

April 2013

ASEAN IP Harmonization: Striking the Delicate Balance

Elizabeth Siew-Kuan Ng
Faculty of Law, National University of Singapore

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Elizabeth Siew-Kuan Ng, *ASEAN IP Harmonization: Striking the Delicate Balance*, 25 Pace Int'l L. Rev. 129 (2013)

Available at: <https://digitalcommons.pace.edu/pilr/vol25/iss1/5>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

ASEAN IP HARMONIZATION: STRIKING THE DELICATE BALANCE

Elizabeth Siew-Kuan Ng*

I. INTRODUCTION

As the Association of Southeast Asian Nations (ASEAN) continues its dynamic evolution towards establishing the ASEAN Community by 2015, one of its key areas of policy focus is to enhance its regional intellectual property (IP) framework and promote greater IP cooperation, so as to advance economic competitiveness and transform the region into a significant and competitive bloc in the international community.¹

While recognizing this desire for broader IP cooperation, ASEAN member states have traditionally guarded their sovereignty fervently and upheld diplomacy the ASEAN Way. The ASEAN Way emphasizes consensus and non-interference. Earlier attempts at IP harmonization² faced numerous setbacks and had to be put on the back burner. Nonetheless, ASEAN

* Associate Professor and Director of the Master of Laws (Intellectual Property and Technology Law) programme, Faculty of Law, National University of Singapore; LL.B (Hons) (University of London); LL.M (First Class) (University of Cambridge); Barrister-at-Law (Middle Temple, London); Advocate & Solicitor (Singapore). My thanks to the ASEAN Secretariat for assistance in the provision of some source materials and Fatin Nadiyah Masud (Fourth year LL.B. student, NUS 2012) for her research assistance. The views expressed in this article are solely those of the author.

¹ See *EC-ASEAN Intellectual Property Rights Cooperation Programme: ECAP II Regional Handbook on IPR for Customs Enforcement*, ASS'N OF SOUTHEAST NATIONS (ASEAN), <http://www.asean.org/communities/asean-economic-community/item/ec-asean-intellectual-property-rights-cooperation-programme-ecap-ii-regional-handbook-on-ipr-for-customs-enforcement-3> (last visited Jan. 24, 2013).

² Such as, through the establishment of one set of regional IP laws and a regional IP office. See Emma Barraclough, *ASEAN Scales Back IP Plans*, *MANAGING INTELL. PROP.*, Dec. 2004-Jan. 2005, at 14.

remained committed to advancing its goal of establishing a “creative ASEAN economy.”³ Its recent adoption of a regional IP cooperation model enables its members to move forward collectively but at varying paces. This model also seeks to preserve diversity and gives due recognition to the differing levels of development of its member states.⁴

This article seeks to bring about a general appreciation of how ASEAN has persevered in its quest to strike an appropriate balance between advancing the mutual regional interests of its member states, while still preserving the diverse national interests of its various stakeholders. This article discusses the idea that as ASEAN moves resolutely towards establishing the ASEAN Community, it is important that it perseveres in its quest for an inclusive regional IP regime that balances the diverse national interests of its member states with their mutual regional interests. From a broader global perspective, unless and until the development gap and disparities in IP creation, utilization and exploitation among nations are closed, or at least minimized, lessons can perhaps be learned from harmonizing IP the ASEAN way. Specifically, this article will seek, *inter alia*, to: (1) provide a brief overview of ASEAN and diplomacy based on the ASEAN Way; (2) discuss the ASEAN Framework Agreement and selected initiatives on IP cooperation; (3) review and analyze the progress of ASEAN IP integration; and (4) share some concluding thoughts.

³ See Dr. Surin Pitsuwan, Secretary-General, A Welcome by the ASEAN Secretariat, Address at the Launch of the ECAP III Website (Jan. 1, 2010), available at <http://www.ecap-project.org/index.php?q=asean> (last visited Dec. 29, 2012). See generally, H.E. S. Pushpanathan, A Welcome of the Deputy Secretary, Address at the First Steering Committee Meeting of the ASEAN Project on the Protection of Intellectual Property Rights (ECAP III) (July 14, 2010), available at <http://www.asean.org/news/item/welcome-address-by-he-s-pushpanathan-deputy-secretary-general-of-asean-for-asean-economic-community-at-the-1st-steering-committee-meeting-of-the-asean-project-on-the-protection-of-intellectual-property-rights-ecap-iii> (last visited Dec. 29, 2012).

⁴ ASEAN Secretariat, *ASEAN IP Rights Action Plan 2011-2015*, 2, available at <http://www.asean.org/archive/documents/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf>

II. BRIEF OVERVIEW OF ASEAN

A. Introduction

In 2012, ASEAN marked its 45th anniversary.⁵ It was established on August 8, 1967 in Bangkok, Thailand, under the ASEAN Declaration (also known as the Bangkok Declaration) by the five founding member countries of Indonesia, Malaysia, Philippines, Singapore and Thailand.⁶ Since then, the ASEAN Community has expanded to become a ten-member grouping encompassing Brunei Darussalam, Vietnam, Lao People's Democratic Republic (Lao PDR/ Laos), Myanmar, and Cambodia.⁷ All, except Laos, are members of the World Trade Organization (WTO).⁸ Currently, Laos is in the WTO accession process and aims for formal approval of its membership by the end of 2012.⁹

ASEAN is located in a dynamic part of Southeast Asia en-

⁵ See *About ASEAN*, ASEAN, http://www.aseansec.org/about_ASEAN.html (last visited Jan. 24, 2012).

⁶ *Id.* (explaining how under the ASEAN Declaration, the founding members declared that the aims and purposes of ASEAN included accelerating economic growth, social progress, cultural development, education, security, and technical and scientific collaboration).

⁷ *Id.* The countries are listed in chronological order: Brunei Darussalam (1994), Vietnam (1995), Laos PDR (1997), Myanmar (1997) and Cambodia (1999). The parenthetical dates denote the year in which the member country joined ASEAN. It is worth noting that Timor Leste, which is geographically part of South-East Asia, has expressed its long-standing desire to join ASEAN as its 11th member. See Jose Ramos-Horta, *Tiny Nation Can Take Rightful Place in ASEAN*, THE AUSTRALIAN (May 11, 2012, 12:00 AM), <http://www.theaustralian.com.au/news/world/tiny-nation-can-take-rightful-place-in-asean/story-e6frg6ux-1226057013181>.

⁸ See Dr. Nam Viyaketh, *Lao's Membership Talks Accelerate with "Ambitious" Target of Joining WTO in 2012*, WORLD TRADE ORG. (March 12, 2012), http://www.wto.org/english/news_e/news12_e/acc_lao_19mar12_e.htm.

⁹ *Id.* (explaining how Laos has recently completed bilateral negotiations with nine interested parties: Australia, Canada, China, the E.U., Japan, Rep. Korea, Chinese Taipei, the U.S., and Ukraine); see Mr. Chairman, *Laos on Target to Complete Membership Negotiations After 2012 Summer Break*, WORLD TRADE ORG. (July 12, 2012), http://www.wto.org/english/news_e/news12_e/acc_lao_13jul12_e.htm.

compassing a total land area of approximately 4.44 million square kilometres, a population of around 600 million and a combined GDP (2011) of about USD 1.8 trillion.¹⁰ The ASEAN region comprises mainly of developing countries with varying levels of political, social, cultural, economic, and technological development. A few examples may serve to highlight the diversity among ASEAN member states. Take, for example:

- Economic development: A comparison of the GDP per capita (PPP)¹¹ in 2010, for instance, between Singapore and Myanmar, reveals a gap of more than \$55,000 (in current international dollar).¹²
- Political systems: Some ASEAN countries, such as Singapore, Malaysia, Indonesia, and the Philippines are democracies. Until a civilian government was installed in March 2011, Myanmar was ruled by a military junta.¹³
- Social/cultural traditions: ASEAN members' diverse cultural traditions may influence their perception of IP and impact cooperation efforts. As one commentator has noted, some cultures "emphasize commonality" and hold the traditional belief that creative works and inventions are "community property" to be shared freely.¹⁴ The idea that IP is

¹⁰ ASEAN Secretariat, *Asean Community in Figures (ACIF) 2011*, 1-16 (2011), available at <http://www.asean.org/resources/publications/asean-publications/item/asean-community-in-figures-acif-2011-3>.

