

# Community and Convergence: Intellectual Property Rights in Light of the ASEAN Regional Integration

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I. INTRODUCTION.....	1391
II. INTELLECTUAL PROPERTY IN THE ASEAN ECONOMIC COMMUNITY.....	1398
III. CONVERGENCE OF PRACTICES.....	1400
A. Patents	
B. Trademarks	
C. Industrial Designs	
D. Copyright and Related Rights	
E. IPR Enforcement	
IV. IP AND DEVELOPMENT: CROSS-CUTTING ISSUES.....	1422
A. Innovation	
B. Traditional Knowledge	
C. Geographical Indications	
V. CONCLUSION: PROSPECTS FOR IP IN ASEAN .....	1427

## I. INTRODUCTION

The year 2017 marked the 50th anniversary of the founding of the Association of Southeast Asian Nations (ASEAN) as established by virtue of

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the 1967 Bangkok Declaration,<sup>1</sup> which was signed by the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore, and Thailand, also known as the ASEAN-5.<sup>2</sup> Under the Bangkok Declaration, the five countries established a mechanism of regional cooperation with the aim of accelerating economic growth, social progress, and cultural development in the region as well as promoting regional peace and stability.<sup>3</sup>

As the membership of ASEAN subsequently expanded to include Brunei, Vietnam, Laos, Myanmar, and Cambodia,<sup>4</sup> the ASEAN Member States (AMS) adopted the “ASEAN Vision 2020” as the framework for the future of ASEAN.<sup>5</sup> The AMS envisioned that, by 2020, ASEAN would be “a concert of Southeast Asian nations, outward looking, living in peace, stability[,] and prosperity, bonded together in partnership[,] in dynamic development[,] and in a community of caring societies.”<sup>6</sup> In terms of economic integration, the AMS also committed to narrowing the developmental gap among the Member States, by ensuring a fair and open multilateral trading system and achieving global competitiveness by 2020.<sup>7</sup>

By the time “ASEAN Vision 2020” was signed, the leaders of the AMS have also previously signed the 1995 ASEAN Framework Agreement on Intellectual Property Cooperation (ASEAN Framework Agreement),<sup>8</sup> which established the ASEAN Working Group on Intellectual Property

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1. Declaration constituting an agreement establishing the Association of South-East Asian Nations (ASEAN), *signed* Aug. 8, 1967, 1331 U.N.T.S. 235.
  2. *Id.* at 237-38.
  3. *Id.* para. 9 (1).
  4. Eleanor Albert, Introduction — ASEAN: The Association of Southeast Asian Nations (A Backgrounder Published by the Council of Foreign Relations) *available at* <https://www.cfr.org/backgrounder/asean-association-southeast-asian-nations> (last accessed May 4, 2018). Brunei joined the Association of Southeast Asian Nations (ASEAN) in 1984, Vietnam joined in 1995, Laos and Myanmar joined in 1997, and Cambodia joined in 1999. *Id.*
  5. Association of Southeast Asian Nations, ASEAN Vision 2020 (A Statement Signed in Kuala Lumpur, Malaysia on 15 December 1997), *available at* [http://asean.org/?static\\_post=asean-vision-2020](http://asean.org/?static_post=asean-vision-2020) (last accessed May 4, 2018) [hereinafter ASEAN Vision 2020].
  6. *Id.*
  7. *Id.*
  8. ASEAN Framework Agreement on Intellectual Property Cooperation, *opened for signature* Dec. 15, 1995, 35 I.L.M. 1072 [hereinafter ASEAN Framework Agreement].

