

THE DEVELOPMENT OF ASEAN'S INTELLECTUAL PROPERTY RIGHTS LAW; FROM TRIPS COMPLIANCE TO HARMONIZATION

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Article Info

Received : 13 October 2016 | Received in revised form : 26 January 2017 | Accepted : 23 March 2017

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Abstract

Intellectual Property Rights (IPR) is one of the most important subjects of trading, not only in the era of globalism, but also in this era of regionalism. In the ASEAN region, due to the significant role of IPR protection, Member Nations introduced ASEAN Framework Agreement on Intellectual Property (IP) Cooperation in 1995, a year after the conclusion of the Trade-related Aspects of Intellectual Property Rights (TRIPs) Agreement of the World Trade Organization (WTO). This paper discusses the current development of this Framework in the light of harmonizing Intellectual Property (IP) laws in the region, covering the objectives, the basic principles, and some substantial provisions. Furthermore, it examines whether the fast pace of IP laws development in ASEAN has been mainly driven by the ASEAN Framework Agreement or the time frame for such countries to comply with the TRIPs obligations. This paper also examines whether the regional economic cooperation of ASEAN Free Trade Agreement (FTA) with their trading partners pays specific attention to the issue of IPR. By taking into account the different level of national IPRs laws, and the current development thereof, it can be concluded that the ASEAN framework on IP Cooperation is rather ambitious. While the Working Groups succeeded in developing draft on regional filing forms for IP registration, particularly in Trademark, the progress of harmonization has been very slow.

Keywords : ASEAN, Harmonization, Intellectual Property Rights (IPRs), TRIPs Agreement

Abstrak

Hak Kekayaan Intelektual (HKI) merupakan salah satu subyek perdagangan yang sangat penting, tidak hanya di era globalisasi, tetapi juga di era regionalisasi. Dalam regional ASEAN, pentingnya perlindungan HKI telah membuat negara-negara anggota menyepakati Kerangka Perjanjian Kerjasama Kekayaan Intelektual tahun 1995, setahun setelah disepakatinya Perjanjian yang terkait dengan Hak Kekayaan Intelektual (TRIPs) yang diprakasai Organisasi Perdagangan Dunia (WTO). Tulisan ini mendiskusikan perkembangan terakhir Kerangka Perjanjian Kerjasama tersebut dalam rangka mengharmonisasikan HKI di wilayah ASEAN yang meliputi, tujuan, prinsip-prinsip dasar, dan beberapa ketentuan penting. Kemudian, tulisan ini menguji apakah perkembangan hukum HKI yang sangat cepat di ASEAN digerakkan oleh Kerangka Perjanjian Kerjasama ini atau karena deadline negara-negara anggota ASEAN untuk menyesuaikan dengan kewajiban-kewajiban yang disepakati dalam Perjanjian TRIPs. Tulisan ini juga menguji apakah kerja sama ekonomi regional dalam Perjanjian Perdagangan Bebas (FTA) - ASEAN dengan negara mitra dagangnya memberikan perhatian khusus pada issue HKI. Dengan mempertimbangkan hukum nasional mengenai HKI di negara-negara anggota ASEAN yang berbeda-beda levelnya, and perkembangannya yang terakhir, dapat disimpulkan bahwa Kerangka Perjanjian Kerjasama HKI ini cukup ambisius. Kelompok kerja yang dibentuk telah sukses mengembangkan draft tentang pengisian formulir aplikasi regional untuk pendaftaran HKI terutama untuk merek, tetapi perkembangan harmonisasi masih sangat lambat sekali.

Kata Kunci : ASEAN, Harmonisasi, Hak Kekayaan Intelektual (HKI), Perjanjian TRIPs

I. INTRODUCTION

It was 2 (two) decades ago that the ASEAN Framework Agreement on Intellectual Property Cooperation signed (hereinafter referred to as Framework Agreement) by 7 (seven) Member States of the Association of South East Asian Nations (hereinafter referred to as ASEAN) on December 15, 1995 in Bangkok, Thailand.¹ The Framework Agreement recognizes the significance of Intellectual Property Rights (hereinafter referred to as IPR) for the flow of trade and investment among ASEAN Member States and the importance of cooperation in IPR protection and enforcement in the region.²

From 1995 to 1996, the said regional Framework Agreement was subsequently ratified by 9 (nine) Member States. For the purpose of its implementation at the national level, the ASEAN Working Group on Intellectual Property Cooperation (hereinafter referred to as AWGIPC) was established in 1996, consisting of Intellectual Property (IP) Offices of 10 (ten) ASEAN Member States, and recently, its work is based on ASEAN IPR Action Plan 2011-2015.³ Since 1996, ASEAN has made significant endeavors to enhance the frame work of policies and institutions regarding IPR in this region. However, the level of development of national IP laws among ASEAN Member States has been varied. Based on that fact it seems that the effort to harmonize national IP laws has not been an easy task considering the differences in the level of economic development among Member States. Interestingly, in the era of ASEAN Free Trade Agreement (FTA) and ASEAN Economic Community (AEC), IPR protection, including enforcement thereof, has been one of the most sensitive issues.

This research discusses the current development of the Framework Agreement in the light to harmonizing IP laws among Member States. It covers the objectives, the basic principles, some substantial provisions, and historical background. It goes on to analyze the current development of national IPR laws in each ASEAN country. Furthermore, this paper also analyzes whether these national IPR laws of ASEAN Nations are in accordance with the Framework Agreement. Along similar lines, it also analyzes the progress of developing administrative system under the Framework Agreement. Lastly, this paper examines whether the regional economic cooperation of ASEAN Free Trade Agreement (FTA) with its trading partners pays specific attention to the issue of IPR by taking into account the different level of national IPR Laws within ASEAN Member States.

