

## **7. Regional Regulatory Coherence in the Association of Southeast Asian Nation: The Case of Competition Law and Intellectual Property**

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# Regional Regulatory Coherence in the Association of Southeast Asian Nations: The Case of Competition Law and Intellectual Property

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## **Abstract**

As the Association of Southeast Asian Nations (ASEAN) is not a supranational organisation and does not have specific competence to regulate certain areas, ASEAN Member States rely on tools such as regulatory cooperation and coordination to address fragmentation in the laws, policies, and regulations relating to intellectual property and competition policy. These tools involve harmonisation, standardisation, or mutual recognition to bring related laws and regulations closer to each other. Using these tools to reduce fragmentation and increase coherence will help ASEAN reduce barriers to investment, innovation, and economic activity in the case of intellectual property. Regarding competition policy,

regulatory coherence is important to encourage businesses to participate in the market and avoid the market dominance of certain firms to create de facto barriers to entry and innovation. This is especially important as the world moves towards a more innovative economy through digitalisation, and as ASEAN integrates more fully in the global value chain, for which it will need to boost innovation while increasing trade and investments. To ensure that ASEAN remains an attractive trade and investment destination towards 2040, ASEAN must bring a high degree of coherence to its substantive and procedural laws concerning intellectual property and competition. This can be achieved by establishing minimum rules and standards for substantive laws, and employing mutual recognition for procedural laws.

Keywords: **Harmonisation, standardisation, mutual recognition, enforcement, compliance, intellectual property, competition policy, regional integration**

## 1. Introduction

Decades of integration initiatives amongst Southeast Asian countries have turned the region into one of the world's most dynamic and fastest growing regions. The removal of tariff and non-tariff barriers, which formed the main agenda of the Association of Southeast Asian Nations (ASEAN) Free Trade Area, has increased intra-regional trade from around 18% of the region's total trade in the early 1990s to around 26% in the 2010s, and increased total trade by almost 10% on average over the course of two decades. The region has also become an attractive destination for foreign direct investment (FDI). FDI currently accounts for more than 20% of total investment, compared to 12% in the early 1990s when economic integration began.

The removal of border barriers such as tariffs and quotas was later complemented by various initiatives to deal with behind-the-border barriers and trade facilitation. For example, the ASEAN Framework for Agreement in Services and the ASEAN Comprehensive Investment Agreement included the principle of national treatment to prohibit

discrimination with regard to cross-border services, activities, and investments. Technical regulations and non-tariff measures are also subject to non-discriminatory principles to ensure that imported and domestically produced goods are treated similarly.

However, it has been realised that the removal of trade barriers and adoption of non-discriminatory treatment are insufficient to induce deeper economic integration and the creation of a single market and production hub as envisioned by the ASEAN Economic Community (AEC). Regulatory heterogeneity might hinder deeper integration as it increases costs for cross-border activities, which will become more prevalent with the rise of a regional production network. In addition, greater interdependence amongst ASEAN Member States (AMS) creates regional and international externalities that require regulatory arrangements at the regional level. Hence, greater regulatory harmonisation and coordination are necessary for AMS to pursue deeper integration.

This chapter discusses the way forward for ASEAN towards 2040 in two important areas of laws and policy: intellectual property rights (IPRs) and competition policy. These two areas are very important in the drive to position ASEAN as a competitive region and single production base. By effectively implementing IPRs and competition policies, ASEAN will be able to attract more economic activity and FDI while protecting the interests of innovators, talent, and consumers.

The chapter explores steps taken by ASEAN to bring coherence to laws and policies related to IPRs and competition. It also discusses gaps in the implementation of IPRs and competition laws and policies, despite various policy documents designed and prepared to achieve harmonisation and coherence in ASEAN, such as the AEC Blueprint 2025. The chapter proposes a way forward for ASEAN to plug these gaps and bring convergence and harmonisation to IPRs and competition policy towards 2040.

## 2. The Costs of Regulatory Heterogeneity

Regulatory heterogeneity relates to the fragmentation of rules and principles. Fragmentation of laws relating to IPRs and competition policy can be described as substantive, horizontal, or vertical fragmentation. Substantive fragmentation involves conflict between different understandings or interpretations of general law, conflict arising when a special body deviates from the general law (not as a result of disagreement as to the general law but based on the basis that a special law should be applied), and conflict arising when specialised fields of law seem to be conflict with each other (International Law Commission, 2003). Horizontal fragmentation implies the risk of clashes between diverse and competing ethical rationales, goals, and norms (Gehne, 2009), which may also involve the conflict structure of differing ethical backgrounds and values. Conversely, vertical fragmentation involves diverse layers of governance comprising competing ethical rationales in terms of different cultural, traditional, and societal backgrounds (Gehne, 2009). Regulatory fragmentation in the International Patent and Trademark Register and competition in ASEAN are mainly due to vertical fragmentation where ASEAN Member States (AMS) have different legal and regulatory environments in IPR and competition matters.

Regulatory heterogeneity can hinder the realisation of the ASEAN single market and the deeper economic integration of the region. Differing regulations increase the cost of regional economic activities, since businesses need to adapt to different regulatory environments in terms of IPRs and competition. The cost of regulatory heterogeneity is believed to be significant. Nordas (2016) used the Organisation for Economic Co-operation and Development's service trade restrictiveness index to measure regulatory heterogeneity and estimate its impact on trade in services for 42 countries. This revealed that the 2014 level of regulatory heterogeneity was associated with a trade cost of 20% to 75%, depending on the level of regulatory restriction.

The costs related to regulatory heterogeneity can be divided into three categories. The first of these includes costs related to identifying, gathering, and processing information on the regulatory requirements in the destination markets that might differ from the requirements at home.

In the case of IPRs and competition policy, producers must seek legal advice to obtain information from 10 different countries, instead of using one system for all 10 countries. The extent of the impact of this obligation depends on the transparency and availability of regulatory information. Although countries with a good regulatory management system provide detailed information at a relatively low cost, in countries with undeveloped systems, the private sector might have to bear significant additional costs.

The second category includes costs related to compliance with regulations. Different regulations require business to adapt their production processes or supply of services to the specified regulations. For foreign business, compliance costs increase when regulations diverge significantly from those in their original country.

The third category includes costs related to conformity assessment to verify compliance with regulations. Duplicating conformity assessments in each country increases the cost of conducting cross-border economic activities, since producers must file applications for intellectual property protections (IPPs) in different countries by modifying applications where necessary to meet national intellectual property laws (IPLs). This involves additional costs such as registration fees and attorney fees. With regard to competition law, businesses must behave differently in different countries. For example, businesses must ensure that mergers and acquisitions concerning the same subject matter and possibly the same partners in different countries are designed separately to avoid falling foul of competition law.

In creating a single market and production hub, AMS should deal more seriously with the issue of regulatory heterogeneity with respect to the various aspects of cross-border economic activities, such as cross-border mergers and acquisitions and IPPs. This is mainly because the regional production network in Southeast Asia has become deeper, wider, and more complex (Obashi and Kimura, 2016), and involves not only trade and investment, but also trade in services, technology transfer, innovation, and various strategic business actions.

### 3. Economics of Competition Policy

Competition policy is premised on the need to enhance community welfare through overall economic efficiency. Hence, competition policy that encourages greater overall economic efficiency will lead to provision of informed choices and providing values to consumers. In a perfect competitive environment, while producers of goods or services will seek to maximise profits, they are not able to simply do so by increasing prices. Instead, to be competitive, producers will seek to reduce their cost by increasing efficiency.

To reduce cost, price and to increase profit, firms in a perfect competitive environment are encouraged to invest, innovate and conduct research and development to meet consumer demands. Innovation may include innovative design, branding, pricing and product differentiations. Firms that are not competitive will have to exit the market either by choice or by consumer force. This situation will then encourage new entries which will seek to offer a new and possibly more efficient and more innovative products and services. Fear of losing market share, market demand and new entry will in itself encourage improvements and efficiency by firms.