Cooperation (AWGIPC) as the sectoral platform for cooperation in the field of intellectual property (IP).<sup>9</sup> Among the objectives of the ASEAN Framework Agreement were: (1) to explore the possibility of setting up an ASEAN patent system and an ASEAN trademark system,<sup>10</sup> and (2) to hold consultations on the development of the IP regimes to create ASEAN standards and practices, which are consistent with international standards.<sup>11</sup>

Subsequently, the AMS adopted the Bali Concord II,<sup>12</sup> which set out the framework for a dynamic, cohesive, resilient, and integrated ASEAN Community as the realization of regional integration.<sup>13</sup> The ASEAN Community was to be comprised of three pillars, namely: (1) Political and Security Cooperation,<sup>14</sup> (2) Economic Cooperation,<sup>15</sup> and (3) Socio-Cultural Cooperation.<sup>16</sup> Under the second pillar, or the ASEAN Economic Community (AEC), one of the recommendations adopted under the Concord was to extend ASEAN cooperation on intellectual property rights (IPR) beyond trademarks and patents, by including cooperation efforts on copyright information exchange and enforcement by 2004.<sup>17</sup>

Noting the significant and important progress that had been made towards the goals of the Kuala Lumpur visionary Declaration,<sup>18</sup> the AMS subsequently agreed to accelerate the establishment of the ASEAN Community from 2020 to the year 2015, through the “Cebu Declaration of 2007.”<sup>19</sup> Thereafter, the Declaration on the ASEAN Economic Community

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9. *Id.* art. 3, ¶ 3.6 (a).

10. *Id.* art. 1, ¶¶ 4-5.

11. *Id.* ¶ 6.

12. Declaration of ASEAN Concord II, *opened for signature* Oct. 7, 2003, 43 I.L.M. 18 [hereinafter Bali Concord II].

13. *Id.* pmbl.

14. *Id.*

15. *Id.*

16. *Id.*

17. Association of Southeast Asian Nations, Recommendations of the High-Level Task Force on ASEAN Economic Integration (Annex to the Declaration of ASEAN Concord II), *available at* [http://asean.org/?static\\_post=recommendations-of-the-high-level-task-force-on-asean-economic-integration](http://asean.org/?static_post=recommendations-of-the-high-level-task-force-on-asean-economic-integration) (last accessed May 4, 2018).

18. ASEAN Vision 2020, *supra* note 5.

19. Association of Southeast Asian Nations, Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 (A Statement Signed in Cebu, Philippines on 13 January 2007), *available at* <http://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/> (last accessed May 4, 2018).

Blueprint<sup>20</sup> was adopted by the ASEAN leaders for the purpose of putting in place rule-based systems to realize the establishment of the AEC by 2015.<sup>21</sup> As a highly competitive economic region, the AEC was to be established in order to create a business-friendly and innovation-supporting regional environment through the adoption of common frameworks, standards, and mutual cooperation across many areas, including IPR.<sup>22</sup>

With the formal establishment of the ASEAN Community on 31 December 2015,<sup>23</sup> the work of regional integration continued to progress through the “Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together.”<sup>24</sup> The Declaration adopted the ASEAN Economic Community Blueprint 2025 (AEC 2025),<sup>25</sup> which acknowledged that regional economic integration was a dynamic and ongoing process.<sup>26</sup> Serving as the blueprint for the work of ASEAN for the next 10 years from 2016–2025, the AEC 2025 sets out the important role that IP plays in the achievement of both national and regional socio-economic development goals — particularly in enabling the AMS to move higher in the technology ladder, in encouraging

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20. ASEAN Economic Community Blueprint (A Declaration Signed in Singapore, Singapore on November 2007), *available at* <http://asean.org/wp-content/uploads/archive/5187-10.pdf> (last accessed May 4, 2018).

21. *Id.* pmb1.

22. *Id.*

23. Association of Southeast Asian Nations, 2015 Kuala Lumpur Declaration on the Establishment of the ASEAN Community (A Declaration Signed in Kuala Lumpur, Malaysia on 22 November 2015), *available at* <http://www.asean.org/storage/2015/12/KL-Declaration-on-Establishment-of-ASEAN-Community-2015.pdf> (last accessed May 4, 2018).

24. The ASEAN Secretariat, Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (A Declaration Adopting the ASEAN Community Vision 2025, the ASEAN Political-Security Community Blueprint 2025, the ASEAN Economic Community Blueprint 2025, and the ASEAN Socio-Cultural Community Blueprint 2025 Signed in Kuala Lumpur, Malaysia on 22 November 2015), *available at* <http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf> (last accessed May 4, 2018).