¹¹ See *GDP per Capita: PPP*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD> (last visited Feb., 7, 2013) (describing that gross domestic product (GDP) per capita based on purchasing power parity (PPP)).

¹² *Id.* (noting that an international dollar has the same purchasing power over GDP as the U.S. dollar has in the United States).

¹³ See generally, Marie Lall, *More Milestones in Myanmar*, BBC NEWS (Jan. 23, 2012, 10:10 PM), <http://www.bbc.co.uk/news/world-asia-16695353>; *Burma Profile*, BBC NEWS (Aug. 21, 2012, 6:34 AM), <http://www.bbc.co.uk/news/world-asia-pacific-12990563>.

¹⁴ See Dongwook Chun, *Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 127, 131-32 (2011) (stating that "[t]he Chinese be-

“private property” that must be protected by law may be a new and foreign concept, which may contribute to inertia in its national implementation.

Despite these challenges, ASEAN “has come a long way ... and is today an ‘effective grouping’ of prospering and peaceful countries which enjoy good global standing.”¹⁵ Flanked by “Asian giants” (China and India),¹⁶ which experienced growth and development at impressive paces, ASEAN is well-placed at the center of the regional architecture as the hub of East Asia. In its “neutral and non-threatening” way, ASEAN will continue to play a “prominent role in managing stakeholders interests in Southeast Asia and in the immediate neighborhood.”¹⁷ Indeed, at a time when the “rivalry between the major powers in the Asia-Pacific intensifies, ASEAN’s role at the center of regional institutions has been enhanced.”¹⁸

B. *The ASEAN Way*

The ASEAN Community has evolved dynamically over the last forty-five years in a conciliatory manner bolstered by the desire to enhance effective and mutual cooperation, peace and friendship with each other. Bonded together by historical, geo-

lieved for centuries that inventions and creative works belonged to the community or the government and should be freely shared”).

¹⁵ Lee Hsien Long, Singapore Prime Minister, Address at the 20th ASEAN Summit at Phnom Penh, in *Straits Times: Members Urged to Press on With Integration*, MINISTRY OF FOREIGN AFFAIRS: SINGAPORE, http://www.mfa.gov.sg/content/mfa/media_centre/singapore_headlines/2012/201204/new_20120404_02.html (last visited Feb. 7, 2012).

¹⁶ See generally, T.N. Srinivasan, *China and India: Economic Performance, Competition, and Cooperation, An Update*, (SIEPR, Working Paper No. 199), available at <http://siepr.stanford.edu/publicationsprofile/1249> (providing a macroeconomics discussion of China and India’s economic performance, cooperation, and competition).

¹⁷ Ong Keng Yong, *ASEAN Economic Integration: The Strategic Imperative*, in LEE YOONG YOONG, *ASEAN MATTERS: REFLECTING ON THE ASSOCIATION OF SOUTHEAST ASIAN NATION* 87, 88 (2011).

¹⁸ Tommy Koh, *The World in 2011*, THE STRAITS TIMES (Dec. 31, 2011), http://www.spp.nus.edu.sg/ips/docs/pub/pa_tk_ST_The%20world%20in%202011_311211.pdf.

graphical and cultural ties, ASEAN member states have jealously guarded their sovereignty and upheld non-interference and non-intervention as primary values of ASEAN diplomacy.¹⁹ This “ASEAN Way” is premised on the principle of consensus and non-interference in the internal affairs of its member states.²⁰ These principles²¹ are anchored in the Treaty of Amity and have remained intact despite calls by some member states for a measure of “flexible engagement or constructive intervention.”²² The ASEAN Way has also withstood immense scrutiny and criticism from the West, more recently for its policy of constructive engagement with the government of Myan-

¹⁹ See Koh Kheng-Lian & Nicholas A. Robinson, *Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the ‘ASEAN Way’*, 6 SING. J. INT’L & COMP. L. 640 (2002) at 642, available at <http://digitalcommons.pace.edu/lawfaculty/371> where the authors highlighted that ASEAN’s regional collaboration emphasizes three norms including “non-interference or non-intervention in each others’ domestic affairs. See generally, Mark J. Valencia, *Malacca Strait: Clash of Sovereignty*, JAKARTA POST (Nov. 8, 2004), <http://www.unesco.or.id/cgi-sys/suspendedpage.cgi> (suggesting that historical advantages and noninterference principles entice new member states to zealously preserve their national sovereignty), noted in Joel Vander Kooi, *The ASEAN Enhanced Dispute Settlement Mechanism: Doing it the ‘ASEAN Way’*, 20 N.Y. INT’L L. REV. 1, 18 (2007). Akiko Fuskushima, *ASEAN as a Mover of Asian Regionalism*, in YOONG *supra* note 17, at 221, 228 (expressing the view that in “Asia, it will take time for countries to yield even a small part of their sovereignty for the sake of regional community-building. But what counts is the process involved and the sharing of the vision for regional co-operation...that, while it is harder to realize than bilateral co-operation, regional co-operation has the major merit of being able to turn intra-regional antipathy into empathy”); see also Lee Sun-Jin, *What I Have Always Wondered About ASEAN: A Perspective from ROK*, in YOONG, *supra* note 17, at 229.

²⁰ See Treaty of Amity and Cooperation in Southeast Asia, art. 2, Feb. 24, 1976, available at <http://www.official-documents.gov.uk/document/cm84/8472/8472.pdf>

²¹ Namely principles of mutual respect, solidarity, amity, cooperation, sovereignty, equality, territorial integrity and unity in diversity. See *id.* See generally, ASEAN Secretariat, *ASEAN Charter*, (Jan. 2008), available at <http://www.aseansec.org/21861.htm>

²² K. S. NATHAN, THE EUROPEAN UNION, UNITED STATES, AND ASEAN: CHALLENGES AND PROSPECTS FOR COOPERATIVE ENGAGEMENT IN THE 21ST CENTURY 373 (2002).

mar.²³ Yet, as one commentator aptly avowed, “ASEAN has been vindicated with the dramatic changes that have taken place [in Myanmar] recently, again proving the futility of the West’s preference for sanctions and isolation.”²⁴

C. *The Way Forward*

Some may regard ASEAN as “a work-in-progress”²⁵ and debate whether its usefulness, effectiveness, and long-term viability will continue. Nevertheless, ASEAN has remained committed to its goal of establishing an ASEAN economic community. It has continued to enhance its integration into the global economy, for example, through the creation of “ASEAN plus One FTAs,”²⁶ as well as through the development of strategic economic cooperation, such as the recent Shanxi-

²³ See Gillian Goh, *The ‘ASEAN Way’ Non-Intervention and ASEAN’s Role in Conflict Management*, 3 STAN. J. E. ASIAN AFF. 113, 113 (2003) (citing Barry Wain, *ASEAN Is Facing Its Keenest Challenges to Date*, ASIAN WALL STREET J., (Feb. 23, 1998); Murray Hiebert, *Out of Its Depth*, FAR E. ECON. REV., (Feb. 19, 1998)); see also EUL-SOO PANG, THE US-SINGAPORE FREE TRADE AGREEMENT: AN AMERICAN PERSPECTIVE ON POWER, TRADE AND SECURITY IN THE ASIA PACIFIC 147 (2011) (noting that the ASEAN Way has institutionalized the absence of supranational enforcement and highlighted “ASEAN’s frustrated inability to deal with the junta in Yangon” as an “example of the limits of regionalism”).