II. ASEAN FRAMEWORK AGREEMENT ON INTELLECTUAL PROPERTY COOPERATION AND TRIPS AGREEMENT: HISTORICAL PERSPECTIVE, PRINCIPLES AND OBJECTIVES

Historically, the ASEAN Framework Agreement on IP was inspired by the need to provide a solid foundation for economic development and expanding the realization of ASEAN FTA for prosperity of Member States.⁴ It was also recognized that promotion of a better cooperation and understanding of IPR among States in the ASEAN region will promote regional dynamism, synergy and growth.⁵ The Framework Agreement was followed by the establishment of a regional patent and trademark office. Subsequently, the action plan for implementation was agreed in Thailand 4 (four) months after the

¹ The seven Member Countries are as follows: Brunei Darussalam, Indonesia, Malaysia, The Philippines, Singapore, Thailand and Vietnam.

² See paragraph 2 of the Preamble of the *ASEAN Framework Agreement on Intellectual Property Cooperation*, Bangkok, Thailand, December 15, 1995.

³ "ASEAN Intellectual Property Portal", <http://www.aseanip.org/About-Us/About-AWGIPC>, accessed December 15, 2015.

⁴ *ASEAN Framework Agreement on Intellectual Property Cooperation*, paragraph 4.

⁵ *Ibid*, paragraph 5.

conclusion of the Framework Agreement in 1996. It was expected that the action plan would be able to establish a regional electronic information network, an Intellectual Property (IP) database and a common system of protection for industrial design, patents as well as copyright,⁶ and that it would be followed by the creation of ASEAN standards and practices. It would appear that the establishment of a common system of protection resembles the one established in Europe under the European Patent Convention (EPC) establishing the European Patent Office (EPO). Accordingly, it has raised certain comments that this ultimate goal is rather ambitious since the level of economic development of ASEAN member nations is quite different.

The objectives of the Framework Agreement as enshrined in Article 1 are; firstly, to strengthen the cooperation in the area of IP with the perspective to support the growth of trade liberalization regionally and globally. This promotion of cooperation is not intended for government agencies only, but also for the private sectors and professional bodies of ASEAN.⁷ Secondly, to explore the possibility of establishing an ASEAN patent and trademark system, including its office by considering the development of regional, and international patent and trademark protection.⁸ Lastly, to enhance the intra-ASEAN cooperation arrangements for solidarity and to promote innovation, transfer and dissemination of technology. This last objective is in accordance with the objective stipulated under the Trade Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPs) Agreement of World Trade Organization (hereinafter WTO).⁹ Article 7 of the TRIPs Agreement states as follows:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

The Framework also requires Member States to conduct consultation on developing their national IPR laws to create ASEAN standards and practices which are in line with international standards. Although the objective does not mention a specific international convention to be used as reference by ASEAN Member Nations for developing their national laws, it can be interpreted that the wording of “international standard under this Framework refers to the TRIPs Agreement” can serve as such reference. This is because the principles of this Framework clearly mention “the TRIPs Agreement”.¹⁰ It means that the principles stipulated under the Framework Agreement is the derivative of the objectives of the TRIPs Agreement whereby Member States “shall implement intra-ASEAN intellectual property arrangement in a manner in line with objectives, principles, and norms set out in such relevant conventions and the Agreement on TRIPs”, for the mutual benefits “to creator, producers and user of intellectual property and in a manner conducive to social and economic welfare”.¹¹

⁶ World Intellectual Property Organization, *World Intellectual Property Report*, Vol. 10, No. 5 (Geneva: WIPO, 1996), pp. 127-8.

⁷ See *ASEAN Framework Agreement on Intellectual Property Cooperation*, Article 1 (1) and (2).

⁸ *Ibid.*, Article 1 (4) and (5).

⁹ *Agreement Establishing the World Trade Organization, Annex 1C - Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*, Marrakesh, 15 April 1994, *United Nations Treaty Series*, Vol. 31; 33 I.L.M. 1197, 1201, Article 7.

¹⁰ *ASEAN Framework Agreement on Intellectual Property Cooperation*, Article 2(2) of

¹¹ *Ibid.*, compared to TRIPs Agreement, Article 7 as follows: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Interestingly, the adoption of measures necessary to protect “public health, nutrition and the promotion of the public interests in sectors of vital importance to the socio economic and technological development by Member States are allowed as long as consistent with their international commitments”.¹² It is clear that the language construction used to explain the above principles is similar to the language used in the TRIPs Agreement.¹³ Similarly, the wording of the language under Article 66 of the TRIPs Agreement on transfer of technology is also entirely adopted in this Framework Agreement.¹⁴ Therefore, it can be concluded that the establishment of this Framework Agreement was inspired and generated by the TRIPs Agreement.

From the perspective of the scope of protection, the Framework provides for comprehensive cooperation for IP protection and enforcement which includes copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information and lay-out designs of integrated circuits.¹⁵ Such scope of protection is also as comprehensive as the TRIPs Agreement. Furthermore, ASEAN Member nations also set up a number of cooperative activities as follows: (1) activities for enhancing an effective IP enforcement and protection; (2) activities for strengthening administration of ASEAN IP; (3) activities for strengthening IP legislation; (4), activities for promoting development of human resources; (5) activities in promoting public awareness of IPR; (6) activities for promoting private sector cooperation in IP; and (7) exchange of information on the issues of IP.¹⁶ On the above basis and for those issues, ASEAN Member nations have been working together in a cooperative way.