In contrast, uncompetitive environment such as monopoly, duopoly or to certain extent oligopoly lead to a counter-efficient market. Firms that have market dominance through uncompetitive environment may dictate price, may have less motivation to innovate and move with time. These firms may also be contented by their market position hence offering less value to consumers. Not only consumers may face with higher prices and less choices, but also faced with low quality products and services.

Anti-competitive behaviour could result from several factors, including creation of monopolistic government related services; provision goods and services through state-owned enterprises which have a default advantage over private firms; merger and acquisition of rival firms which lead to market domination; and cartel or collusion between firms in the same economic sector. In addition, protections of intellectual property are anti-competitive in nature, as holders of intellectual property are

generally granted exclusive rights to exploit the intellectual property or its derivative over a specified period of time.

States may have to intervene in order to avoid or reduce incidence of anti-competitive practice, either through market domination of private firms; or the anti-commercial practice of state-owned enterprises, or unfair practice of intellectual property right holders. Many countries in the world have introduced competition policy, which either is based on the anti-trust or competition policies. Theoretically, well-designed state policies could enhance choices, reduce transaction costs and provide information to consumers.

However, over time, many economies see the escalation of state-owned enterprises in the market. These government owned or government linked firms are created either to provide specific services such as electricity or telecommunications or to increase government revenue through offering goods and services that could be offered by private firms. The former group of state-owned enterprises are important as they provide goods and services which are normally costly produce and beyond the reach private firms. On the other hand, the latter group of firms provide unfair competition to private firms. Many of these firms provide banking and financial services and some venture into construction and retail services in direct competition with private firms. These state-owned firms tend to venture into government procurement, hence crowding out private venture.

Apart from state-owned enterprises, government policies relating to issuance of incentives, quota, licences and permit may lead to anti-competitive environment. For example, some countries restrict the entry of supermarkets in the retail and distribution sectors. Cabotage policy, either in the maritime or aviation services is another example of a quota which leads to inefficient and expensive services, the cost of which are forced on consumers. Many countries impose restrictions on ownership and control on maritime and aviation companies purely based on nationalistic ground, which are archaic in the more globalised economy, which is either based on multilateralism or regionalism.



Thus, in creating competition policy, economies should focus on conducts, policy and rules that harm competitive market, either by private firms or state-owned enterprises. The main focus is the market efficiency rather than behaviour of specific firms or groups of firms. The competition policy should be neutral to the ethnic groups, business group, business practice or technology. On the other hand, states should also realise that not all services or goods can efficiently be supplied by private firms. Some services will have to remain within the realm of the government, such as healthcare, water and power.

Policy makers are also encouraged to move with time and be able to accommodate new sources of competition. With globalisation or regionalism, and digitalisation of the economy, the nature of market and competition has also changed and evolved. Whilst digitalisation and e-commerce will increase choice of products and services, intellectual property protections over these goods and services may create another layer of anti-competitive environment. Firms, through their government, are beginning to seek intellectual property protection beyond what are originally envisaged in the international treaties such as the TRIPS Agreement of the WTO or the treaties administered by the World Intellectual Property Organisation (WIPO).

#### **4. The Importance of Regulatory Coherence in Intellectual Property and Competition Policy to the Association of Southeast Asian Nations**

IPRs comprise a wide range of rights, including patents, trademarks, copyrights, industrial designs, integrated circuits, and geographical indications. IPRs are territorial in nature, meaning that they are protected by national laws relating to individual IPRs. These rights are granted in the form of exclusive rights to work, manipulate, and use intellectual property within a certain period of time. Hence, IPRs are the antithesis of competition, meaning that they exclude free competition over the use of the same findings or innovation. Most IPRs are granted on a first-to-file basis (at the relevant national intellectual property office [IPO]) and, in some countries, on a first-to-use basis. IPRs registered in one

territory may be registered in another territory subject to registration in accordance with the territory's laws.

Of the many international drives to harmonise IPRs around the world, the main examples are those undertaken by the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO). These multilateral organisations provide broad guidance on what components of intellectual property should be recognised, how to recognise them, and the length of the term of protection. However, other issues need to be addressed at the national and regional levels, including the interpretation of the terms of protection and, importantly, the enforcement of those rights against infringers. Intellectual property is an important element of boosting innovation and private investment, whether in the form of domestic direct investment or FDI.

IPP has a positive effect on all four economic indicators, that is, gross domestic product, trade, FDI, and the level of innovation. IPP provides confidence to investors, leading to inflows of foreign capital that promote technological competition, which in turn fosters innovation (Jusoh and Kam, 2016). As a result, higher quality goods and services are produced more efficiently within the country. This increases the competitive advantage of a country in terms of exports, and positively impacts its gross domestic product growth. IPRs have the potential to make innovation economically functional and managerially controllable, thus enabling companies to enter a market-based economy and creating additional value.

IPRs can be used for various business purposes and, like other forms of property, can form the baseline of a secondary market, decoupled from the primary economic function of the underlying asset (European Union Expert Group on Intellectual Property Valuation, 2013). IPRs allow the sale, purchase, trade, or licensing of innovations via processes made explicit and codified through the legal system, leading to strategic-asset investments in many countries. Hence, IPRs play an increasingly fundamental role in corporate strategy to maximise revenue and attract new investment, such as in mergers and acquisitions. IPRs have substantially altered the competitive landscape of developed economies.

In their efforts to encourage revenue maximisation and attract new investment, organisations are recognising that intellectual property and IPRs are key assets that require treatment like any other assets, including the need for a proper valuation (Arora, Fosfuri, and Gambardella, 2001).

As globalisation and international trade expand, the number of cross-border IPR re-registration applications is increasing, making it necessary to understand each nation's IPLs fully. A coherent and predictable IPP system throughout ASEAN is important to ensure that domestic innovations are protected and promoted, as expected by foreign investors. Although IPP is not the main consideration for certain firms when making investment decisions, investors perceive intellectual property systems as important when establishing investments and commencing business operations in AMS.

Investors in ASEAN tend to be advised to see ASEAN as a set of territory for intellectual property, rather than seeing the 10 AMS separately. An ERIA study (2013) found that intellectual property issues are perceived as a major problem for investors expanding businesses in ASEAN. The European Union (EU) advised its small and medium-sized enterprises (which could also be applicable to multinationals) to see Southeast Asia as 'one area' for IPP, and to 'consider incorporating IP [intellectual property] protection on an [sic] South-East Asia-wide basis into their regular IP strategy reviews or at the least, through expanding their protection to prioritised countries within the region, proportionately to their financial resources' (EU, 2017). This puts more pressure on AMS to harmonise national IPLs to facilitate easier cross-border intellectual property registration, IPP, and IPR enforcement.

The intellectual property system also has to keep up with global megatrends. The digitalisation of the economy will create more opportunities for cross-border trade and investments in digital trade and e-commerce, thus heightening the need for cross-border IPP and enforcement. Further digitalisation of the economy (the 'internet of things') is inevitable, in ASEAN as elsewhere. This will increase the demand for IPPs such as patent rights and enforcement.

On the other hand, IPRs are by nature anti-competitive as they provide intellectual property holders with exclusive rights to work and exploit the intellectual property over several years. Intellectual property holders could practise anti-competitive behaviour by manipulating their property for unfair gains, such as by increasing the prices of products (e.g., medicines), ensuring the usage of certain software, and dictating consumer choices (such as online movie downloads). The move towards the fourth industrial revolution and the greater usage of the digital economy, standards, and standard essential patents (SEPs) that rely heavily on intellectual property and innovation could increase de facto anti-competitive behaviours amongst intellectual property holders.

Technology transfer has been somewhat problematic. Technology developers want to minimise the risks from technological diffusion by keeping innovation private and protecting their rights to the technology through intellectual property policy. On the other hand, technology importers want to minimise the costs of acquiring and using the technology; however, their efforts could be subject to IPRs and the sometimes anti-competitive behaviour of intellectual property holders. ASEAN should be able to deal with this issue, since more businesses will produce and utilise technology in the future.