²⁴ Koh, *supra* note 18. It is also interesting to note that the European Commission has a long established belief of “trying to help countries develop through cooperation and capacity building, rather than rely on sanctions and threats.” Valentin Mir, *ASEAN: The EU’s ASEAN Strategy*, MANAGING INTELLECTUAL PROPERTY (Sep. 1, 2008), <http://www.managingip.com/Article/1998899/ASEAN-The-EUs-ASEAN-strategy.html>. See generally Li Xueying, *Myanmar By-Elections Expected to Dominate Asean Summit Talks*, THE STRAITS TIMES (Apr. 2, 2012), <http://www.asianewsnet.net/home/news.php?id=29225>.

²⁵ Lee Yoong Yoong, *Introduction to ASEAN MATTERS! REFLECTING ON THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS*, at xxv (2011).

²⁶ Such as ASEAN-China Free Trade Agreement (ACFTA), ASEAN-Korea Free Trade Agreement (AKFTA), ASEAN-Japan Comprehensive Economic Partnership (AJCEP), ASEAN-India Free Trade Agreement (AIFTA). ASEAN Secretariat, *ASEAN Economic Community Scorecard*, 14 (2012), available at http://www.aseansec.org/documents/scorecard_final.pdf.

ASEAN Trade and Economic Cooperation.²⁷ China's recent deployment of a permanent mission to ASEAN further reflects the growing importance of this South East Asian grouping.²⁸ The conclusion of the ASEAN Charter and the progress made on implementing a roadmap for an ASEAN Community (2009-2015)²⁹ further demonstrates ASEAN's zest to advance economic growth and build a competitive and dynamic region in pursuit of an "ASEAN community in a Global Community of Nations."³⁰ This has been further endorsed by ASEAN leaders in the recently adopted Phnom Penh Declaration 2012.³¹ To this end, one of its key areas of policy focus is to transform the re-

²⁷ For more details, see *Shanxi and ASEAN Increase Trade Cooperation*, CHINA DAILY, http://www.chinadaily.com.cn/m/shanxi/2012-05/30/content_15426981.htm (last updated May 30, 2012).

²⁸ Ambassador Madam Yang Xiuping was appointed as the first resident Ambassador of China to ASEAN. See *ASEAN and China to Work on Strengthening Strategic Partnership*, ASIA VIEWS (Aug. 6, 2012), http://www.asiaviews.org/index.php?option=com_content&view=article&id=38664:asean-and-china-to-work-on-strengthening-strategic-partnership&catid=19:asean-agenda.

²⁹ See ASEAN Secretariat, *ASEAN Economic Community Blueprint*, (2009), available at <http://www.asean.org/archive/5187-10.pdf> (explaining how the report is comprised of three community blueprints, (namely, the ASEAN Economic Community (AEC), ASEAN Political-Security Community (APSC) and ASEAN Socio-Cultural Community (ASCC)), the Initiative for ASEAN Integration (IAI) Strategic Framework, and IAI Work Plan II (2009-2015)); Hadi Soesastro, *Implementing the ASEAN Economic Community (AEC) Blueprint*, in DEEPENING ECONOMIC INTEGRATION IN EAST ASIA 47, 47-59 (2007), available at <http://eria.org/research/images/pdf/PDF%20No.1-2/No.1-2-part2-3.pdf> (discussing the implementation of the AEC blueprint). See generally ASEAN Secretariat, *ASEAN Political-Security Community and Blueprint*, (2009), available at <http://www.aseansec.org/5187-18.pdf>; ASEAN Secretariat, *ASEAN Socio-Cultural Community Blueprint*, (2009), available at <http://www.aseansec.org/5187-19.pdf>.

³⁰ See ASEAN, *Co-Chairs' Statement of the 4th ASEAN-UN Summit, Bali, Indonesia* (Nov. 19, 2011) [hereinafter *Co-Chairs' Statement*], available at <http://www.aseansec.org/documents/19th%20summit/UN-CCS.pdf> (demonstrating Indonesia's theme for its chairmanship of ASEAN).

³¹ ASEAN, *Phnom Penh Declaration on ASEAN: One Community, One Destiny*, 1 (Apr. 3, 2012) [hereinafter *Phnom Penh Declaration*], available at http://www.asean.org/archive/documents/pp_declaration_3%20April_FINAL.pdf. This document was adopted by ASEAN leaders at the twentieth ASEAN summit.

gion into a “Creative Economy”³² through cooperation in IP.

II. ASEAN IP COOPERATION: AN OVERVIEW

The adoption of the ASEAN Framework Agreement on Intellectual Property Cooperation marked an important step forward for regional IP integration. Coupled with the establishment of the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC),³³ which has been tasked to develop, coordinate and implement all IP-related activities in the region, ASEAN has clearly demonstrated its commitment toward forging a common regional IP profile. Towards this end, it has adopted a two prong approach. First, it developed the legal framework and initiatives for intra-ASEAN IP cooperation. Second, it strengthened inter-ASEAN IP cooperation programs with international organizations and key partners, such as the European Union. These will be explored in greater detail below.

A. ASEAN Framework Agreement on Intellectual Property Cooperation

The ASEAN Framework Agreement on Intellectual Property Cooperation was created in 1995, subject to constraints at three levels. First, being created at around the time when the WTO and TRIPS Agreement were established, it had to adopt a standard of IP protection that was consistent with those man-

³² H.E. S. Pushpanathan, Deputy Secretary-General of ASEAN for ASEAN Econ. Community, Welcome Address at the 1st Steering Committee Meeting of the ASEAN Project on the Protection of Intellectual Property Rights (ECAP III) (July 26, 2012), *available at* <http://www.asean.org/news/item/welcome-address-by-he-s-pushpanathan-deputy-secretary-general-of-asean-for-asean-economic-community-at-the-1st-steering-committee-meeting-of-the-asean-project-on-the-protection-of-intellectual-property-rights-ecap-iii> (last updated July 26, 2012).

³³ See ASEAN Secretariat, *supra* note 4, at 2 (explaining how the AWGIPC was tasked to develop, coordinate, and implement all IP-related regional programs and activities in ASEAN).

dated by TRIPS.³⁴ Second, it had to preserve ASEAN diversity and recognize the varying levels of economic development among its member states. Third, it had to produce and be “seen to produce positive and dynamic impacts on the efforts and aspirations of the peoples of the ASEAN region to elevate their technological and living standards.”³⁵ This led to the adoption of a flexible cooperation arrangement dealing with all the TRIPS-mandated IP rights; namely, patents, trademarks, copyright, and related rights, geographical indications, industrial designs, layout-designs of integrated circuits and protection of undisclosed information.³⁶ One of its more ambitious goals was the establishment of the ASEAN regional trademark and patent systems.³⁷

Under the objectives of the framework Agreement, ASEAN member states agreed, *inter alia*, to:

- Explore appropriate intra-ASEAN cooperation arrangements in the field of IP, contributing to the enhancement of ASEAN solidarity, as well as promote technological innovation and the transfer and dissemination of technology;³⁸
- Consider the possibility of setting up an ASEAN pa-

³⁴ See Assafa Endeshaw, *The Momentum for Review of TRIPS and Harmonisation of Intellectual Property in ASEAN*, in INTELLECTUAL PROPERTY HARMONISATION WITHIN ASEAN AND APEC 139, 152-57 (Christopher Antons et al eds., 2004) (discussing ASEAN's contribution to the review of the TRIPS Agreement). See generally Anthony Taubman, *Collective Management of TRIPS: APEC, New Regionalism and Intellectual Property*, in INTELLECTUAL PROPERTY HARMONISATION WITHIN ASEAN AND APEC 161, 178-86 (Christopher Antons et al eds., 2004) (explaining the impact of TRIPS on regional cooperation).