After the conclusion of the Framework Agreement in 1995, the ASEAN Working Group on IP Cooperation was established in 1996, to implement the Framework. This Working Group consists of the IP offices of ASEAN Member Nations, and is responsible for IP Issues in the region. Through this Working Group, significant efforts have been made to improve the regional IP framework of policies and institutions. The working group proposed the adoption of the regional filing system, based on which applicants from ASEAN Member States are able to file their IPR application with any ASEAN office, and the application is subsequently forwarded to other designated offices. In the context of trademarks, the Working Group has developed drafts on regional filing form, however, there has been no substantial progress for the introduction of the system due to certain factors: Firstly, there has been concern that regional filing would affect new IP offices of Member nations as a result of which they would lose source of income and because of that some local practitioners would reject it; and secondly, that such regional filing system would do not better than the multilateral system of Patent Cooperation Treaty (PCT), to which most countries in the region are members, hence regional filing may not be necessary.

III. THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAWS IN ASEAN COUNTRIES

Most of the intellectual property laws of ASEAN Member countries were originally either inherited from the colonial government or adopted later as part of the desire

¹² *Ibid.*, Article 2 (4).

¹³ Compared to TRIPs Agreement Article 8, which states that: “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”.

¹⁴ *Ibid.*

¹⁵ ASEAN Framework Agreement on Intellectual Property Cooperation, Article 3.1

¹⁶ *Ibid.*, Article 3.3

to modernize their countries.¹⁷ However, one of the main reasons contributing to the revision of ASEAN Member IP laws has been their treaty obligation under the WTO-TRIPs Agreement. This part will discuss the current significant development of IP laws in ASEAN Member countries, including the endeavors to establish a better system of protection, and some areas of difficulties such as enforcement of the laws.

A. Singapore

Singapore is ASEAN's most innovative country and in the last decade, it has made significant steps in developing a successful IP environment, including an enforcement mechanism. The World Economic Forum ranked Singapore's IP regime among the top five in the world since 2006.¹⁸ In 2015/2016, it ranked fourth in the world and at the top in Asia for the best IP protection.¹⁹ Singapore became member of WTO in 1995 and made legislative changes to meet its TRIPs obligations by amending its Patent Act in 1995, Trade Mark Act in 1998, Geographical Indication Act in 1998, Copyright Act in 1998 and 1999, Layout Design of Integrated Circuits Act in 1999.²⁰ By 2000, all of Singapore's IP laws were in compliance with the TRIPs Agreement. It has also developed a strong IP infrastructure, has established a specialized IP Court, has excellent expertise on IP arbitration or dispute resolution, and because of that WIPO has established Arbitration and Mediation Centre in Singapore to support IP dispute resolution in Asia.²¹ According to Christoph Antons, this country has an effective IP enforcement system compared to other countries in ASEAN.²²

In the context of patent for example, Singapore has strong protection compared to other ASEAN member nations. It has adopted a rather liberal approach as it provides patents protection for plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. It means that Singapore does not use the flexibilities provided under the TRIPs Agreement which allows member nations to make exception to Article 27.3 (b) thereof. Patent protection for plant and non-human animal varieties was necessary for Singapore in order to encourage research and investment in horticulture, agriculture and biodiversity.²³ The progressive development of Singapore's Patent Law has probably been driven by the country's ambitious plans in biotechnology industry which requires significant IP protection.²⁴ Singapore also joined the UPOV Convention of 1991 in 2004,²⁵ probably due to the commitment that Singapore has made under the bilateral free trade agreement

¹⁷ Assafa Endenshaw, "Harmonization of Intellectual Property Laws in Asean; Issues and Prospects," *The Journal of World Intellectual Property* 2, no. 1 (2005), p.3.

¹⁸ Singapore Ministry of Law, "Intellectual Property Policy," <http://www.mlaw.gov.sg/our-work/intellectual-property-policy.html>, accessed October 3, 2015.

¹⁹ See Intellectual property Office of Singapore, "Singapore IPR Ranking," <http://www.ipos.gov.sg/MediaEvents/SingaporesIPRanking.aspx>, accessed 3 October 2016.

²⁰ Alisha Gill, Zsuzsanna Vári-Kovács and Ashish Lall, *The Development of Singapore's Intellectual Property Rights Regime*, Lee Kuan Yew School of Public Policy - Microsoft Case Studies Series on Information Technology, Public Policy, and Society, May 2014, p. 9.

²¹ *Ibid.*

²² Christoph Antons, "Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Development," http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/antons/antons.pdf, accessed September 10, 2015, p. 2.

²³ S.S.C. Tay and J.P. Estanislao, "The Relevance of ASEAN; Crisis and Change," in *Reinventing ASEAN*, eds. S.S.C. Tay, J.P. Estanislao and H. Soesastro (Singapore: Institute of Southeast Asian Studies, 2001), p. 294.

²⁴ Antons, "Intellectual Property Law," p. 3.

²⁵ See the list of UPOV Member Countries, <http://www.upov.int/en/about/members/pdf/pub423.pdf> accessed 10 September 2013.

(BFTA) with the United States.²⁶

Moreover, Singapore's universities and public research organizations have also been paying special attention to securing IP protection for their research results, innovation, and knowledge produced in Singapore.²⁷ Accordingly, the number of registered patents in Singapore is rather high compared to other ASEAN member nations.

B. Malaysia

Intellectual property laws of Malaysia are mostly in line with the requirements of the TRIPs Agreement.²⁸ In 2003, the administration of intellectual property covering patent, trade mark, industrial design and copyright, has improved significantly because it has been conducted by a new institution known as the Malaysian Intellectual Property Corporation (MyIPO).²⁹ This new institution is fully autonomous as it has greater freedom to manage and regulate its own affairs in the area of administration and finance hence the MyIPO possesses the capacity to support the development of human resources. This institution has recruited and started training substantial numbers of new staff at various levels, including patent and trademark examiners. Such change has led to significant increases in the number of patents and trademarks being examined and registered.