More recent anti-competitive complaints against intellectual property holders include a complaint against Qualcomm regarding its anti-competitive licensing tactics to maintain its monopoly on the sale of baseband processors for mobile handsets in the United States (US) and the Republic of Korea. In 2016, the Korean Fair Trade Commission found that Qualcomm's refusal to license SEPs to its competitors and what the commission deemed to be customer coercion into unfair licensing agreements violated Qualcomm's fair, reasonable, and non-discriminatory commitments and constituted an abuse of market dominance. In a related case in 2017 (*Unwired Planet International Ltd. versus Huawei Technologies Co. Ltd.*), the English High Court found that Huawei had infringed on Unwired Planet's SEPs, and that Unwired Planet was entitled to seek an injunction, even though Unwired Planet had not offered to license those patents, nor had Huawei made a counteroffer.

In addition to potential anti-competitive behaviour by intellectual property holders (especially those involved in the latest technology), other threatened anti-competitive behaviours in ASEAN involve potential cross-border business and actions. As foreign investment amongst AMS increases, issues related to competition might no longer be handled at the national level. While the liberalisation of investment amongst AMS should encourage the free entry of foreign companies, it should not result in monopolies at the regional level. Anti-competitive behaviours might occur at the international level without violating domestic requirements for dominant powers. These include the practices of international cartels, regional price fixing, or various vertical anti-competitive modes of conduct. Greater coordination in competition policy and law at the ASEAN level is critical to reduce the abuse of market power.

For example, the acquisition of Uber Southeast Asia by the ride-hailing company Grab attracted anti-competition investigations in Malaysia and Singapore, with differing results. Singapore issued Grab a fine of S\$13 million (Reuters, 2018), whereas Malaysia only put Grab on an anti-competition watch list.

Hence, this chapter discusses approaches to (i) create more coherent regulatory measures to provide IPPs, and (ii) ensure that anti-competitive behaviours do not jeopardise consumer interests in the region. The contradictions and juxtapositions outlined in this chapter require concerted and coherent approaches throughout ASEAN.

## **5. Approaches to Achieve Regulatory Coherence and Coordination**

The costs of heterogeneity can be reduced through greater regulatory coordination and coherence. Regulatory coordination refers to a means of achieving regulatory coherence, whereas regulatory coherence refers to the content of the regulations. Regulatory coordination is normally achieved through a process of harmonisation or mutual recognition. On the other hand, regulatory coherence may be achieved by harmonising or recognising the rules, standards, or principles.

## 5.1 Regulatory Coherence—Rules, Standards, or Principles

As globalisation and regional integration increase, there is a need to enhance regulatory coherence to overcome increased fragmentation across different nations. The increased fragmentation across different nations is due to the legacy issues, with the multitude of national legal orders (Fischer-Lescano and Teubner, 2004).

In discussing regulatory coherence, Balkin (1993) suggested distinguishing between different types of coherence. The first type of coherence is a set of factual beliefs that can relate to standards or principles; the second type is the coherence of a normative system like the law, which relates to the rules; and the third is the coherence of the world around us. The coherence of factual beliefs is a question of logical or narrative coherence, while the coherence of the legal system is a question of normative coherence. In a coherent legal environment, coherence of law relates to the integrity of both political decisions and the law. This means that the state acts on a single coherent set of principles, even when its citizens are divided 'about what the right principles of justice and fairness really are' (Dworkin, 1986).

One way to bring regulatory coherence is through adapting standards, meaning that AMS should adopt similar standards with regard to the law, compliance, and enforcement. For such standards to be adopted, they have to be recognised, in this case by the AMS. Various international organisations have issued model laws or international conventions that can be considered standards. Although compliance with these standards is not mandatory, importers may insist on compliance with these standards, in which case they will become necessary to access the market. Enforcing standards will present a problem as these standards are voluntary, not compulsory. Problems may also arise when a state has the option to resort to different mechanisms of enforcement in attempting to resolve one particular problem because each state considers itself committed, first of all, to applying only its own system or subsystem of standards (Pauwelyn, 2001).

AMS can also achieve regulatory coherence by adopting a clear system of rules and competencies based on positive theory of law.

In addition to rules, one can seek an answer to legal coherence from other standards, such as principles (Dworkin, 1977). Principles are active when agents use them either rhetorically or instrumentally. They are passive when they are not being used within a domain or when they are used symbolically (Braithwaite and Drahos, 2000). Principles may refer to decisions of judges or jurists when interpreting the laws when the rules are ambiguous. For the legal principle to be accepted as one of the major principles, it must satisfy two conditions: (i) the principle coheres with existing legal materials, and (ii) the principle is the most morally attractive standard that satisfies the former principle.

Principles and rules do not operate in the same way: rules are applicable in an all-or-nothing fashion whereas a principle 'states a reason that argues in one direction, but does not necessitate a particular decision' (Braithwaite and Drahos, 2000). Rules lay down specific rights and obligations, whereas principles formulate general and flexible imperatives (Hilf, 2001). Since principles are based on reasons, conflicting principles provide competing reasons that must be weighed according to the importance of the respective values they express. Other differences between principles and rules include the following: rules necessitate, where principles only suggest, a particular outcome; and principles have the dimension of weight that rules lack (Hilf, 2001).

Like any other law, both rules and principles can be enacted or repealed by legislatures and administrative authorities. Many legal systems recognise that both rules and principles can be made into law or lose their status as law through precedent (Raz, 1979). According to this view, legal principles are similar to legal rules in that both derive their authority under the rule of recognition from the official acts of courts and legislatures.

## 5.2 Regulatory Coordination – Harmonisation or Recognition

A constitutionalist attempting to address ‘bad’ fragmentation phenomena generally aims to achieve coherence through establishing, not only a coherent legal system, on which the technical approach focusses, but a legally determined, clear system of political order and governance (Gehne, 2009). This can be achieved through the process of either harmonisation or recognition by way of mutual recognition arrangements.

Harmonisation can be broadly defined as the process of making different domestic laws, regulations, principles, and government policies substantially or effectively the same or similar (Mayeda, 2004). This involves bringing divergence into a state of comparability. Harmonisation of law takes place through gradual mutual convergence and the adoption of model codes developed by international private and professional bodies, or by direct negotiation. Alternatively, harmonisation can be described as the process of ‘making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar’ (Leebron, 1996). Thus, harmonisation is the process of reducing divergence or fragmentation to increase similarity or comparability.

Harmonisation must be distinguished from standardisation. Standardisation involves focussing on a generally accepted and followed system of nomenclature. Setting standards is a ‘top-down approach’ that does not necessarily consider existing conventions and definitions. Hence, harmonisation means bringing accepted and enforceable rules into the legal system, while standardisation sets voluntary standards, making this a softer approach than harmonisation.

Harmonisation may be achieved through several different means, the degrees of which may vary (Leebron, 1996). These can be described as follows: (i) the harmonisation of specific rules that regulate the outcome, characteristics, or performance of goods; (ii) the harmonisation of policy objectives that sets policies for governmental action, but leaves room for discretion as to how these objectives are to be achieved; (iii) the



harmonisation of policies in a particular area, such as cost allocation (e.g., the 'polluter pays' principle), the requirement for a scientific basis for decisions, or preserving labour's right to organise; and (iv) the harmonisation of institutional structures and procedures, such as public participation in rulemaking and access to judicial dispute settlement.

Goode (2003) identifies four crucial factors for success in any harmonisation process. The first of these is the avoidance of excessive ambition. It is better to have a limited target that is achievable than a grand design that is not. Second, it is important to ensure the participation of all interested parties from the outset. The early participation of interested sectors is necessary to show that there is a serious problem to be addressed and that a solution is possible. If major players give an affirmative answer to these two points, then the case for harmonisation has at least been properly made and the project can proceed. Third, harmonisation requires continuity of effort. Finally, there must be a driver, namely the enthusiasm and commitment of a single individual or group, whose self-appointed task is to generate interest and support for the project, draw in participants, and secure their active and continuous involvement in the work.