³⁵ Weerawit Weeraworawit, *The Harmonisation of Intellectual Property Rights in ASEAN*, in INTELLECTUAL PROPERTY HARMONISATION WITHIN ASEAN AND APEC 205, 208 (Christopher Antons et al eds., 2004).

³⁶ ASEAN, *ASEAN Framework Agreement on Intellectual Property Cooperation*, art. 3 (Dec. 15, 1995), available at <http://www.asean.org/asean/asean-summit/item/asean-framework-agreement-on-intellectual-property-cooperation-bangkok-thailand-15-december-1995> [hereinafter *ASEAN Framework Agreement*].

³⁷ Weeraworawit, *supra* note 35, at 205-15 (showing an analysis and background to the ASEAN Framework Agreement on IP Cooperation).

³⁸ *ASEAN Framework Agreement*, *supra* note 36, art. 1.3.

tent and trademark system, which includes an ASEAN Patent and Trademark Office,³⁹ so as to promote regional protection of patents and trademarks;

- Promote IP cooperation among government agencies, private sectors, and professional bodies of ASEAN;⁴⁰ and
- Hold consultations on the development of their IP regimes with a view of creating ASEAN standards and practices consistent with international ones.⁴¹

Various IPR cooperation initiatives ensued to implement these goals such as: the Hanoi Plan of Action (HPA), ASEAN IPR Action Plans 2004- 2010 and 2011-2015, as well as a Work Plan on copyright.

B. ASEAN IPR Cooperation Initiatives

1. Hanoi Plan of Action (HPA) (1999-2004)

The Hanoi Plan of Action was the first in a series of initiatives drawn up to realize the long-term vision of ASEAN 2020 (which was subsequently accelerated to 2015). It was adopted at the Sixth ASEAN summit in 1998 in Vietnam to address the impact of the global financial crisis and hasten economic recovery.⁴² Covering a six year timeframe from 1999 through 2004, it strived to regain the momentum for economic growth and prosperity in the region and re-affirmed ASEAN's commitment for greater regional integration.⁴³ The HPA contained several measures aimed, *inter alia*, at consolidating and strengthening

³⁹ *Id.* art. 1.4, 1.5.

⁴⁰ *Id.* art. 1.2.

⁴¹ *Id.* art. 1.6.

⁴² ASEAN, *Ha Noi Declaration of 1998*, art. 34 (Dec. 16, 1998), available at <http://www.asean.org/news/item/ha-noi-declaration-of-1998-16-december-1998>.

⁴³ See ASEAN, *Hanoi Plan of Action*, (Dec. 15, 1997), available at <http://www.asean.org/asean/asean-summit/item/hanoi-plan-of-action>.

the economic fundamentals of member states through cooperation in a number of areas including IP.⁴⁴ It provided for the enhancement of further cooperation through adequate and effective IP protection based on the principles of most favored nation (MFN) treatment, national treatment, and transparency in accordance with the TRIPS Agreement.⁴⁵ It encompassed three main areas: protection, facilitation, and cooperation.⁴⁶

a. Protection

The HPA provided for the strengthening of civil and administrative procedures and remedies for IP infringement, as well as the provision of technical cooperation relating to patent search and examination, computerization, and human resource development for the implementation of the TRIPS Agreement.⁴⁷

b. Facilitation

Initiatives aimed at deepening IP policy exchange among ASEAN member states were created, including:

- Exchange of information on: (a) well-known marks towards exploring the possibility of establishing a regional trademark system; (b) current IPR administrative systems with a view towards simplifying and standardizing them in the region;⁴⁸
- Review of IP laws to ensure compliance with the TRIPS Agreement;⁴⁹ and
- Setting up of ASEAN electronic database on patents, designs, trademarks, geographical indications, copyright, and layout design of integrated cir-

⁴⁴ *Id.* art. 2.7.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* art. 2.7.1.

⁴⁸ *Id.* art. 2.7.2 D & E.

⁴⁹ *Id.* art. 2.7.2 F.

cuits.⁵⁰

c. Cooperation

To accomplish one of the objectives of the Framework Agreement, which was to establish regional trademark and patent systems, the HPA provided for the implementation of an ASEAN common form for trademark and patent applications in order to streamline the procedure. Provisions were also made for the establishment of an ASEAN Regional Trademark and Patent filing and registration system including the setting up of regional trademark or patent office (on a voluntary basis).⁵¹ Other measures included:

- Promoting the accession of ASEAN member states to international IP treaties;⁵²
- Establishing the ASEAN Regional Fund for Trademark and Patent;⁵³
- Encouraging IP awareness through various training programs;⁵⁴ and
- Enhancing IP enforcement and protection, e.g. dissemination of information on ASEAN IP administration, registration, and infringement; facilitating interaction among legal and judicial bodies; facilitating networking among IP enforcement agencies; encouraging bilateral/plurilateral arrangements on mutual protection and joint cooperation in IPR enforcement.⁵⁵

Notwithstanding the clear mandate from ASEAN member states, the setting up of the ASEAN regional trademark and patent filing systems were delayed. Various reasons were proffered including sectarian oppositions and lack of political will,

⁵⁰ *Id.* art. 2.7.2 G.

⁵¹ *Id.* art. 2.7.3.

⁵² *Id.* art. 2.7.3 E.

⁵³ *Id.* art. 2.7.3 B.

⁵⁴ *Id.* art. 2.7.3 G & H.

⁵⁵ *Id.* art. 2.7.3 I.

as well as inertia arising from international IP developments, such as the increasing importance of international IP registration systems that achieve the same objectives, e.g. the Madrid Protocol (for the international registration of marks) and the Patent Cooperation Treaty (PCT).⁵⁶ This led ASEAN to embark on several action plans that were more focused, *inter alia*, on the standardization of certain IP procedures and processes.

2. ASEAN IPR Action Plan 2004-2010

The ASEAN IPR Action Plan 2004-2010 was approved as part of a new development program - the Vientiane Action Programme.⁵⁷ It aimed to support the long term policy commitment to transform ASEAN into a region based largely on knowledge and driven by innovation.⁵⁸ The 2004-2010 Action Plan sought to place regional IP cooperation within the broader social, economic, and technological development in the region, and improve the dynamic, efficiency, and flexibility of ASEAN enterprises.⁵⁹ Its mission included:

- Fostering of collaborative development of a culture of learning, innovation, and creativity in ASEAN;⁶⁰
- Developing a regional identity and profile in IP creation, protection, commercialization, and enforcement;⁶¹
- Encouraging cross-border collaboration and networking to increase research and development (R &

⁵⁶ Weeraworawit, *supra* note 35, at 214-15; Barraclough, *supra* note 2, at 14-15.

⁵⁷ See ASEAN, *Vientiane Action Programme 2004-2010* (Nov. 29, 2004), available at cil.nus.edu.sg/rp/pdf/2004%20Vientiane%20Action%20Programme%202004-2010.pdf

⁵⁸ ASEAN Secretariat, *ASEAN Intellectual Property Rights Action Plan 2004-2010*, ASEAN, <http://www.asean.org/component/zoo/item/asean-intellectual-property-right-action-plan-2004-2010> (last visited Dec. 28, 2012).

⁵⁹ *See id.* § II.

⁶⁰ *Id.* § II.A.