Like the majority of ASEAN member countries, enforcement mechanism and judiciary remains a problem for Malaysia,³⁰ and the sanctions for the infringement of IPR are regarded as inadequately deterrent. In response to such problem, the enforcement Division of the Ministry of Domestic Trade, Cooperatives and Consumerism has established a Special Task Force on Counterfeiting and Piracy. Based on the report of the European Commission in 2013, there has been a positive development regarding IPR protection in Malaysia including the establishment of a specialized IP Court, the amendment of the Trade Descriptions Act, the amendment of the Copyright Act and the increased number of anti-piracy awareness campaigns.³¹ As a result, there has been a slight increase in the awareness of IP protection in Malaysia,³² and a more efficient IP enforcement system, making Malaysia one of the first countries in the region to have specialized courts to deal with IP cases, after Singapore.

Antons noted that Malaysia is a country with a great desire in the field of information technology and biotechnology.³³ Due to such aspiration, since the 1990s Malaysia has developed a legal framework for the information technology sector with the enactment of the Digital Signature Act of 1997, the Computer Crimes Act of 1997 and

²⁶ See Chapter 16, Article 16.1 of the The US-Singapore Free Trade Agreement (USSFTA). It was signed by Prime Minister Goh Chok Tong and President George W. Bush on 6 May 2003 in Washington DC. The USSFTA entered into force on January 1, 2004 after it was approved by the House of Representatives on July 25, 2003 and by the Senate on August 1, 2003.

²⁷ See Alexander Degelsegger, Svend Otto Remoe and Rudie Trianes, *Asean Economic Community and Intellectual Property Rights; an Assessment of Framework Condition for Innovation* (Austria; Centre for Social Innovation, 2016), p. 54.

²⁸ Henry Goh, *A Guide to Malaysian IP System*, 2013, <http://www.henrygoh.com/downloads/ip-guide-en.pdf> accessed September 10, 2016; See also D. Goon, 'Malaysia' in: C. Health (ed.), *Intellectual Property Law in Asia*, (London; Kluwer Law Internasional, 2003), pp.307-336.

²⁹ Malaysia, *Intellectual Property Corporation Act 2002*, Section 3 and 33.

³⁰ Antons, "Intellectual Property Law," p. 3.

³¹ European Commission, *Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries* (Brussels: European Commission, 2013), p. 16.

³² *Ibid.*

³³ Antons, "Intellectual Property Law," p. 3.

the Telemedicine Act of 1997, the Communication and Multimedia Act of 1998, and numerous amendments to the Copyrights Act.

C. Indonesia

In its effort to be TRIPs compliant, Indonesia has implemented a massive reform of IPR protection by amending some of its IPR legislation and introducing completely new IP laws from 2000 to 2002. The process of amending various IP legislations has been ongoing up to 2016. It has been acknowledged by the European Union that there have been some positive improvements over the protection of IPR in Indonesia in the last few years.³⁴ Although some IP legislation still requires implementing rules, the majority of the legislation in the area of Patent, Copyright, Trademark, Industrial Design are considered as relatively TRIPs compliant.

There have been several recent improvements in the protection of IPR. The Indonesian government has demonstrated greater political will to improve the environment for IP creation and protection, including through promotion of the country's creative economy and creative industries, a commitment to increase the share of IPR-intensive industries. In 2014 the new Copyright Law (No. 28/2014) was enacted, which includes provisions for dealing with online infringement and a higher penalty for piracy. It was followed by the enactment of the new Patent Law in 2016. Furthermore, the amended Trade Mark Law, and Plant Varieties Protection Law are also expected to be adopted in the foreseeable future. In the area of trademark, the amendment draft includes provisions for a more time efficient registration procedure, the recognition of non-traditional marks, and provisions for Indonesia's accession to the Madrid Protocol. However, the accession plan to the Madrid Protocol has been subject to intense debate during the amendment process.

At the same time, it has been acknowledged that there have been a number of weaknesses in the protection of IPR in Indonesia, particularly in the area of enforcement. Despite various policies and measures aimed at dealing with this problem, at the core of the problem seems to be the legal culture,³⁵ as well as weak governance and corruption which continue to pose a challenge to the existence of Indonesia's IPR infrastructure. Indonesia's markets, in some places, still have high levels of pirated and counterfeit products, while public awareness of IPRs and of the need to enforce them is low,³⁶ except for computer programs whereby all vendors selling any type of computers are obligated to sell licensed software, or else the use of open source is encouraged. Indonesia's IP system does not provide for regulatory data protection.

Such condition is more or less similar to Malaysia, which faces the same type of problems related to weaknesses in the enforcement of IPR, despite the task force for the enforcement bodies having been established. It is probably due to inefficient coordination of action by enforcement bodies, along with a lack of deterrent sanctions for piracy.³⁷ The enforcement problem is particularly evident in the area of border controls which allow easy access for Chinese counterfeit products into the country. While in the context of IP infrastructure and administration, it seems that there is inadequacy of well trained staff, lack of transparency in registration procedures, such

³⁴ European Commission, *Report on the Protection*, p. 16.

³⁵ See Simon Butt, "Intellectual Property in Indonesia; A Problematic Legal Transplant", in *Indonesia Law and Society*, ed. Tim Lindsey (Australia: the Federation Press, 2008), pp. 620-635; See also OK Saidin, "Country vs Society Social Reality of Copyright Law Enforcement in Protecting Music, Song, and Cinematography Work in Indonesia," *Journal of Education and Social Science* 4 (June 2016), pp. 43-53.