Harmonisation can take two forms: soft and hard. Soft harmonisation consists of provisions embodied in model laws (to be incorporated in the national law), principles found in legal guides, and scholarly restatements of international commercial law. It provides for the flexible and effective convergence of different legal systems, and is often the recommended harmonisation method. Hard harmonisation is based on treaties, involves state rights, and consists of international conventions, national statutory law, and regional or international customary law. Only a small proportion of hard law rules are mandatory, and they are normally specific to a national legal system.

Nevertheless, harmonisation has its downsides. The process of harmonisation through an international instrument is almost always lengthy and arduous, and involves the infusion of a prodigious amount of expertise, time, and money. In addition, it can be argued that the drive towards harmonisation restricts political sovereignty over domestic

regulations. At the same time, different countries have different legal cultures, resulting in different approaches to legal issues. Wealthy countries may prefer stricter rules since the people living there can afford such rules (Mayeda, 2004), while developing countries may prefer more lenient rules.

To overcome these problems, Posner (1998: 5) suggested that developing countries should adopt rules rather than standards. There are two reasons for this. First, rules are easier to apply, resulting in 'fewer demands on the time and the competence of [judges]', and their use is 'both cheaper and more likely to be accurate'. Second, 'rules facilitate monitoring of the judges and so reduce the likelihood of bribery and the influence of politics in the judicial process'.

Furthermore, in some cases harmonisation may undermine the development of effective legal systems. This is based on the notion of unity of law and state that can be perceived as the identity of law and territory (Shaw, 1996). Thus, the law needs local constituencies with a strong interest in and understanding of the laws (Pistor, 2000). The effective consequence is low levels of voluntary compliance with the law, and consequently, low levels of compliance overall.

### **5.3 Mutual Recognition Arrangement**

In recent years, the internationalisation of regulations has increased, including those pertaining to health, safety, consumer protection, the environment, and labour markets (de Brito, Kaufmann, and Peklmans, 2016). To overcome barriers caused by the internationalisation of regulations, instead of harmonising fully, countries are increasingly working on international regulatory cooperation, including mutual recognition arrangements (MRAs). Nicolaidis (1991) defined an MRA as a form of contractual agreement where countries, standards agencies, or professional organisations (e.g., licensing bodies) agree to recognise the equivalence of another country's technical regulations (or conformity assessment procedures) and sanitary or phytosanitary measures.

In trade in goods, an MRA embodies the general principle that, if a product can be sold lawfully in one jurisdiction, it can be sold freely in any other participating jurisdictions without having to comply with the regulations of these other jurisdictions, regardless of any differences in standards or other sale-related regulatory requirements. The EU through the European Court of Justice (ECJ) has also introduced MRAs through judicial fiat as decided in *Cassis de Dijon* (ECJ Case 120/78). In other words, under an MRA, a process of approval can be initiated domestically by the producers and exporters set by the national law and based on the same standards set by the destination country.

MRAs are trade-facilitative instruments that are negotiated and concluded, often in support of market-access commitments that reduce the cost and time that would otherwise be required to obtain product approvals or certification of professional qualifications. Exporters of goods and services benefit from the conditional recognition such MRAs provide, while market regulators in the importing state essentially agree to forgo any further testing or additional compliance requirements on the suppliers of imported goods or foreign services (Nicolaidis and Shaffer, 2005).

Hamanaka and Jusoh (2018) proposed several reasons why ASEAN needs a recognition system as part of the convergence of the region's regulatory regimes. This is mainly due to limitations of supranational power, the drive to build confidence amongst members, and the need for capacity development. Moreover, neither simple harmonisation nor simple mutual recognition functions well in ASEAN, due to the diversity of legal backgrounds. This suggests that the combination of harmonisation preferred by civil law countries and mutual recognition preferred by common law countries is suitable. Thirdly, the variety in social norms ranging from market mechanisms to social safety implies that the combination of harmonisation and mutual recognition is also suitable.

There are limits to mutual recognition (Trachtman, 2007), the first of which is set by the degree to which the foreign regulation achieves the regulatory goals, and by the importance of meeting these goals. There is a risk that mutual recognition will be implemented in a way that sacrifices

important regulatory goals without adequate justification. States may at times accept compromises in their regulatory goals, but they should not do so unless they are compensated by enhanced welfare from free trade or other sources.

The second limit of mutual recognition relates to the material capacities of developing countries. The risk is that developed countries will establish mutual recognition in a way that disadvantages poor countries. Trachtman (2007) argued that mutual recognition as developed in the EU has managed the first risk through a nuanced deliberative process that includes both legislative and adjudicative capacity, and has experienced only an attenuated form of the second risk, largely due to the relative economic homogeneity of EU member states. This problem will arise when there are disparities in ability to implement the rules in the countries involved in the mutual recognition.

The third limit of mutual recognition is that developing countries may face challenges in creating trust in the domestic system to ensure compliance with the rules or standards agreed in the MRA. A lack of trust can be costly, as it may undermine the cooperative attitude of partners and derail the MRA scheme. To overcome this problem, Trachtman (2007) suggested that mutual recognition be embedded in a two-pronged process of governance. First, mutual recognition can only take place to achieve satisfactory essential harmonisation, to the extent that states can legitimately agree on an appropriate level of regulatory protection. Second, mutual recognition cannot leave poor countries at a disadvantage in international trade. Therefore, essential harmonisation must be established in a way that protects poor countries. This will require technical assistance, the transfer of resources, and the accommodation of differences.

## 6. Achieving Regulatory Coherence in Intellectual Property and Competition Policy

### 6.1 Intellectual Property

The AEC has taken steps to harmonise IPRs throughout ASEAN. At the outset, this looks relatively easy to achieve and manage because all AMS are also members of the WTO and are signatories of the Trade-Related Intellectual Property Rights (TRIPs) Agreement. This automatically makes them the signatories of certain, if not all, conventions, managed by the WIPO.

The AEC Blueprint 2025 provides a plan for ASEAN to achieve by 2025. Amongst other things, the blueprint targets the development of regional intellectual property platforms and infrastructure through several key measures. These include a new network of integrated intellectual property services for the region, technology transfer offices, and innovation technology support offices (patent libraries) focusing on commercialisation and linking existing or new virtual intellectual property marketplaces in AMS. Second, ASEAN aims to improve the service delivery of AMS through connected online services, including patent, trademark, and design search systems, and online filing systems. Third, ASEAN plans to improve and centralise the management of the ASEAN Intellectual Property Portal by ensuring that intellectual property information, including statistical data (e.g., number of filings, registrations, grants, and pendency periods), is accurate and updated regularly. Fourth, ASEAN plans to adopt information technology modernisation to improve the quality of services, including the development of an automated translation system for sharing patent information, and regional patent and trademark databases.

The AEC Blueprint 2025 also aims to expand the ASEAN Intellectual Property Ecosystem, through the following key measures:

- (i) Establish an ASEAN network of offices (intellectual property, judiciary, customs, and other enforcement agencies) to enhance effective cooperation on regional IPR enforcement and to build respect for intellectual property;
- (ii) Enhance engagement with the private sector, intellectual property associations, other stakeholders within the region, and external parties; and
- (iii) Increase the capacity of ASEAN intellectual property practitioners through a study on a regional accreditation system.

The AEC Blueprint 2025 aims to (i) improve awareness and promote the protection and utilisation of intellectual property, including incentive schemes for micro, small, and medium-sized enterprises and creative sectors; (ii) develop intellectual property valuation services to raise awareness of the value of intellectual property as a financial asset; (iii) promote the commercialisation of geographical indication products in ASEAN by improving the capacity of the productive sector in the development of protection and branding strategies; and (iv) promote a protection mechanism for geographical indications and genetic resources, traditional knowledge, and traditional cultural expression and assist in their protection in ASEAN and in foreign markets.

The main instrument for IPR cooperation in ASEAN is the ASEAN Framework Agreement on Intellectual Property Cooperation (AFAIP), which was signed by seven AMS on 15 December 1995 and later ratified by nine AMS.