⁶¹ *Id.*

D) activities in the ASEAN region.⁶²

Towards this end, the 2004-2010 Action Plan sought to (1) assist in accelerating the pace and scope of IP asset creation and commercialization, (2) develop and harmonize an enabling framework for IPR registration, protection and enforcement, (3) promote greater awareness and capacity-building, and (4) enhance cooperative business development services activities by national IP offices.⁶³

Four main strategic programs were developed:

- 1) Fostering IP Asset Creation in ASEAN: Various collaborative activities were proposed, such as those aimed at (a) promoting the emergence of innovative and competitive industries in ASEAN, (b) furthering cooperative cross-border linkages, networks and alliances among R & D institutions and their interaction with private industries within and outside the ASEAN region, and (c) maximizing IPR contribution at the enterprise level;⁶⁴
- 2) Developing a Framework for Simplifying, Harmonizing, Registering, and Protecting IPRs: For example, the 2004-2010 Action Plan seeks the (a) creation of an ASEAN regional IP identity including consideration on the feasibility of establishing an ASEAN Trademark system and ASEAN Design system; (b) consideration of the implications of accession to international IP treaties by ASEAN members; (c) maintaining of a regular exchange of views with ASEAN dialogue partners and organizations;⁶⁵
- 3) Promoting Greater IP Awareness and Capacity Building: Programs include organizing IP workshops, training courses and public events, as well

⁶² *Id.*

⁶³ *Id.* § II.B.

⁶⁴ *Id.* § II.D.1.

⁶⁵ *Id.* § II.D.2.

as, study visits and internship schemes;⁶⁶ and

- 4) Enhancing Activities in Cooperative Business Development Services (BDS) by ASEAN National IP Offices: For example, assessing the needs of national IP offices in ASEAN and crafting roadmaps for collaboration in BDS activities to enhance its efficiency, effectiveness and sustainability with a view to sharing or replicating it on a regional basis. Other activities may include the creation of an ASEAN patent databank, a brokering system for patented technology, etc.⁶⁷

3. Work Plan for ASEAN Copyright Cooperation

At around the same time the IPR Action Plan was being negotiated, ASEAN leaders adopted a recommendation to extend regional cooperation to copyright enforcement⁶⁸ and information exchange as part of the ASEAN Concord II (Bali Concord II).⁶⁹ A work plan for copyright cooperation was subsequently endorsed for regional implementation by the ASEAN Economic Ministers.⁷⁰ It focused on four main areas, namely:

- 1) Policy: To enhance and improve copyright systems of all ASEAN member states so as to transform the region into a desirable investor destination. Activities included ascertaining the extent of copyright contribution to the economy of a member state;⁷¹ determining the copyright policy, and improv-

⁶⁶ *Id.* § II.D.3.

⁶⁷ *Id.* § II.D.4.

⁶⁸ These will include performers' rights and moral rights (where relevant). See ASEAN, *Declaration of ASEAN Concord II (Bali Concord II)*, 9 (Oct. 7, 2003), available at cil.nus.edu.sg/rp/pdf/2003%20Declaration%20of%20ASEAN%20Concord%20II-pdf.pdf.

⁶⁹ This was adopted at the ninth ASEAN summit, which took place in October 2003. *Id.* at 1.

⁷⁰ *The Copyright Work Plan* was endorsed in September 2005. ASEAN Secretariat, *Work Plan for ASEAN Cooperation on Copyrights*, (2006).

⁷¹ *Id.*

ing/enhancing the efficiency of copyright regime member states.⁷²

- 2) **Legislation and Enforcement:** To make recommendations for legislative changes (where necessary) so as to facilitate access to and protection of copyright works; e.g., whether to incorporate provisions relating to parallel import and compulsory licensing for translation of work into national language. Other activities included ascertaining the difficulties faced by copyright owners, enforcement, and custom officers in copyright enforcement, examining the feasibility of establishing specialized IP courts and private criminal prosecutions. Other goals include creating a cross-border network of enforcement authorities to combat piracy and the establishment of collecting societies.⁷³
- 3) **New Developments and Impact on Copyright:** To examine the impact of new developments on copyright law and enforcement. For example, digital media, bilateral free trade agreements (FTAs) and cultural matters.⁷⁴
- 4) **Education, Capacity Building, and Promoting Public Awareness:** Programs include outreach efforts, public awareness campaigns through the media, workshops, seminars, etc. Other initiatives include increasing the capacity of IP stakeholders, such as officials of national IP offices, the judiciary, policy makers, and enforcement authorities, to deal with IP matters.⁷⁵

⁷² *Id.* art. 1.

⁷³ *Id.* art. 2.

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.* art. 4.

4. ASEAN IPR Action Plan 2011-2015

As ASEAN accelerated its economic integration from 2020 to 2015, a new IPR action plan had to be formulated to complement this goal and transform it into “an innovative and competitive region.”⁷⁶ The 2011-2015 Action Plan is built on earlier ones, and seeks to further advance regional IP integration so as to ensure that ASEAN “remains an active player in the international IP community.”⁷⁷ Deferring its earlier goal of designing a fully harmonized regional IP system with one set of IP laws, it adopted a more flexible IP cooperation model. Such an approach enables its members to move forward collectively, but at varying paces in accordance with their developmental level and capacity. Moreover, the 2011-2015 Action Plan emphasizes the intensification of cooperation in joint focused programs and activities with measurable outputs in selected areas. Five strategic goals are highlighted – each led by specific ASEAN members with defined deliverables and timelines. The goals are:

- 1) To Develop a Balanced IP System: The aim is to create an IP system that takes into account the varying levels of development of Member States and differences in the institutional capacity of national IP offices. This will enable them to deliver timely, quality, and accessible IP services thereby promoting the region as one that is conducive to the needs of users and generators of IP. Initiatives include:
 - Reduction of Backlog Applications by 2015 (led by Cambodia and Philippines): It entailed the reduction of turnaround time for trademarks registration (without objections/opposition) to six months.
 - Implementation of the ASEAN Patent

⁷⁶ ASEAN Secretariat, *ASEAN IPR Action Plan 2011-2015*, §1 (2011), available at http://www.asean.org/images/2012/Economic/sectoral_aem/service/agreement/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf.

⁷⁷ *Id.*

2013]

ASEAN IP HARMONIZATION

147

Search and Examination Cooperation (ASPEC) (led by Singapore).⁷⁸

- 2) To Enhance IP Infrastructure: The 2011-2015 Action Plan seeks to develop national or regional legal and policy infrastructures that will address the evolving demands of the IP landscape, as well as ASEAN member states' participation in the global IP systems at appropriate times. Initiatives include accession by ASEAN members to three international IP treaties by 2015, namely:
 - Madrid Protocol (led by Philippines);
 - Hague Agreement Concerning the International Registration of Industrial Designs (accession by at least seven ASEAN members) (led by Philippines); and
 - Patent Cooperation Treaty (led by ASEAN Secretariat).⁷⁹
- 3) To Promote IP Creation, Awareness, and Utilization: This goal aims to advance the interests of the region through systematic promotion of IP creation, awareness, and utilization. Objectives include ensuring that IP becomes a tool for innovation development and support for the transfer of technology to promote access to knowledge. Moreover, due consideration is to be given for the preservation and protection of indigenous products and services, as well as, creative works. Initiatives to achieve this goal focus mainly on improving and increasing access to IP information, particularly in the field of patents.⁸⁰ Take, for example:
 - The establishment of at least twenty regional patent libraries/patent information search facilities in ASEAN by 2015 (led by Philip-

⁷⁸ *Id.* § 3.1.

⁷⁹ *Id.* § 3.2.

⁸⁰ *Id.* § 3.3.