³⁶ Simon Butt, "Intellectual Property in Indonesia"

³⁷ *Ibid.*, p. 11.

as limited public access to data.³⁸

D. The Philippines

According to A.F.S. Fider, the Philippines has the longest tradition of the protection of IPR in the ASEAN region, since the Spanish colonial power introduced its decrees in the beginning of 19th century.³⁹ According to Antons, “the Philippines was one of the first countries in Southeast Asia to adopt a comprehensive intellectual property code” based on the WIPO models in 1995, although initially during the regime of Marcos, IP in this country was already protected through Presidential Decrees.⁴⁰ The Code provides protection for all areas of IPR including, patent, utility model, trademark and geographical indication, copyright, industrial design, layout design of integrated circuits and undisclosed information.⁴¹ On the other hand, plant variety protection was introduced separately in 2002.

In the context of infrastructure and administrative capacity, the Philippines has made some progress in the last few years, particularly in view of the people’s awareness, increased cooperation between the public and private sector as well as amongst IP authorities themselves. One of the most recent significant developments has been the issuance of guidelines and approved Rules of Procedure on IPR cases, which recommend the designation of 22 special IP courts, in November 2011.

In 1995, the Philippines ratified the TRIPs Agreement and the main task was to make the existing IPR laws TRIPs compliant as well as to develop a more efficient IP infrastructure in order to implement the Law.⁴² According to Cabilo, IP Code was passed in response to demands to strengthen enforcement of IP laws in compliance with the Philippines’s commitment to the WTO.⁴³ Like the majority of ASEAN Member countries, the Philippines is also still facing a number of challenges in providing effective IPR protection, and this country has been included under the USTR special 301 Priority Watch List,⁴⁴ together with other ASEAN member nations. The Philippines is also facing the problem related to the lack of public awareness, IP expertise, slow IP rights registration procedures, lack of coordination among enforcement agencies, gaps in enforcement and prosecution, lack of leadership, lack of data and information for effective decision-making and transparency of operations. While in the case of infringements, it is very difficult for right holders to seek assistance from enforcement bodies such as the police agencies.⁴⁵

E. Thailand

Historically, the protection of IP in Thailand has raised much controversy in comparison to other ASEAN member nations, particularly in the area of patent and

³⁸ *Ibid.*

³⁹ See A.F.S. Fider, “The Philippines,” in *Property Law in Asia*, ed. C.Heath (London, Kluwer Law International, 2003), pp. 363-390.

⁴⁰ Antons, “Intellectual Property Law,” p. 3; See also Christoph Antons, “Intellectual Property in ASEAN Countries: A Survey,” *European Intellectual Property Review* 13, no. 3 (1991), pp 78-84.

⁴¹ Christoph Antons, *ibid.*

⁴² Zuraida Mae D. Cabilo, “Philippine Intellectual Property Rights under the World Trade Organization, 1995-2005: Implementing the Flexibilities under a TRIPsPlus Commitment,” *Philippine Journal of Third World Studies* 24 (2009): p. 69.

⁴³ *Ibid.*, p. 70

⁴⁴ Ferdinand M. Negre, Jonathan Q Perez, “The Philippines,” in *Intellectual Property in Asia: Law, Economics, History and Politics*, eds., Paul Goldstein & Joseph Straus (UK; Springer, 2009), p.200.

⁴⁵ Antons, “Intellectual Property in ASEAN Countries”

copyright. The amendment to the Copyright Act to provide strengthened rights to IP holders has led to the dissolution of Parliament and the calling for a new election.⁴⁶ While in the area of patent, the controversy has been linked to pharmaceutical patents and the AIDS crisis in this country during the 1990s, whereby the Government was much criticized for the failure to apply compulsory license mechanisms to deal with the spread of the disease as 90 percent of those infected were unable to access and afford medicine.⁴⁷ Thailand attempted to reduce the cost of certain anti AIDS medications by manufacturing them domestically, but the government dropped the plan in 1999 when the United States threatened sanctions against it.⁴⁸ Companies have raised concerns about the granting of compulsory licenses for medicines in Thailand.⁴⁹ The concern is whether such licenses will be granted in accordance with Thailand's TRIPs commitments, including those under Article 31 of the TRIPs Agreement. It is probably the reason why Thailand is the third WTO member to have accepted the protocol amending the TRIPs Agreement in 2016.⁵⁰

However, in the last few years, the Thai government has treated stronger IPR protection and its enforcement as a national priority, as reflected by the creation of the National Task Force chaired by the Prime Minister, by setting up an IPR Dialogue with the EU and by putting forward the "Creative Economy initiative".⁵¹ Thailand also acceded to the Patent Cooperation Treaty in 2009 and prepared various amendments to its IP laws, e.g. regarding the authority of Thai Customs to take enforcement actions ex-officio, which unfortunately remains pending. All of such endeavors have been directed towards becoming TRIPs compliant.

Like the majority of ASEAN Member States, serious IPR infringements still continue and the enforcement remains one of the main problems. The Thai copyright law is considered not to be in line with technological developments, and actions against digital piracy have not been sufficient.⁵² Moreover, as regards IPR examination and registration, Thailand's patent office lacks resources to keep up with the volume of applications, resulting in a worrying patent backlog.⁵³

F. Brunei

Compared to other ASEAN member nations, Brunei is not among the main players in IP because it is still highly dependent on oil. Brunei replaced UK colonial laws which provide for local re-registration of UK rights during 1999 and 2000 with a new Trade Marks Act and with Orders on Patents, Copyright, Industrial Designs and Layout-

⁴⁶ *Ibid.*

⁴⁷ John A. Harrelson, "TRIPs, Pharmaceutical Patents, and the HIV/AIDS Crisis: Finding the Proper Balance Between Intellectual Property Rights and Compassion," *Widener Law Symposium Journal* 7 (2001), pp. 185-86 (2001). See also Amy Hirst, "Universal AIDS Treatment by 2010: Broken Promises and International Intellectual Property Policies," *Transnational Law and Contemporary Problems* 21 (2012), p. 248.