The objectives of the AFAIP (Articles 1 and 2) include the following:

- (i) To strengthen cooperation in the area of intellectual property to support the growth of trade liberalisation regionally and globally, covering government agencies, the private sector, and professional bodies;
- (ii) To explore the establishment of an ASEAN patent and trademark system (including a regional office), taking into account the development of regional and international patent and trademark protection;

- (iii) To promote innovation, transfer, and dissemination of technology, consistent with Article 7 of the TRIPs Agreement; and
- (iv) To create ASEAN standards and practices that are in line with international standards. The article clearly states that AMS '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', to provide mutual benefits 'to creator, producers and user of intellectual property and in a manner conducive to social and economic welfare.'

The AFAIP provides for comprehensive cooperation for IPP and enforcement as reflected in the TRIPs Agreement, which includes copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information, and the lay-out designs of integrated circuits (Article 3). AMS also set up a number of cooperations for (i) enhancing effective intellectual property enforcement and protection; (ii) strengthening the administration of ASEAN intellectual property and intellectual property legislation; (iii) promoting the development of human resources, public awareness of IPR, and private sector cooperation; and (iv) exchanging information on issues of intellectual property. To implement the AFAIP, in 1996 ASEAN formed the ASEAN Working Group on Intellectual Property Cooperation consisting of IPOs from all 10 AMS.

The AMS are currently working on the ASEAN Intellectual Property Rights Action Plan 2016–2025, which will replace the ASEAN Intellectual Property Rights Action Plan 2011–2015. The new plan has four strategic goals: (i) developing a more robust ASEAN intellectual property system by strengthening IPOs and building intellectual property infrastructure in the region; (ii) developing regional intellectual property platforms and infrastructure to enhance the AEC; (iii) developing an expanded and inclusive ASEAN intellectual property ecosystem; and (iv) enhancing regional mechanisms to promote asset creation and commercialisation, particularly geographical indications and traditional knowledge.

To enhance regulatory coherence, ASEAN under the AFAIP originally planned to have a regional patent and trademark office, a regional

electronic information network, an intellectual property database, a common system of protection for industrial design (patents as well as copyright), and newly created ASEAN standards and practices. The plan to set up a regional patent and trademark office with a regional filing system was one of the most important efforts undertaken by the ASEAN intellectual property working group. Under the proposed system, applicants from AMS would be able to file their IPR application with any ASEAN office, after which the application would be forwarded to other designated offices. However, this proposal was not well received as it could lead to some IPOs losing their source of income. As most AMS are also parties to the multilateral system of the Patent Cooperation Treaty, of which most countries in the region are members, a regional system is meaningless.

Most of the harmonisation that has taken place in ASEAN consists of memberships of external organisations, including the WTO and WIPO, which entail a minimum number of conventions to accede to. The AMS have undertaken to ensure that their IPLs comply with the TRIPs Agreement.

The above discussion shows that most AMS are laying down more effective foundations for intellectual property policy (Global Innovation Policy Centre, 2018). However, despite these efforts, fragmentation in IPP persists between AMS, and the level of IPPs varies greatly. Issues and disparities mostly involve issues with either TRIPs Plus (e.g., term extension or restoration for pharmaceutical patents) or TRIPs Minus (e.g., reducing the flexibility allowed under TRIPs Article 27, or reducing the scope of use of compulsory licences) as imposed or proposed by ASEAN Dialogue Partners. In fact, the Plus and Minus provisions will only affect some AMS, mainly through bilateral free trade agreements (FTAs) with more developed nations such as the EU and the US or with the emergence of US membership in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CTPPP). Countries not joining these high standard FTAs will not be affected by the TRIPs Plus and Minus provisions.

The following table shows the IPP rankings in select AMS.



**Table:** Association of Southeast Asian Nations  
International Intellectual Property Rankings

AMS	WEFCI (intellectual property pillar) (of 137)	GIPC Index (of 50)	Harmonisation efforts	Barriers to harmonisation
Brunei Darussalam	55	35	<ul style="list-style-type: none"> <li>• 2017 accession to WIPO internet treaties</li> <li>• Major intellectual property reforms in the past few years, including the establishment of an IPO</li> </ul>	<ul style="list-style-type: none"> <li>• Life sciences IPRs lacking</li> <li>• Regulatory data protection not available</li> <li>• Compulsory license framework overly broad</li> <li>• Limited framework for addressing online piracy and circumvention devices, and high software piracy rates (66% according to the latest estimates)</li> </ul>
Cambodia	130	NA		
Indonesia	46	43	<ul style="list-style-type: none"> <li>• Administrative relief available for copyright infringement online</li> <li>• Good cabinet-level coordination and a coordinating framework for intellectual property enforcement</li> </ul>	<ul style="list-style-type: none"> <li>• Heightened efficiency requirement targeting biopharmaceutical patents</li> <li>• Patent law that includes a requirement for technology transfer of all patented technologies and processes in Indonesia</li> <li>• Challenging copyright environment with high levels of piracy</li> <li>• Limited participation in international intellectual property treaties</li> </ul>
Lao PDR	85	NA		
Malaysia	26	23	<ul style="list-style-type: none"> <li>• The Intellectual Property Corporation of Malaysia has PPH agreements in place with both the European Patent Office and Japan Patent Office.</li> </ul>	<ul style="list-style-type: none"> <li>• Compulsory licences, including one issued in 2017 for sofosbuvir, a new breakthrough medicine to treat Hepatitis C</li> <li>• Patent term restoration not allowed</li> <li>• Ex officio powers not used by customs officials</li> </ul>
Myanmar	NA	NA		

AMS	WEFCI (intellectual property pillar) (of 137)	GIPC Index (of 50)	Harmonisation efforts	Barriers to harmonisation
Philippines	71	38	<ul style="list-style-type: none"> <li>• Most basic IPRs provided for in legislation (although missing certain key sector-specific rights)</li> <li>• Growing specialisation and capacity building, such as in administrative intellectual property courts</li> <li>• Streamlining of the intellectual property registration system</li> <li>• Coordination with rights holders and government agencies, and raising public awareness</li> </ul>	<ul style="list-style-type: none"> <li>• Loopholes, red tape, and non-deterrent remedies in intellectual property legislation and in courts</li> <li>• Significant gaps in life sciences and content-related IPRs</li> <li>• Digital piracy largely unaddressed</li> <li>• Limits on trademark protection, and mixed enforcement outcomes</li> </ul>
Singapore	4	9	<ul style="list-style-type: none"> <li>• Advanced national intellectual property framework in place</li> <li>• Active participant in efforts to accelerate patent prosecution (the IPO of Singapore has a few PPHs in place and is a member of the Global PPH).</li> </ul>	<ul style="list-style-type: none"> <li>• Software piracy decreased from an estimated 35% in 2009 to 30% in 2018, but is still quite high for a high-income economy.</li> <li>• Lack of transparency and data on customs seizures of intellectual property-infringing goods</li> </ul>
Thailand	106	41	<ul style="list-style-type: none"> <li>• Prioritisation of greater enforcement, awareness, and use of intellectual property within a wider development plan</li> <li>• Basic level of protection and a registration system in place for copyrights, trademarks, and designs, including recent membership in the Madrid Protocol</li> <li>• Efforts to adjust copyright legislation to new technological developments</li> <li>• Increased enforcement campaigns</li> </ul>	<ul style="list-style-type: none"> <li>• Gaps in patentability, and severe patent backlogs</li> <li>• Life sciences IPRs inconsistent with TRIPs, including trade and competition law as the basis for compulsory licensing</li> <li>• An incomplete digital copyright regime and a lack of clarity on effective implementation</li> <li>• Barriers to market access for patent holders</li> <li>• Physical counterfeiting and digital piracy</li> <li>• Weak IPR enforcement due to delays, lack of resources, and non-deterrent sentences</li> </ul>

AMS	WEFCI (intellectual property pillar) (of 137)	GIPC Index (of 50)	Harmonisation efforts	Barriers to harmonisation
Viet Nam	99	40	<ul style="list-style-type: none"> <li>• Basic intellectual property protections and enforcement framework in place, with stronger penalties for commercial-scale infringement</li> <li>• Development of a national intellectual property strategy</li> <li>• Growing integration into international intellectual property platforms</li> <li>• Effort to coordinate intellectual property enforcement</li> <li>• Promotion of IPR awareness</li> </ul>	<ul style="list-style-type: none"> <li>• Inadequate protection of life sciences patents, and a challenging enforcement environment</li> <li>• Gaps in copyright protection, including a lack of measures to address online infringements</li> <li>• High physical counterfeiting rates and rampant online infringement</li> <li>• Enforcement generally poor; penalties insufficient in practice; administrative inaction</li> </ul>

AMS = ASEAN member state, GIPC = Global Innovation Policy Center, IPO = intellectual property office, IPRs = intellectual property rights, Lao PDR = Lao People's Democratic Republic, NA = not applicable, PPH = patent prosecution highway, TRIPs = Trade-Related Intellectual Property Rights Agreement, WEFCI = World Economic Forum Competitiveness Index, WIPO = World Intellectual Property Organisation.