- piners);⁸¹ and
- The development of ASEAN IP Portal (led by Thailand and Singapore).⁸²
- 4) To Strengthen Regional Participation in the International IP Community: This objective seeks to engage ASEAN member states in active regional participation in the international IP community and deepen relations with dialogue partners and institutions so as to develop their capacities and address the needs of stakeholders in the region.⁸³ These initiatives are led by the ASEAN Secretariat and include:
- Implementing a structured cooperation with WIPO on a regional level;⁸⁴ and
 - Enhancing cooperation with dialogue partners, such as, ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), EC-ASEAN IPRs cooperation programme (ECAP III); ASEAN-China MOU on cooperation in the field of IP.⁸⁵
- 5) To Intensify Intra-ASEAN IP Cooperation: This strategy seeks to intensify cooperation among ASEAN member states and increase the level of collaboration among them, so as to enhance human and institutional capacity of IP Offices in the region. Initiatives include capacity building for patent examiners (led by Malaysia and Singapore), and industrial design and trademark examiners (led by Philippines), as well as infrastructure modernization of ASEAN IP offices (led by Philippines)

⁸¹ *Id.* (Initiative 17).

⁸² *Id.* (Initiative 21).

⁸³ *Id.* § 3.4.

⁸⁴ *Id.* (Initiative 22).

⁸⁵ *Id.* (Initiative 23).

and Vietnam).⁸⁶

5. Review of Progress on ASEAN IP Integration: Some Highlights

Although IP integration in ASEAN has proceeded at a slow pace, the recent momentum and resolve among ASEAN members to implement some of the strategic goals within the scheduled time frame has led to several deliverables being met. These include the completion of the ASEAN Common Form for Trademark⁸⁷ and the consolidated ASEAN List of Ethnic Goods and Services,⁸⁸ which represent important steps towards the establishment of a regional trademark filing system. To further enhance participation in the global IP system, many ASEAN member states have also acceded to major international IP treaties. Other programs that have been implemented include the ASEAN Patent Search and Examination Cooperation (ASPEC) and ASEAN IP Direct. A few of these are highlighted below.

a. ASEAN Patent Search and Examination Cooperation (ASPEC)

The ASPEC program, which commenced on June 15, 2009, is the first regional patent cooperation program aimed at facilitating the sharing of patent search and examination results among the participating ASEAN IP offices.⁸⁹ Currently, nine ASEAN IP offices are participating in this program; Brunei

⁸⁶ *Id.* § 3.5.

⁸⁷ *See Overview of Intellectual Property*, ASEAN, <http://www.asean.org/communities/asean-economic-community/category/other-documents-12> (last visited Jan. 23, 2013).

⁸⁸ *Id.*

⁸⁹ For full details on the ASPEC program including its procedure and relevant forms, see *ASEAN Patent Examination Co-operation (ASPEC)*, INTELL. PROP. OFF. OF SINGAPORE, <http://www.ipos.gov.sg/AboutIP/TypesofIPWhatisIntellectualProperty/Whatisapatent/Applyingforapatent/ASEANPatentExaminationCo-operationASPEC.aspx> (last updated Sept. 23, 2012).

Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Singapore, Thailand, and Vietnam.⁹⁰

Under the ASPEC program, the patent search and examination results may be used by participating IP offices as reference in their own search and examination process.⁹¹ This is a non-binding process since the national IP offices are not obliged to adopt any of the findings or conclusions in the search and examination results, and may proceed in accordance with their own national laws to reach their own decisions, *inter alia*, whether to grant the patent.⁹² The objective of this scheme was aimed mainly at:

- Easing the workload of IP offices by minimizing duplication of work;⁹³
- Reducing turnaround time for patent application prosecution and obtaining of corresponding patents in participating ASEAN countries;⁹⁴
- Increasing access to databases and information to generate better search and examination by patent examiners.⁹⁵

As part of a regular review of the ASPEC programme, it was recently enhanced and will now operate in the English language in all participating ASEAN IP offices.⁹⁶

b. ASEAN IP Direct

ASEAN IP Direct is an online directory that acts as a “one-

⁹⁰ See ASEAN, *ASEAN Patent Examination Co-operation (ASPEC) Programme*, § 1.2 (Apr. 30, 2012), available at <http://www.ipos.gov.sg/Portals/0/Patents/ASPECNoticeProcedures30Apr2013.pdf>.

⁹¹ *Id.* § 1.1.

⁹² *Id.* § 1.3.

⁹³ *Id.* § 1.4.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* § 3.2; see also, Press Release, ASEAN Secretariat, ASEAN Enhances ASEAN Patent Examination Co-operation Programme (April 27, 2012) available at <http://www.asean.org/news/asean-secretariat-news/item/asean-enhances-asean-patent-examination-co-operation-programme>.

stop” IP resource for businesses and other interested parties.⁹⁷ It was initiated by the Singapore IP Office to provide information on the various ASEAN member states relating to IP laws, dispute resolution bodies, technology transfer, and licensing offices, rights management organizations, government financing and incentives to encourage R & D in the various ASEAN countries, as well as IP public education and awareness.⁹⁸

At present, the online directory hosts information on eight ASEAN member states; Brunei Darussalam, Indonesia, Malaysia, Myanmar, Philippines, Thailand, Singapore, and Vietnam.⁹⁹

c. Accession to International IP Treaties

One of strategic initiatives suggested to enhance the regional IP infrastructure was to facilitate ASEAN member states’ participation in the international IP system. Consequently, efforts have been made to apply an “ASEAN-helps-ASEAN” approach, *inter alia*, to facilitate the sharing of insights and experience from ASEAN member states accession to international treaties.¹⁰⁰ To date, ASEAN members have made steady progress towards acceding to several international IP treaties¹⁰¹ including:

- World Intellectual Property Organization: Acceded

⁹⁷ *ASEAN IP Direct*, INTELL. PROP. OFF. OF SINGAPORE, <http://www.ipos.gov.sg/AboutIP/IPResources/UsefulLinks/RegionalOrganisations/ASEANIPDirect.aspx> (last visited Feb. 17, 2013).

⁹⁸ Press Release, ASEAN, ASEAN to Launch “IP DIRECT” (June 1, 2009), available at <http://www.asean.org/images/archive/PR-Launch-IPDirect.pdf>.

⁹⁹ *ASEAN IP Direct*, supra note 97.

¹⁰⁰ ASEAN Secretariat, *ASEAN Economic Community Factbook*, 56 (2011), available at <http://www.asean.org/resources/item/asean-economic-community-factbook-2>.

¹⁰¹ Some of these occurred while *ECAP II* was in operation. Mir, supra note 24.

to by all ten ASEAN member states;¹⁰²

- World Trade Organization (WTO): All ASEAN member states have joined the WTO;¹⁰³
- Paris Convention: Nine ASEAN member states are members, with the exception of Myanmar;¹⁰⁴
- Patent Co-operation Treaty (PCT): Eight ASEAN members have joined; Brunei Darussalam,¹⁰⁵ Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam;¹⁰⁶
- Madrid Protocol: Philippines¹⁰⁷, Singapore, and Vietnam are members;¹⁰⁸
- Hague Agreement Concerning the International Registration of Industrial Designs (Hague Agreement): Acceded to by Singapore only;¹⁰⁹ and
- Berne Convention: Eight countries are members;

¹⁰² *Member States*, WIPO, <http://www.wipo.int/members/en/> (last visited Feb. 17, 2013).

¹⁰³ *See Members and Observers*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated Mar. 2, 2013).

¹⁰⁴ *See Paris Convention for the Protection of Industrial Property*, Mar. 20, 1883, as last revised at Stockholm July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

¹⁰⁵ Brunei Darussalam acceded to the PCT on 24 April 2012 which entered into force on 24 July 2012. *PCT Notification No. 200 Patent Cooperation Treaty: Accession by Brunei Darussalam*, WORLD INTELL.PROP.ORG. (Apr. 24, 2012), http://www.wipo.int/treaties/en/notifications/pct/treaty_pct_200.html.

¹⁰⁶ Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231, *available at* <http://www.wipo.int/pct/en/texts/pdf/pct.pdf>.