⁴⁸ Harrelson, "TRIPs, Pharmaceutical Patents, and the HIV/AIDS,"

⁴⁹ Stephanie Skees, "Thai-ing up the TRIPs Agreement: Are Compulsory Licenses the Answer to Thailand's AIDS Epidemic?," *Pace International Law Review* 19, no. 2 (2007); Suwan-in, Nattapong, "Compulsory License, a Long Debate on TRIPs Agreement Interpretation: Discovering the Truth of Thailand's Imposition on Pharmaceutical Patents," *Asian Journal of WTO & International Health Law and Policy* 7, no. 1, (2012), pp. 225-261, (2012), <http://ssrn.com/abstract=2117983>, accessed August 20, 2016.

⁵⁰ World Trade Organization, "Thailand is Third WTO member to accept protocol amending the TRIPs Agreement in 2016," https://www.wto.org/english/news_e/news16_e/trip_28jan16_e.htm, accessed October 2, 2016.

⁵¹ European Commission, *Report on the Protection*, p. 18.

⁵² Marie Wilson, "TRIPs Agreement Implications for ASEAN Protection of Computer Technology," *Annual Survey of International & Comparative Law* 4, no. 1 (1997), p. 28

⁵³ European Commission, *Report on the Protection*, p. 18.

Design of Integrated Circuits.⁵⁴

Like other ASEAN member nations, Brunei is also a signatory to the WTO-TRIPs Agreement and has the obligation to be TRIPs compliant. This country introduced legislative reforms which were completed in advance of their year 2000 deadline for implementation.⁵⁵ Then, the Brunei IP Office (BruIPO) was set up on June 1, 2013 in line with the joint effort between the Brunei Economic Development Board (BEDB) and the Attorney General's Chambers (AGC) in the restructuring of the IP administration in Brunei Darussalam. The restructuring began with the establishment of the Patent Registry Office (PRO) on January 1, 2012 under the BEDB which was followed by the transfer of the Registry of Industrial Designs on October 1, 2012 and the Registry of Trademarks on June 1, 2013. With effect from July 1, 2013, all applications for the registration of patents, industrial designs and trademarks can be lodged at the BruIPO.⁵⁶

In the context of enforcement, 2014 was a fruitful and successful year for Brunei in the field of IP. It was owed primarily to concerted efforts by the relevant enforcement agencies and government departments as well as the BEDB's continuous endeavors in promoting public awareness on the importance of IPR protection, all which resulted in Brunei Darussalam remaining off the USTR's 301 Watch List for 2 consecutive years in 2013 and 2014.⁵⁷ In terms of IP office modernization, through the successful deployment of WIPO's Industrial Property Administration System (IPAS), work quality and efficiency had significantly improved, time in receiving and processing applications became shorter and the dissemination of notifications became much quicker, providing the BruIPO with a large boost in efficiency.⁵⁸

G. Vietnam

Early on before its accession to the WTO, Vietnam had reviewed its IP laws in accordance with the TRIPs standards.⁵⁹ Since its accession to the WTO in 2006, Vietnam made a significant legislative effort by enacting revised laws on IP and Criminal Code, aside from nearly 40 pieces of legislation and implementing decrees, circulars and ordinances. Vietnam is increasingly taking IPR more seriously and is seeking to complete its IPR legislative framework to be fully consistent with the TRIPs Agreement in order to enhance the development of its economy.⁶⁰ Vietnam has indicated that its legal framework is generally good and adequate. Public awareness and general understanding of IPR are increasing and the government encourages the training of its officials.⁶¹

In view of IPR protection, the implementation of IPR laws requires continuous attention. Improvement is also needed in the awareness of the general public regarding the importance of IPRs. Moreover, insofar as IPR enforcement is concerned, the complexity of the system and the lack of efficient cooperation between enforcement

⁵⁴ Antons, "Intellectual Property Law," p. 5.

⁵⁵ Carolyn Deere, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (London; Oxford University Press, 2009), p. 71

⁵⁶ Brunei Darussalam Intellectual Property Office, "About Us," accessed 12 October 2015.

⁵⁷ Brunei Darussalam Intellectual Property Office, "Brunei Hosts 46th Meeting of the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC)," <http://www.bruipo.com.bn/index.php/media-event/archive/101-what-s-new/115-brunei-hosts-46th-meeting-of-the-asean-working-group-on-intellectual-12-October-2015>.