Sources: World Economic Forum (2018) *Competitiveness Index (Intellectual Property Protection Pillar)*; United States Chamber of Commerce, Global Innovation Policy Centre (2018), International Intellectual Property Index; European Union (2017), Intellectual Property Rights Small and Medium-Sized Enterprises Helpdesk.

Some reasons for the fragmentation of IPR laws, regulations, and frameworks are differing levels of development, levels of understanding, and preferences on issues related to intellectual property. Some AMS such as Singapore and Malaysia place high importance on strong protections of traditional intellectual property such as patents, trademarks, and copyrights, whereas other AMS such as Viet Nam, the Lao People's Democratic Republic, and Thailand place a high degree of importance on other forms of intellectual property, such as geographical indications.

In addition, the details of IPLs may differ from one AMS to another due to differing legal traditions. Former British colonies in ASEAN, i.e. Brunei Darussalam, Malaysia, Myanmar, and Singapore inherited their IPLs from the British system, which contains similarities with the TRIPs Agreement of the WTO. Conversely, other AMS need to work from the ground up to prepare their national IPLs, and require technical assistance from donors. As a consultant who has worked on developing a national IPL, the author can attest that the transfer of knowledge between drafters (who

were mainly international consultants and national intellectual property officials) was minimal at best. The situation in ASEAN is different from that of most other regional cooperations in the world. For example, the EU, apart from Ireland and the United Kingdom, is mainly based on the civil law system. The same can be said of the Common Market of the Southern Cone (Mercosur) and Caribbean Community countries, which are mainly linked with Spanish civil law systems. In addition, Europe is the main birthplace of the IPLs that form the basis of the WIPO conventions and TRIPs Agreement that started during the First Industrial Revolution.

Two other key issues facing AMS are intellectual property infrastructure and enforcement. The Singapore IPO is an important element of Singapore's strong intellectual property system, and it provides an effective and efficient intellectual property management and registration system within the country. The Malaysian Intellectual Property Corporation has also introduced a comparatively more efficient intellectual property system. Meanwhile, Singapore, Malaysia, and the Philippines have established intellectual property courts, and Singapore has also established the Arbitration and Mediation Center in collaboration with the WIPO to support intellectual property dispute resolution in Asia.

Intellectual property enforcement mechanisms and sanctions for the infringement of IPRs in some AMS do not provide adequate deterrence in themselves. Common problems facing AMS include the inefficient coordination of action by enforcement bodies, a lack of deterrent sanctions for piracy, lax border controls that allow counterfeit products easy access to the country, and a lack of well-trained staff (Butt, 2008; Saidin, 2016). The intellectual property courts in Malaysia, Singapore and the Philippines contribute towards a more effective intellectual property enforcement system (Anton 2003).

Indonesia, on the other hand continues to face issues with intellectual property enforcement, mainly due to its weak intellectual property governance system. In the Philippines (Negre and Perez 2009), the poor enforcement of intellectual property ties in with a lack of public awareness, limited intellectual property expertise, slow IPR registration

procedures, lack of coordination amongst enforcement agencies, gaps in enforcement and prosecution, lack of leadership, lack of data and information for effective decision-making, and limited operational transparency. In the case of infringements, it is very difficult for right holders to seek assistance from enforcement bodies such as police agencies.

In Viet Nam, there is insufficient understanding of IPRs on the part of enforcement officials, as well as a shortage of resources, resulting in lengthy and burdensome enforcement procedures (Nguyen, 2010). The legal frameworks in Cambodia and the Lao People's Democratic Republic is still in the early stages of development. On the other hand, Myanmar does not generally recognise trademarks or copyrights from other countries, and infringement of IPRs is common. As per the WTO's decision on 29 November 2005, Myanmar would have to provide IPP in accordance with the TRIPs Agreement by 1 July 2013 (on 11 June 2013 the WTO extended this deadline to 1 July 2021).

In Thailand, intellectual property piracy and breach of copyright law are not in line with technological developments, and actions against digital piracy have been insufficient (Global Innovation Policy Center, 2018). Nevertheless, Thailand has made intellectual property enforcement a priority by creating a national task force, setting up intellectual property dialogue with the EU, introducing creative economy initiatives requiring strong IPP, and introducing amendments inducing Thai custom officers to take enforcement actions *ex officio*.

Another issue relating to IPP in AMS is the linkage of IPP with public health, mainly relating to access to and the price of medicine. This includes the linkage between compulsory licence mechanisms and the AIDS crisis in the country, mainly to due to the high cost of patented pharmaceuticals for AIDS patients (see Harrelson, 2001). Thailand and Malaysia, for example, have been issuing compulsory licenses for AIDS-related medicines.

The primary challenge for any harmonisation effort within ASEAN is the fact that IPR continues to be governed within the sovereignty of each state. AMS have the right to choose their own standards of IPPs, either through adopting the minimum standards under the WIPO and WTO arrangements or adopting higher standards, mainly through FTA commitments. For example, as a result of CTPPP, Brunei Darussalam, Malaysia, Singapore, and Viet Nam (being parties to the CTPPP) undertake certain TRIPs-Plus measures. To comply with the 2004 US–Singapore FTA, Singapore allows patents to support life science industries such as patent protections for plants and animals, and essentially biological processes (other than non-biological and microbiological processes) for the production of plants or animals. In 2004 Singapore also joined the 1991 International Union for the Protection of New Varieties of Plants Convention (2004 US–Singapore FTA, Article 16).

ASEAN differs from the EU in that it lacks the EU’s competence and legal system. For example, the EU can enforce harmonisation through the EU legal system by means of regulations or directives. ASEAN on the other hand remains relatively individualistic, meaning that each AMS has sovereignty over the IPR system in their country.

Having an established legal system with its own enforcement mechanism, the EU is generally able to take regional steps to harmonise IPRs. For example, it tackled the problem of piracy exacerbated by new digital technologies with a directive harmonising the protection of certain neighbouring rights through the 1992 council resolution on increased protection for copyright and neighbouring rights. The 2003 EU InfoSoc Directive (or European Union Copyright Directive) harmonised the principal rights of a copyright holder (i.e., reproduction, communication, and distribution rights), provided legal technological protection measures, and listed several exceptions to the exclusive rights that member states could choose to implement.

The EU has also harmonised IPR enforcement through various measures. For example, in 2004 it introduced the Intellectual Property Enforcement Directive setting minimum standards for civil remedies in the courts of member states. The directive sets a general obligation to establish an

efficient and not too costly procedure to protect copyright and regulates the production of evidence, right to information, provisional measures, and injunctions. IPR enforcement will utilise private international law on legal conflicts in the law based on the 2001 Brussels Regulation, which was repealed in 2012 and will be used against non-signatory countries from 2015. Critics argue that the Intellectual Property Enforcement Directive has not met its objective as it is only effective against occasional, not professional, infringers (see Ricolfi, 2004).