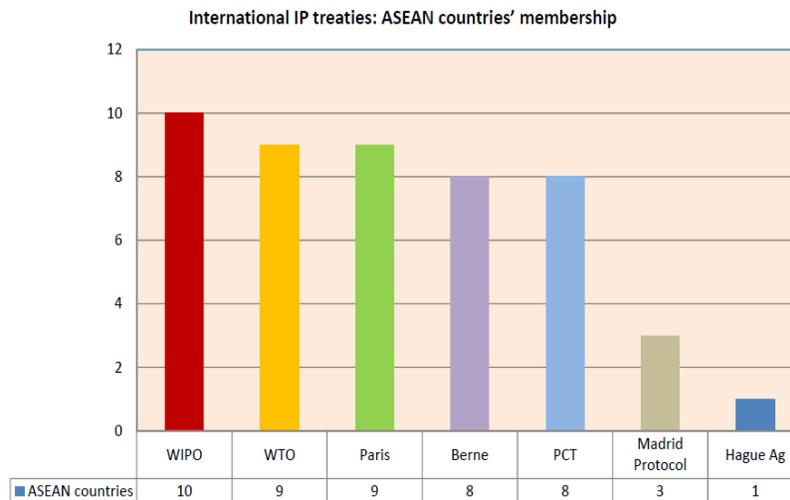
¹⁰⁷ Press Release, World Intell. Prop. Org., Madrid Protocol Concerning the International Registration of Marks (June 6, 2012), *available at* http://www.wipo.int/edocs/madrdocs/en/2012/madrid_2012_9.pdf (explaining how the Philippines recently acceded to the Madrid Protocol on April 25, 2012, which subsequently entered into force on July 25, 2012).

¹⁰⁸ *See Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, June 27, 1989, S. Treaty Doc. No. 106-41, *available at* http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf.

¹⁰⁹ *See Hague Agreement Concerning the International Registration of Industrial Designs*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/registration/hague/> (last visited Feb. 23, 2013).

Brunei Darussalam, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam.¹¹⁰

With less than three years to go, ASEAN members will have to press on with accession efforts if they are to meet the 2015 target set by the 2011-2015 Action Plan.¹¹¹ Currently, only 10% of ASEAN member states have acceded to the Hague Agreement, 30% are members of Madrid Protocol, 80% have joined the PCT and Berne Convention, 90% are members of the WTO, and all ASEAN member states are members of the WIPO.¹¹² The chart below depicts the current international landscape:



¹¹⁰ See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971), available at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>.

¹¹¹ See ASEAN Action Plan 2011-2015, supra note 76 at 11.

¹¹² Data computed based on ASEAN members' accession to the relevant treaties.

C. ASEAN Cooperation with Key Partners: Some Examples

1. EU-ASEAN

Apart from intra-regional IP cooperation, ASEAN has also continued to actively engage its dialogue partners, international agencies, and private organizations in IP cooperation. A notable example is its IP cooperation programmes with the European Union (EU). The strong relationship between the EU and ASEAN is evidenced by the fact that EU is ASEAN's second largest trading partner, while ASEAN forms the EU's fifth largest trading partner.¹¹³ Since the early 1990s, trade and investment between Europe and Southeast Asia has increased by more than tenfold,¹¹⁴ and in 2010, the EU was the biggest source of foreign investment for ASEAN member states, accounting by about 20%.¹¹⁵ In the field of IP, European Patent Office (EPO) member states account for around 30% of patent filings in the ASEAN region.¹¹⁶ The ties between these two regions are set to deepen further as they celebrated the thirty-fifth anniversary of EU-ASEAN cooperation in 2012.¹¹⁷

The EU-ASEAN cooperation in IP commenced in the early 1990s with the launch of a series of initiatives, such as, the EC-ASEAN Intellectual Property Rights Cooperation Programmes (ECAP I, II, III). These projects aimed at increasing IP capaci-

¹¹³ Benoit Battistelli, President, European Patent Office (EPO), Keynote Address to the ASEAN Member States-EPO Heads of Intellectual Property Offices Conference: ASEAN-EPO Cooperation – Past, Present and Future (Jan. 13, 2011), available at http://www.epo.org/news-issues/press/speeches/20110_113a.html.

¹¹⁴ *Id.*

¹¹⁵ *19th ASEAN-EU Joint Co-operation Committee (JCC) Meeting Convenes in Bali*, CARI ASEAN (Nov. 12, 2011), http://cariasean.org/view/afd_19thasean_jcc.

¹¹⁶ Battistelli, *supra* note 113.

¹¹⁷ Karel de Gucht, European Union Comm'r for Trade, *Speech at the 2012 EU-ASEAN Business Summit: EU-ASEAN Trade and Investment* (Apr. 1, 2012), available at http://www.eu-un.europa.eu/articles/en/article_12043_en.htm (focusing on the importance of the South East Asian region to Brussels and other European capitals).

ty building and technical assistance implemented the European Commissions' philosophy of seeking to "help countries develop through cooperation and capacity building, rather than relying on sanctions and threats."¹¹⁸

ECAP I (1993-1997) focused on industrial property rights and strengthening of the national IP system in ASEAN member states.¹¹⁹ It was succeeded by ECAP II (2000-2007), which expanded the scope of coverage to include the whole range of IPRs with particular emphasis on enforcement.¹²⁰ Its overall objective was aimed at enhancing "trade, investment and technology exchanges between Europe and ASEAN" through a "sound IP system."¹²¹ Following the successes of ECAP I & II, ECAP III was launched in January 2010 endowed with €5.1 million, co-funded by the EU and the EPO.¹²²

This latest ECAP III project (2010 – 2013) sought to provide further support for ASEAN IPR cooperation and integration as a means to enhance economic competitiveness and development.¹²³ Its overall goal was to:

- Further integrate ASEAN countries into the global economy and world trading system to promote economic growth and poverty reduction;¹²⁴
- Facilitate ASEAN regional integration through the establishment of regional institutional capacity and harmonization of legal and administrative IPR frameworks;¹²⁵ and
- Address the objectives of the ASEAN IPR Action

¹¹⁸ Mir, *supra* note 24.

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *ASEAN Project on the Protection of Intellectual Property Rights*, ACAR INTELL. PROP., <http://en.acarpatent.com/icerikg.asp?id=1871&smi> (last visited Sept. 25, 2012).

¹²³ *See ECAP III*, ECAP-PROJECT, <http://www.ecap-project.org/> (last visited

¹²⁴ *Id.*

¹²⁵ *Id.*

Plan, especially in relation to IPR enforcement.¹²⁶

To meet these objectives, five projects were undertaken that were aimed at:¹²⁷

- Capacity building as well as regional cooperation for IPR enforcement and regulation in ASEAN;¹²⁸
- Improving legal and administrative aspects of IPRs;¹²⁹
- Using IP as a tool for economic development and integration;¹³⁰
- IP education and networking - ASEAN regional network of IP education, training and research;¹³¹
- Enhancing ASEAN Secretariat capacity to support and co-ordinate ASEAN regional IP policies, and work streams including training courses, workshops, awareness-raising activities, etc.¹³²

Overall, the ECAP programs have been a major source of technical assistance, and have provided invaluable support in helping ASEAN move closer to establishing the AEC by 2015 and further integrating into the global economy.¹³³ Notable contributions include a compilation of geographical indications (GIs) registered in the ASEAN region and the setting up of a results-based monitoring plan of ASEAN IP statistics.¹³⁴ The latter is a data collection system to monitor various IP and related indicators, such as, applications and registrations of in-

¹²⁶ *See id.*

¹²⁷ *See Launch of Third Phase of ASEAN IPR Protection Project*, IPR2 (Feb. 2010), http://www.ipr2.org/index.php?view=article&id=1058%3Alaunch-of-third-phase-of-asean-ipr-protection-project&option=com_content&Itemid=235.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Pushpanathan, *supra* note 3; Mir, *supra* note 24.