25. Association of Southeast Asian Nations, ASEAN Economic Community Blueprint 2025 (A Document Adopted Through the Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together Signed in Kuala Lumpur, Malaysia on 22 November 2015), *available at* <http://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf> (last accessed May 4, 2018) [hereinafter AEC 2025].

26. *Id.* ¶ 2.

transfer of technology, and in stimulating innovation and creativity.<sup>27</sup> According to the AEC 2025, IP in a fully integrated ASEAN would entail that

[n]ational IP regimes should achieve full technical and procedural convergence, and IP Offices [should adopt] modern business models and practices that enable provision of efficient and effective ‘world class’ services to clients at the national and regional levels. The future landscape will be more competitive and productive[,] as IP is one of the contributory factors towards enhancing the volume and value of exports, flows of domestic and foreign direct investment[,] and improved global competitiveness rankings.<sup>28</sup>

As its 50-year evolution shows, ASEAN’s formula for the process of regional integration is somewhat unique. In what has been dubbed as the “ASEAN Way,”<sup>29</sup> despite the ambitious goals of the ASEAN Community, the AMS have consistently maintained the principles of full respect for national sovereignty, non-interference in internal or domestic affairs, and decision-making by consensus.<sup>30</sup> Until the ASEAN Charter<sup>31</sup> was adopted in 2007, the strategy towards integration was based on diplomacy and political brokering as part of the decision-making process, rather than legally-binding agreements that contain sanctions for non-compliance.<sup>32</sup> Various factors have contributed to the development of this particular method of ASEAN integration. Due to its strategic location at the center of important trading routes between Europe, Asia, and the Pacific, each of the 10 Member States has its own unique historical and cultural identity as a result of its colonial

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27. *Id.* ¶ 30.

28. *Id.*

29. See Logan Masilamani & Jimmy Peterson, *The “ASEAN Way”: The Structural Underpinnings of Constructive Engagement*, FOREIGN POL’Y J., Oct. 2014, at 11 (citing Daniel Seah, *I. The ASEAN Charter*, 58 INT’L & COMP. L.Q. 197, 198-99 (2009)).

30. Clara Portela, *ASEAN: Integration, Internal Dynamics and External Relations*, in RESEARCH COLLECTION SCHOOL OF SOCIAL SCIENCES OF SINGAPORE MANAGEMENT UNIVERSITY 9 (2013 ed.). See also Michael Ewin-Chow & Tan Hsien-Li, *The Role of the Rule of Law in ASEAN Integration* (A Working Paper Published by the European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme) at 5-6, available at [31. Charter of the Association of Southeast Asian Nations, signed Nov. 20, 2007, 2624 U.N.T.S. 223.](http://cadmus.eui.eu/bitstream/handle/1814/26452/RSCAS_2013_16.pdf?sequence (last accessed May 4, 2018).</a></p></div><div data-bbox=)

32. Ewin-Chow & Hsien-Li *supra* note 30, at 5.

history.<sup>33</sup> “The region is also characterized by a wide diversity of land, people, political systems, languages, levels of economic activity, and stages of development.”<sup>34</sup> These have resulted in different legal traditions and regimes, varying from common law, civil law, and mixed systems.<sup>35</sup>

All these realities lie at the heart of a rules-based approach to regional harmonization, convergence, and integration. In contrast to other models of regional integration, the ASEAN approach is primarily a market-led process that aims to secure the region’s position in the global value chain.<sup>36</sup> Fifty years on, the ASEAN today “represents almost [seven percent] of total world trade, and is collectively the world’s [fourth] largest trade powerhouse after the major world economies of the European Union [EU], the [United States (US),] and China.”<sup>37</sup> The ASEAN economy has evolved into a highly competitive economic region with a combined Gross Domestic Product of US\$2.55 trillion, ranking sixth largest in the world and third in Asia.<sup>38</sup> The challenge of the ASEAN regional economic integration therefore lies in how to transform such diversity into opportunities for establishing a more dynamic and stronger segment of the global supply chain, in order to cement ASEAN’s economic competitiveness, as envisioned in the AEC.