⁵⁸ *Ibid.*

⁵⁹ Michael W. Smith, "Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime," *Case Western Reserve Journal of International Law* 31, no. 1 (1999) pp. 245-249

⁶⁰ Tu Thanh Nguyen, *Competition Law, Technology Transfer and the TRIPs Agreement: Implications for Developing Countries* (UK; Edward Elgar Publishing Limited, 2010), p. 215-216

⁶¹ See in European Commission, "European Commission- DG Trade-IPR survey 2010; Country Vietnam," http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150797.pdf.

bodies and IPR stakeholders were mentioned as two important issues. It is also noted that there has been insufficient understanding of IPR on the part of enforcement officials, as well as a shortage of resources, resulting in lengthy and burdensome enforcement procedures.⁶² Due to the foregoing, Vietnam has been devoting special attention to improving its enforcement mechanism, increasing public awareness of IP protection, and striving for closer coordination among relevant competent authorities enforcing IPR.⁶³

H. Cambodia

IP is a vital asset for many corporations doing business in Cambodia. Whether it be to distinguish goods from those of a competitor, protecting the fruits of research investment, or maintaining the confidentiality of financial plans, IP considerations are very important for all industries. In 2004 Cambodia joined the WTO, and agreed to revise its IP laws in advance of its transitional period to meet TRIPs obligations by no later than January 2017.⁶⁴ While it will be a number of years before Cambodia comes into full WTO compliance, investors can take advantage of this developing regulatory framework and seek out protection for their inventions, trademarks, industrial designs, and other creative products. Although the laws are still in the early stages of development, relatively efficient procedures for registering and enforcing important IP rights are in place.⁶⁵

Trademarks and related IPRs are protected under the Law on Marks, Trade Names and Acts of Unfair Competition of 2002. The Law lists the steps for registering a trademark and the scope of protection. An applicant who has already registered a mark in another member country of the Paris Convention will have priority in registering the mark in Cambodia. The Law on Patents, Utility Models and Industrial Designs of 2003 governs this area of IP. A protectable invention can be any idea which permits in practice the solution to a specific problem in the field of technology. The Law categorically excludes certain types of inventions, such as scientific theories and mathematical formulae. It also excludes inventions which are not socially "useful", as they would harm public health or morality, such as illegal narcotics.⁶⁶

I. Myanmar

Myanmar does not generally recognize trademarks or copyrights from other countries, while infringement of IP rights is common. The due date by which Myanmar would have to provide IP protection in accordance with the TRIPs Agreement, as per WTO's decision on November 29, 2005, is July 1, 2013. However, the WTO has extended such time frame up to July 1, 2021 under its final decision of June 11, 2013.

Myanmar enacted its Constitutional Law in 2008 which guarantees the protection of IPR. The Fundamental Principles of the Constitution provide that "the Union shall permit citizens right of private property, right of inheritance, right of private initiative, and patent in accord with the law".⁶⁷ Furthermore, the Fundamental Rights and Obligations of Citizens [Chapter 8, Section 372] provides guarantee of the right

⁶² *Ibid.*

⁶³ Nguyen, *Competition Law*, p. 215-216.

⁶⁴ Carolyn Deere, *op. cit.*, p.155.

⁶⁵ Cambodia Ministry of Commerce, "Intellectual property in Cambodia", https://www.moc.gov.kh/TradeSwap/userfiles/file/uploadedfiles/Job/Intellectual%20Property%20in%20Cambodia2_21_2013_22_40_39.pdf, accessed 4 October 2015, p.1.

⁶⁶ *Ibid.*

⁶⁷ Myanmar, *Constitutional Law of 2008*, Chapter 1 Section 37 (C).

to private invention and patent in the conducting of business as long as not contrary to the Constitution and the existing laws.⁶⁸ Furthermore, the Union Legislative Lists clearly specified IPR such as Copyright, Patent, Trademark, and Industrial Design. Interestingly, although this country has yet to struggle to comply with TRIPs obligation, IPR is regarded as “Constitutional Right”, and once promulgated by the Union Hluttaw (Union Parliament) it will be automatically applicable throughout the country.

J. Laos

Laos’ IPR legal framework is still in the early stages of development. With guiding decrees on the implementation and interpretation of the IP Law yet to be passed, protection and enforcement of IPR in Laos is still relatively weak. However, the law offers a fairly efficient system for registration of most major IPRs.

A new and comprehensive IP law was approved by the National Assembly of Laos in 2011 and promulgated in 2012 covering most areas of IPRs. Subsequent to that, Laos only joined the WTO in February 2013. However, the enforcement of the new IP law will not be effective until the Prime Minister has issued guiding decrees on its implementation and interpretation. Currently, many of the provisions in the IP law are general and/or vaguely drafted, and guiding decrees are needed to clarify such provisions. Overall, however, the new IP Law significantly strengthens the position of the major IPRs in Laos.⁶⁹

As the foregoing has attempted to demonstrate, the majority of ASEAN member nations have made significant efforts to improve their legal framework for IP protection, including endeavors to make their national laws compliant with international standards. However, the path toward harmonization is still filled with sharp gravel, and is facing many challenges. As Antons argued:

“[...] the problem of harmonizing procedural rules in developing Asia are much more severe than those experienced in Europe and North America, with law in Asia drawn not only from different traditions, but also from different colonial periods and with a judiciary that is often struggling to free itself from political influence and from a negative image of being corrupt to some degree.”⁷⁰

Apart from the problem of culture, tradition, different colonial times, politics, and corruption as stated by Antons, the above exploration indicates that the different stages of development of each member nation lead to lack of standardization of IP protection and enforcement among ASEAN member nations, and accordingly, expecting the same level of protection and enforcement within ASEAN member nations is unlikely to materialize for the time being.

IV. REGIONAL ECONOMIC COOPERATION OF ASEAN FREE TRADE AGREEMENT ON IPR

Interestingly, although the ASEAN Framework Agreement has made no significant progress, the ASEAN-Australia New Zealand Free Trade Agreement (ANZ-FTA) provides for IPR in the 13th Chapter which consists of only 12 (twelve) articles. Compared to the other FTAs, IPR provisions in this AANZ-FTA Agreement are relatively short and simple. One of the reasons why IPR provisions were included in

⁶⁸ *Ibid*, Chapter 8, Section 372.

⁶⁹ South East Asia IPR Helpdesk, “Laos, ASEAN IPR SME Help Desk, IP Country FactSheet,” <http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Laos%20Factsheet.pdf>, accessed 4 October 4 2015.