¹³⁴ *See ASEAN Action Plan 2011-2015*, *supra* note 76 at 7, 9.

dustrial property in ASEAN, trade and FDI flows, etc.¹³⁵

2. ASEAN-Japan

The recent signing of the Memorandum of Cooperation (MOC) in industrial property between the ASEAN Member States Intellectual Property Offices (AMS-IPOs) and the Japan Patent Office (JPO) on July 11, 2012 in Singapore marked yet another important milestone in the advancement of IP cooperation between ASEAN and Japan.¹³⁶ The MOC will enhance the IP capabilities in ASEAN and Japan, in the areas of trademarks, industrial designs, patents, and utility models with particular focus on industrial property protection, administration and exploitation, as well as, the streamlining of examination procedures, and practices, etc.¹³⁷ The AMS-IPOs and JPO also adopted the ASEAN Intellectual Property Offices – JPO Action Plan 2012-2013.¹³⁸ Activities that have been prioritized for implementation include the conducting of case studies on successful Japanese SMEs in IP commercialization in the creative industries that are applicable to ASEAN, the workshop on establishing IT infrastructure for sharing of information on patent examination, and the provision of support for accession to international IP treaties for ASEAN member states.¹³⁹

On a separate note, the JPO has also intensified its cooperation with several AMSs by acting as a competent Interna-

¹³⁵ See *id.*

¹³⁶ See *ASEAN – Japan Signed Agreement to Further Cooperate on Intellectual Property*, ASEAN (July 12, 2012), <http://www.asean.org/news/asean-sec-retariat-news/item/asean-japan-signed-agreement-to-further-cooperate-on-intellectual-property>.

¹³⁷ See *id.*; Bander Seri Begawan, *AGC Inks MoC on Industrial Property*, BRUNEI TIMES (July, 12, 2012), <http://www.bt.com.bn/news-national/2012/07/12/agc-inks-moc-industrial-property>.

¹³⁸ Ministry of Economy, Trade and Industry, Japan (METI), *Conclusion of Memorandum of Cooperation on Intellectual Property between the Japan Patent Office and the ASEAN IP Offices* (July 11, 2012), available at http://www.meti.go.jp/english/press/2012/0711_02.html.

¹³⁹ *ASEAN – Japan Signed Agreement to Further Cooperate on Intellectual Property*, *supra* note 136.

tional Search Authority (ISA) and International Preliminary Examination Authority (IPEA) for Patent Cooperation Treaty (PCT) international applications filed in three ASEAN member states, Philippines, Thailand, and more recently Vietnam.¹⁴⁰

As ASEAN continues to broaden its economic cooperation through various forums, such as, ASEAN+3, ASEAN+6, APEC and East Asia Summit, it will continue to work in partnership with other participants to further strengthen cooperation in the field of IP.

IV. THE ASEAN IP MODEL: STRIKING THE DELICATE BALANCE

ASEAN IP harmonization has undergone numerous challenges occasioning a deferment of its initial goal of implementing a “fully” harmonized IP regime. Its recent adoption of an IP cooperation model based on a common, yet differentiated approach, serves to highlight ASEAN’s limitation, which is also its strength.¹⁴¹ By taking into “due account the interests and preferences”¹⁴² of its stakeholders, ASEAN has persevered in its quest for an inclusive regional IP system that seeks to avoid adverse outcomes and avert risks of potential alienation of any member state.¹⁴³ While ASEAN IP harmonization may still be a “work in progress”, its IP cooperation model performs three significant roles that will contribute towards establishing a well-functioning regional IP regime.¹⁴⁴ These roles are enabling, balancing, and implementing.¹⁴⁵

¹⁴⁰ *JPO to Act as a Competent ISA and IPEA for PCT International Applications Filed in Vietnam*, IPFRONTLINE (July 6, 2012), <http://www.ipfrontline.com/depts/article.aspx?id=27250&deptid=3>. In the case of Vietnam, it only relates to applications filed on or after July 1, 2012.

¹⁴¹ See Tommy Koh, *Foreward to ASEAN MATTERS!: REFLECTING ON THE ASSOCIATION OF SOUTHEAST ASIAN NATION*, at xii (Yoong Yoong Lee ed., 2011), available at <http://www.worldscientific.com/worldscibooks/10.1142/8022>.

¹⁴² *Id.* at xiii.

¹⁴³ ELIZABETH SIEW KUAN NG, *THE IMPACT OF THE INTERNATIONAL PATENT SYSTEM ON DEVELOPING COUNTRIES* 5 (2003), available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=17557.

¹⁴⁴ *Id.*

¹⁴⁵ Teo Chee Hean, Deputy Prime Minister of Sing., Speech at the 2012

First, ASEAN IP harmonization enables. The ASEAN IP model strives to create a conducive environment where IP can be utilized as one of the tools to promote regional integration, economic competitiveness, and development. The ASEAN Framework Agreement on Intellectual Property Cooperation and initiatives, together with inter-ASEAN cooperation with dialogue partners, have sought to enable its members to use IP for promoting regional integration, broad-based, inclusive economic and social development aimed at closing the development gap, eradicating poverty and maintaining sustainable development.¹⁴⁶

Second, it balances. The ASEAN model seeks to strike an appropriate balance between advancing the mutual regional interests of ASEAN member states and preserving the diverse national interests of all the various stakeholders. ASEAN's initial attempts at crafting one set of regional IP laws and establishing regional trademark and patent offices are illustrative of this challenging task. In the face of competing interests and demands, trade-offs have to be made. Its eventual adoption of an ASEAN IP cooperation model that enables its members to move forward collectively, but at varying paces, serves to highlight ASEAN's perseverance in seeking an inclusive regional IP regime that balances the mutual regional interests of its members while preserving their diversity.

Third, it implements. A well-functioning regional IP system needs not only to formulate IP policies and set strategic goals, but also ensure their timely execution. ASEAN's model centered on joint focused cooperation in selected areas, with measurable outputs and deliverables, in general serves to highlight this attribute.

Clearly, ASEAN has many more opportunities ahead to deepen its regional IP integration. Guided by the principle of

Administrative Service Dinner and Promotion Ceremony (Mar. 27, 2012), available at http://www.mha.gov.sg/news_details.aspx?nid=MjQxOA%3D%3D-e8UFZiHct2A%3D (highlighting the three critical roles played by the government, as a balancer or regulator, an enabler and a provider).

¹⁴⁶ *Co-Chairs' Statement*, *supra* note 30; Pushpanathan, *supra* note 3.

consensus and inclusiveness, it will advance steadily towards implementing a more effective regional IP regime to establish an innovative and creative ASEAN economy.

CONCLUSION

ASEAN's goal to realize a harmonized and integrated regional IP system is commendable. Yet, the lack of homogeneity of nations within the ASEAN community, exacerbated by the developmental and economic gap, suggests that internal differences over the scope, significance, and importance of IP rights exists among its members. While many challenges will lie ahead, ASEAN will continue to seize the many opportunities to fulfil its potential as the hub of East Asia. As ASEAN moves resolutely towards establishing the ASEAN Community, its perseverance in its quest for an inclusive regional IP regime that balances the diverse national interests of its member states with their mutual regional interests¹⁴⁷ will hold it in good stead. From a broader perspective, unless and until the development gap¹⁴⁸ and disparities in IP creation, utilization and exploitation among nations are closed, or at least minimized, lessons can perhaps be learned from harmonizing IP the ASEAN way.

¹⁴⁷ See Suthiphand Chirathivat et al., *ASEAN Prospects for Regional Integration and the Implications for the ASEAN Legislative and Institutional Framework*, 16 ASEAN ECON. BULLETIN 28, 28-29 (1999).

¹⁴⁸ *Phnom Penh Declaration*, *supra* note 31, at 4 (ASEAN leaders have re-affirmed their commitment to ensure that regional economic integration will help to alleviate poverty and narrow the development gaps within and between ASEAN member states).