The first level of harmonisation took place through the 1973 Convention on the Grant of European Patents (also known as European Patent Convention [EPC]). The EPC, which is also open to non-EU states, established a European Patent Office that provides a legal framework for a centralised procedure for patent application in Europe. The European Patent Office is charged with receiving the applications and centrally administering revocation and opposition procedures. As the EPC recognised the territorial nature of patents, the procedure does not grant a single European patent but rather a bundle of national patents enforceable in the states for which the patent is filed. The EPC has harmonised the most essential features of patent protection, such as patentable subject matter (Article 27), rights conferred by a patent (Article 28), conditions on patent application (Article 29), exceptions to the rights and other allowed unauthorised uses (Articles 30 and 31), revocation and forfeiture, and term of protection (Articles 32 and 33). However, the harmonisation process is more difficult to apply to new technologies such as biotechnology (Favale and Plomer, 2009) and information communication technology (Deschamps, 2011).

The EU has also been working on an EU patent package as part of a unified European patent system with a unified patent court. Unitary community patents are created through three pieces of legislation: (i) Regulation 1257/2012, which outlines the features and discipline of the community patent (defined as a 'European patent with unitary effect'; (ii) Regulation 1260/2012, which settles the crucial question of the translations of the patent application; and (iii) Agreement on a Unified Patent Court 2013, which establishes a patent court with jurisdiction over cases regarding unitary patents. The court will consist of (i) a court of first instance (including a central division, and local and regional divisions);

and (ii) a court of appeal. However, this process and other proposals for a community patent have been heavily criticised for their lack of attention to exceptions and limitations (Hilty, 2012).

The ECJ also plays an active role in enforcing harmonisation in the EU. In the EU, harmonisation in the field of copyright is achieved by several decisions of the ECJ.<sup>1</sup>

In addition, the European Council invites the European Commission to 'pay particular attention' to the ratification of international IPR treaties by non-EU members when negotiating agreements with them. This means that AMS entering into an FTA will face similar demands from the EU, and if the EU has an FTA with ASEAN as a group, there would be a creeping harmonisation of IPRs in the region. As ASEAN does not have a judicial system covering the whole region, ASEAN may be unable to achieve judicial harmonisation, as in the EU.

Beyond the EU, African countries have also made good progress in setting up regional IPOs, including the African Regional Intellectual Property Organisation for English-speaking African countries, which is based in Harare, and the African Intellectual Property Organisation for French-speaking African countries. These two organisations act as receiving offices for patents and trademark applications from the member countries. Other regional patent offices include the Gulf Cooperation Countries Patent Office and the Eurasian Patent Organisation (for Russia and several former Soviet Union countries).

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<sup>1</sup> See *Infopaq International A/S v Danske Dagblades Forening* (C-5/08)\*I.P.Q. 57 (2009) I-6569; (2009) E.C.D.R. 16, *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd* (C-403/08 and C-429/08) (2012) Bus. L.R. 1321, *Eva-Maria Painer v Standard VerlagsGmbH* (C-145/10) (2012) E.C.D.R. 6, *Football Dataco v Yahoo! UK Ltd* (C-604/10) (2012) E.C.D.R. 10, *Bezpečnostní softwarová asociace* (2011) E.C.D.R. 3; and *SAS Institute Inc v World Programming Ltd* (C-406/10) (2012) E.C.D.R. 22.



## 6.2 Harmonisation of Competition Policy

Competition policy plays an important role in single market integration efforts like ASEAN, which aims to be a single production base. The primary objective of competition policy and law is to foster economic efficiency and consumer welfare while maintaining the free competitive process, or protecting effective competition (Khemani, Anderson, and Bamford, 1998). The focus of competition policy is the supply side of the market, such as business conduct (which is anti-competitive), cartels, price control arrangements, or the abuse of dominant positions by intellectual property holders. In a single market or single production base where businesses tend to operate across borders, competition policy may affect trade and investment, such as via cross-border mergers (Lee and Fukunaga, 2013).

Competition policy is important for the AEC as trade barriers to new entries may exist in a regional economic community. These obstacles come from the restrictive business practices of dominant domestic firms (Lee and Fukunaga, 2013). For example, intellectual property holders may set high licence fees or introduce unreasonable licencing arrangements, which set barriers for entry. High entry barriers may also impact research and innovation, and intellectual property holders may limit access to research tools to work on new innovations.

The AEC Blueprint 2025 acknowledges that for ASEAN to be a competitive region with well-functioning markets, rules on competition will need to be operational and effective (ASEAN, 2015). It also states that the fundamental goal of competition policy and law is to provide a level playing field for all firms, regardless of ownership. ASEAN recognises that enforceable competition rules that proscribe anti-competitive activities are an important way to facilitate liberalisation and a unified market and production base, as well as to support the formation of a more competitive and innovative region.

The measures proposed by the AEC Blueprint 2025 include the following:

- (i) Establishing effective competition regimes by putting in place competition laws for all AMS that still lack them, and effectively implementing national competition laws in all AMS based on international best practices and agreed-upon ASEAN guidelines;
- (ii) Strengthening the capacities of competition-related agencies in AMS by establishing and implementing institutional mechanisms necessary for the effective enforcement of national competition laws, including comprehensive technical assistance and capacity building;
- (iii) Fostering a 'competition-aware' region that supports fair competition, by establishing platforms for regular exchange and engagement, encouraging competition compliance and enhanced access to information for businesses, reaching out to relevant stakeholders through an enhanced regional web portal for competition policy and law, outreach to and advocacy for businesses and government bodies, and sector studies on industry structures and practices that affect competition;
- (iv) Establishing regional cooperation arrangements on competition policy and law by establishing competition enforcement cooperation agreements to deal effectively with cross-border commercial transactions;
- (v) Achieving greater harmonisation of competition policy and law in ASEAN by developing a regional strategy on convergence;
- (vi) Ensuring that competition policy chapters negotiated by ASEAN under the various FTAs with Dialogue Partners and other trading nations align with competition policy and law in ASEAN to maintain a consistent approach to competition policy and law in the region; and
- (vii) Continuing to enhance competition policy and law in ASEAN, taking into consideration international best practices.

The other important ASEAN competition policy document is the ASEAN Regional Guidelines on Competition Policy 2010, which serves as a general framework to introduce, implement, and enforce competition policy and law in each AMS, although it is not binding. To implement the

policy, ASEAN formed the ASEAN Experts Group on Competition, which acts as an official body comprising representatives from the competition law authorities and agencies responsible for competition policy in the AMS. The group's main function is to coordinate competition policy for all ASEAN members. According to some, the experts group acts as an official ASEAN body for cooperative work on competition policy, and serves as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on competition policy and law (Lee and Fukunaga, 2013).

To date, there is no regional legal framework regulating competition and no regional body overseeing the administration of competition policy and law at the ASEAN level. As with the IPLs, the competition laws and policies in ASEAN are territorial and subject to national laws. Each AMS now has some form of legislation addressing competition issues.

As competition is subject to domestic competition laws, each AMS will be responsible for anti-competitive behaviour in each member state. The concentration on the domestic law and the absence of regional competition law will impose obstacles on cross-border anti-competitive behaviour for businesses operating in more than one AMS. At the same time, it will also impose a regulatory burden on businesses involved in a merger or acquisition in more than one AMS as the firms will have to deal with more than one competition law.

These differences in approach towards competition law in the AMS are influenced by several factors. First, the state law depends on the competition culture in each country. Countries with dominant state-owned enterprises tend to exclude such enterprises from the coverage of the competition law, thus distorting the actual economic and competition behaviour in the economy.

Secondly, the state law depends on the model adopted by the national legislature and in some circumstances based on the models provided by development partners through technical assistance. For example, the competition laws in Malaysia (Competition Act 2010) and Singapore

(Competition Act 2004) are modelled on the EU competition law, and modified to suit local circumstances. On the other hand, Indonesia's competition law (Law No. 5, 1999) has a hybrid character. These laws differ in many ways, including in their substantive and procedural provisions. While the ultimate objective of the Malaysian and Singaporean laws is to protect the process of competition in the market, the Indonesian law pursues broader objectives, including the promotion of equal business opportunities for large, medium-sized, and small-scale business actors in Indonesia (Ahamat and Rahman, 2013).

