ See <http://www.wipo.int/treaties/en/ip/plt/trtdocs_wo038.html> 25 January 2008.

⁵ See <http://www.wipo.int/treaties/en/ip/singapore/singapore_treaty.html> 25 January 2008.

registered, protected and enforced. Agreement to reduce differences in intellectual property law practice and administration would be helpful. Similarly, the availability of the same range of intellectual property rights in both parties to the FTA would enhance economic integration.

CHAPTER PROVIDES A BASIS FOR CLOSER CO-OPERATION AND ON-GOING ENGAGEMENT

Co-operation and on-going engagement are important elements of the FTA, and have particular value in relation to intellectual property. There is currently a broad range of interaction between intellectual property agencies, including the regular meetings of the industrial property offices, and the recent visit to Australia by the National Copyright Administration of the People's Republic of China. These provide a good basis for enhanced co-operation, and Australia regards the FTA as a useful vehicle for expanding and improving co-operation in IP.

We know that China also sees the Intellectual Property Chapter as a useful vehicle for the further development of co-operation. I am sure that together both parties can work out how best to use the FTA negotiations to support their shared objectives, and give greater focus to the areas in which better co-operation can be most beneficial to both parties.

CONCLUSION

In concluding, it is necessary to briefly summarise why it is important to include a separate chapter on intellectual property in the FTA and the five main areas where it can be expected that the FTA will impact on intellectual property law.

Looking first at why a separate chapter on intellectual property is important in a FTA – intellectual property can make a big contribution to promoting bilateral trade and economic integration. Its importance to bilateral trade will only increase in the future. Australia's experience shows that including intellectual property in FTAs can increase the confidence of business people in the FTA partner country and enhance

bilateral cooperation in many areas. Even small efforts at harmonising regulation have resulted in financial savings to industry, thereby promoting bilateral trade.

So where will the FTA impact on intellectual property regulation in Australia and China? The first point to note is that Australia and China are negotiating on intellectual property at a time when both countries are amending domestic regulations to accommodate new technologies and signing on to new treaties, such as the WIPO Internet Treaties. Hopefully, this will lead to better, more considered and effective regulation in both countries. Technological change is something each country must deal with, and Australia and China have already exchanged a great deal of information in this area in the context of the Intellectual Property Chapter negotiations.

The second point is that the Intellectual Property Chapter may also see new issues for both countries addressed for the first time. At this stage, the negotiations on these issues are sensitive and confidential, so it is not possible to elaborate on the specific issues. But it is worth mentioning that both countries have raised issues that could see the inclusion of commitments on new developments in intellectual property.

Third, we hope that the Intellectual Property Chapter will address specific bilateral concerns raised by each other's stakeholders. This is the basis for a successful FTA – it is an agreement specifically tailored to improving bilateral trade relations, and in the area of intellectual property, even simple things such as amending registration and objection processes to take into account translation or timeliness issues can facilitate trade between countries.

Fourth, the Intellectual Property Chapter may also make a useful contribution in identifying positive developments already in place that many interested parties may not be aware of. This can increase the public understanding of the importance of intellectual property and the priority both Australia and China give to effective intellectual property protection. This is true for Australia, where we would like to use the Intellectual Property Chapter to highlight some recent developments in our own legislation and practice. We also believe there is much in China's regime that is of a very high standard. Indeed, we are aware of China's efforts to improve the transparency of China's intellectual

property laws and enforcement systems, that go beyond China's existing commitments. The more people know about China's achievements in this regards, the more confidence they will have in China's current intellectual property regime.

Finally, the Intellectual Property Chapter should lay the foundation for enhanced co-operation between Australia and China in a wide range of intellectual property related issues. There already exists a good level of co-operation between our countries, but the Intellectual Property Chapter can provide focus, momentum and even institutional commitment to on-going co-operation.

In closing, it must be said that Australia hopes that the Intellectual Property Chapter will make a valuable contribution to enhancing bilateral trade between Australia and China. In the negotiations so far, the Australian negotiators have been impressed by the professionalism and commitment of China's intellectual property negotiating team. Together both countries have developed a good working relationship, and the discussions have been conducted in a positive and constructive spirit. Australia knows the negotiations will be complex, long and difficult. However, intellectual property is an important issue to both countries, and it deserves the careful consideration both sides are giving to it.