⁷⁰ Antons, as cited in Degelsegger, Remoe and Trianes, *ASEAN Economic Community*, p. 44.

this AANZ-FTA Agreement was probably that ASEAN Member nations believe that the enforcement of IPR, by taking into account national differences in legal system, economic development, and capacity, can be used to promote deeper economic integration to reduce impediments to trade and investment.⁷¹ It is important to note that such objective can be achieved if the enforcement of IPR takes into account the balance between the rights of IP owners and the legitimate interests of users of protected IPR. Accordingly, Parties agreed to provide for a balance between the rights of IP owners and the interests of users for the enforcement of IPR in their territories.⁷²

However, it does not provide detailed provisions for all subjects of IPRs. Each party agreed that the subject of IPRs under the AANZ-FTA Agreement is in accordance with the TRIPs Agreement, covering copyright and related rights, trademark, geographical indications, industrial designs, patent, layout-designs (topographies) of integrated circuits, plant varieties rights, and undisclosed information (trade secret).⁷³ Furthermore, Article 3 states that each party clearly reaffirms the rights and obligations provided for under the TRIPs Agreement.

Under the AANZ-FTAs, Parties agree to establish a Committee on IP to monitor the implementation and administration of the IP Chapter. The said Committee consists of representatives of the Parties, and shall meet annually, and determine new mechanism to promote dialogue between Parties on IP issues, and shall provide an opportunity to stakeholders to engage with the Parties on such issues as stipulated under Article 12. Lastly, notification to the Committee is to be made every year for each of the Parties regarding the progress of commitment provided by Article 5 on Copyright, and progress of accession to international conventions or treaties listed in Article 9.7 regarding Co-operation.⁷⁴

Besides Australia and New Zealand, ASEAN has also has signed Memorandum of Cooperation (MOC) in industrial property with Japan.⁷⁵ Such cooperation agreement is between the IP Offices of ASEAN Member Nations with the Japan Patent Office (JPO) as from July 11, 2012 to enhance the IP capabilities in both Parties. The area of cooperation particularly focuses on industrial property protection, such as Patent, Utility Model, Trademark, and Industrial Design, and administration and exploitation, straightening examination procedures, and practices.⁷⁶ Both Parties also adopted the ASEAN IP Offices-JPO Action Plan 2012-2013.⁷⁷ Under the Action Plan, both Parties agreed to implement certain activities such as conducting case studies on the success of Japanese small and medium enterprises (SMEs) in creative industries in IP commercialization that are appropriate for ASEAN. This Memorandum of Cooperation also served as a basis for holding a workshop on establishing IT infrastructure for sharing information on patent examination, and provides support for accession to international IP instruments for ASEAN member nations.⁷⁸ In such a way, standardization can probably be achieved in a more accelerated manner.

⁷¹ *Ibid*; *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, Cha-am, Phetchaburi, Thailand, 27 February 2009, Art. 1 Chapter 13

⁷² *Ibid*.

⁷³ *Ibid*, Art. 2

⁷⁴ *Ibid*, Art. 12

⁷⁵ See ASEAN, "Japan Signed Agreement to Further Cooperate on Intellectual Property," <http://www.asean.org/news/asean-secretariat-news/item/asean-japan-signed-agreement-to-further-cooperate-on-intellectual-property>, accessed 15 August 2015.

⁷⁶ *Ibid*., see also in Elizabeth Siew-Kuan Ng, "ASEAN IP Harmonization; Striking the Delicate Balance," *Pace International Law Review* 2, no. 1 (2013)

⁷⁷ See 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 Office," http://www.meti.go.jp/english/press/2012/0711_02.html, accessed October 3, 2015

⁷⁸ Siew-Kuan Ng, "ASEAN IP Harmonization," p. 29.

V. CONCLUSION

The fast pace of the development of IP laws in ASEAN was mainly driven by the countries' deadline to comply with TRIPs obligations, with the exception of Vietnam where it was motivated by Vietnam's effort to become a WTO Member Nation. Most of the IP legislation within ASEAN countries covers all fields of IP protection as stipulated under the TRIPs Agreement, while the substance of the legislation has been varied. In line with the development of IP laws, IP infrastructure has also been developed in most of the Member countries such as Indonesia, Malaysia, Thailand, the Philippines and others. It can be stated that the substance of IP protection in ASEAN member nations is highly diverse due to different stages of their economic development respectively. This has made it difficult to achieve harmonization of IP protection and its enforcement among ASEAN member nations.

For the purpose of harmonizing IP laws in ASEAN, a year after the conclusion of the TRIPs Agreement, a Framework Agreement on IP Cooperation was signed by ASEAN Member Nations. However, in drafting and amending their respective national IP laws, the Framework has not been taken into consideration by the Member Nations. Accordingly, it is extremely difficult to assess whether the objectives of the Framework Agreement in this area are likely be implemented since the experience of each single Member Nation is different. On the other hand, the ASEAN Framework on IP Cooperation is rather ambitious. The Working groups succeeded in developing a draft on regional filing forms for trademarks; however, progress concerning the way of using the system as well as harmonization has been slow. It is expected that regional economic cooperation in the ASEAN FTA on IP with other trading partners will speed up the progress of such harmonization, but it is hardly to be seen up to the present time.

Acknowledgement

This paper is result of research project funded by Faculty of Law, Universitas Airlangga. The first version of this paper was presented at the 6th CILS International Conference on Regional Integration, October 5-6, 2015, a conference jointly organised by the Faculty of Law, Universitas Indonesia, and the Faculty of Law, Universitas Airlangga.

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