These different models may also lead to fragmentation in the substantive provisions of the domestic competition laws in the region. While the Malaysian and Singapore laws include a general provision prohibiting anti-competitive agreements (with non-exhaustive lists of prohibited agreements), the Indonesian competition law prohibits specific conduct based on several specific provisions. For example, Article 9 (market allocation) and Article 11 (cartels in general) of the Indonesian law consider business behaviour illegal if it is 'potentially resulting in monopolistic practices and/or [sic] unfair business competition' (Indonesian Competition Law, Article 11).

The Singaporean law does not consider the imposition of unfair prices as abusive conduct, whereas the Malaysian law confers upon the Malaysian Competition Commission the status of a quasi-price regulator with the right to determine whether a price is fair or unfair. While the Singaporean law excludes vertical agreements from the ambit of competition law, the prohibition of anti-competitive agreements under the Malaysian law covers both horizontal and vertical agreements. This leads to fragmentation of the laws, causing legal uncertainty and conflict when applied across borders or over the same subject matter in different jurisdictions.

AMS whose laws allow for extraterritorial application, such as Malaysia and Singapore, will face several obstacles. The Malaysian Competition Act 2012 applies to any commercial activity, both within and outside Malaysia that influences competition in any market in Malaysia. The Singapore Competition Act 2004 applies to anti-competitive conduct committed

outside its territory so long as it has the object or effect of preventing and restricting competition in Singapore. Thus, these countries face certain obstacles, including the gathering of evidence, exchange of confidential information, and reciprocal enforcement of judgements. The fact that the Singaporean and Malaysian competition authorities issued different conclusions and recommendations over the Grab e-hailing business taking over Uber provides an example of different results produced from the same subject matter in two different jurisdictions.

ASEAN is not the only region seeking to achieve coherence in competition policy; however, some regions achieve a higher level of coherence than others. The African approach is based on hard law, as in the EU. The South African Development Community bound its member states to implement measures that prohibit unfair business practices and promote competition within the Community (Gladmore, 2012). The West African Economic and Monetary Union established a treaty prohibiting abuse of dominant position on the common market.

Competition policy and law have been part of the EU since the establishment of the European Economic Community in 1957. Based on the EU treaties, EU members are required to adopt national competition policies and laws parallel to the EU laws as contained in Regulation 1/2003. The EU also enforces its competition policy through a hybrid approach, where cross-border competition issues are addressed by EU organs and domestic competition issues are addressed by national laws. Some fragmentation still exists in the national competition laws of EU member states. Cultural differences play a role even within the EU where the strength of the competition culture of member states varies. Nevertheless, the EU's cultural identity is more homogeneous compared to that of ASEAN, which is more heterogeneous (Low, 2003).

In Latin America, the harmonisation of competition policies has been on the agenda of the Mercosur project since the signing of the Treaty of Asunción in 1991. In 1993, a protocol indicating the guidelines for a single competition policy was signed by the Mercosur member countries. Under this framework, Argentina, Brazil, Paraguay, and Uruguay entered

into an agreement for the Defence of Competition.<sup>2</sup> The scope of the agreement covers all acts by individuals and legal persons, private or public, with effects on competition within Mercosur and that affect commerce for the parties.

## 7. Conclusion and Policy Recommendations

The above discussion shows that ASEAN faces disparities in the substantive and procedural provisions of domestic laws and policies relating to IPRs and competition in the AMS. To reduce the gaps and disparities in IPR laws, AEC 2025 focuses more on technical and procedural convergence, rather than on the provisions of substantive laws. This does not address the main fragmentation in the substantive procedure to provide IPP, and substantive provisions and procedures on the enforcement of IPRs.

ASEAN should consider adopting both substantive and procedural coherence. Substantive coherence may be achieved through harmonising or standardising rules, principles, and standards. In addition, procedural convergence may be achieved by harmonising or recognising the rules regarding the procedure.

With regard to IPRs, ASEAN should work on the following:

- (i) ASEAN should come up with a model of a substantive law and of procedures in the laws relating to patents, copyrights, trademarks, and other intellectual property, based on the minimum standards commonly adopted in the region. ASEAN will have to ensure that all AMS agree on the common standards contained in the model law. Most common standards are already being promoted through individual AMS FTAs with more developed countries, such as the Singapore–US FTA, Singapore–EU FTA, Viet Nam–EU FTA, and the

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<sup>2</sup> Mercosur, *Protocolo De Defensa De La Competencia Del MERCOSUR 1996* <http://www.mre.gov.py/v1/Adjuntos/mercosur/Acuerdos/1996/espanol/19-protocolodedefensadelacompetenciadelmercosur.pdf>.

CTPPP. It can be assumed that by 2040 ASEAN will have entered into an ASEAN–EU FTA, and the CTPPP have been ratified by AMS that enter into the arrangement, making it easier to achieve the ASEAN model law containing the minimum standards.

- (ii) If AMS are unwilling to change their existing IPLs, they could work on recognising IPRs issued by another AMS without having to go through national substantive formalities and procedures again. This can be done either through the harmonisation of rules or mutual recognition of the intellectual property registration. AMS may adopt recognition arrangement of IPRs issued in another AMS without having to go through the examination process of the host intellectual property authority, not just in terms of patents and trademarks, but all registrable IPRs, such as geographical indications. For example, Malaysia and Myanmar are yet not parties to the Madrid Union, and applicants for trademarks in these countries must still go through the normal country-to-country application. In addition, the Patent Cooperation Treaty and Madrid arrangements only act as common receiving offices, whereas intellectual property awards are still subject to national IPLs, creating the need to reach a common standard and mutual recognition of substantive examinations.
- (iii) To facilitate cross-border IPPs in ASEAN, all ASEAN IPOs can introduce a single intellectual property ASEAN window in each AMS, where each applicant may file a single application in one AMS (designating as many AMS as desired for protections) and be examined and awarded in a single examination office, which will then issue an ASEAN IPP. AMS that lack the capacity to conduct a substantive examination may designate another examination office within ASEAN to do so. Through such cooperation, ASEAN may be able to achieve a standardised time to award IPPs. At the time of writing, Indonesia and Thailand are facing significant backlogs of applications for patents, with delays of 5–9 years in Thailand (Setiati and Darmawan, 2018).
- (iv) In addition to recognising IPRs issued in other AMS, AMS need to facilitate cross-border enforcement of court awards to counter professional intellectual property infringers who infringe or become conduits for intellectual property infringements across AMS borders. Hence, ASEAN may want to introduce a cross-border intellectual

property enforcement system, such as the mutual recognition of decisions by courts or authorities on intellectual property infringements.

With regard to competition law and policy, as ASEAN lacks a harmonised competition law, ASEAN has two options for creating competition policy harmonisation: (i) a bilateral approach to recognise competition law of each AMS; and (ii) a regional approach to assist in cross-border enforcement.

ASEAN may achieve competition policy and law harmonisation by establishing model laws that impose minimum standards of rules or principles. AMS could help each other implement the model laws through capacity building and experience sharing. AMS may also work on realising cross-border anti-competition enforcement through the application of positive comity (Ahamat and Rahman, 2013). ASEAN may introduce an agreement to effect positive comity in the region. This would allow a party to notify another party about anti-competitive conduct being carried out in the jurisdiction of the host state, which would take effect in the requesting jurisdiction. It would also allow the requesting state to ask the host state to launch an investigation, remedy anti-competitive conduct, and notify the requesting state of its decision. This would involve the recognition of decisions and awards, and the standardisation or harmonisation of substantive procedural rules. Finally, another important way to harmonise competition law within ASEAN is the reciprocal recognition and enforcement of judgements or awards. This mechanism would enforce decisions made by one AMS in another AMS, freeing the latter from conducting a new investigation over the same anti-competitive behaviour. One model for this type of cooperation is included in the Australia–New Zealand Closer Economic Relations Trade Agreement.



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