In the field of IP, regional initiatives to harmonize rules are linked to facilitating trade, investment, and perhaps, quite recently, to fostering of domestic innovation and transfer of technology.<sup>39</sup> With the global transition

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33. DEPARTMENT OF TRADE AND INDUSTRY, UNDERSTANDING THE ASEAN ECONOMIC COMMUNITY, A PRIMER 2 (1st ed. 2004).

34. *Id.*

35. See Anselmo Reyes, *ASEAN and the Hague Conventions*, 22 ASIA. PAC. L. REV. 25, 43 (2014).

36. However, other factors also drive economic integration in ASEAN. See Myrna S. Austria, *The Pattern of Intra-ASEAN Trade in the Priority Goods Sector (Executive Summary of a Study of the Same Title Under the Regional Economic Facility, ASEAN-Australia Development Cooperation Program)* at i-ii, available at <http://aadcp2.org/file/03-006e-ExecutiveSummary.pdf> (last accessed May 4, 2018).

37. ASEAN SECRETARIAT, CELEBRATING ASEAN: 50 YEARS OF EVOLUTION AND PROGRESS, A STATISTICAL PUBLICATION 13 (2017).

38. *Id.* at 16.

39. Wisarn Puppavesa, et al., *Competition Policy, Infrastructure, and Intellectual Property Rights*, in REALIZING THE ASEAN ECONOMIC COMMUNITY: A COMPREHENSIVE ASSESSMENT 67 (Michael G. Plummer & Chia Siow Yue eds., 2009).

to a knowledge economy in the 21st century,<sup>40</sup> the value of intangible assets, IP, and innovation has gained prominence.<sup>41</sup> Consequently, IP in ASEAN has likewise been undergoing a transformational phase. When the Philippines assumed the chairmanship of ASEAN in the year of its 50th founding anniversary, the overall thematic priority of “inclusive, innovation-led growth” was adopted, and, with that, a renewed recognition that IPRs are critical to stimulating innovation and the transfer of new technologies.<sup>42</sup> IP was seen as a potential tool for securing the competitive advantage of domestic enterprises in the global value chain, particularly for micro, small, and medium enterprises.<sup>43</sup>

In light of the renewed focus on IPR in the global arena,<sup>44</sup> substantive work has been undertaken by the AMS not only in harmonizing their IP regimes, but also in pushing for the innovation agenda as a means to secure ASEAN’s global economic competitiveness. This Article then seeks to outline the progress of the regional integration initiatives relating to IP in ASEAN, as well as examine the challenges and issues that must be addressed by the AMS to achieve the goals under the AEC 2025.

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40. See Esteban Burrone & Guriqbal Singh Jaiya, Intellectual Property (IP) Rights and Innovation in Small and Medium-Sized Enterprises (A Paper Submitted to the Organisation for Economic Co-operation and Development for Its Ministerial Conference for Small and Medium-sized Enterprises) at 2, *available at* [http://www.wipo.int/export/sites/www/sme/en/documents/pdf/iprs\\_innovation.pdf](http://www.wipo.int/export/sites/www/sme/en/documents/pdf/iprs_innovation.pdf) (last accessed May 4, 2018). See also Organisation for Economic Co-operation and Development (OECD), *The Knowledge Economy* at 7, *available at* <https://www.oecd.org/sti/sci-tech/1913021.pdf> (last accessed May 4, 2018).

41. *Id.* at 4.

42. Association of Southeast Asian Nations, *Partnering for Change, Engaging the World* (Chairman’s Statement of the 31st ASEAN Summit) ¶¶ 50 & 61, *available at* <http://asean.org/storage/2017/11/final-chairman%E2%80%99s-statement-of-31st-asean-summit.pdf> (last accessed May 4, 2018).

43. Rodrigo R. Duterte, President, Republic of the Philippines, *Speech at the ASEAN 2017 Committee in Business and Investment Promotion Launch*, Rizal Hall, Malacañang Palace, Manila, Philippines (Jan. 24, 2017) (transcript *available at* <http://www.asean2017.ph/speech-president-rodrigo-roa-duterte-asean-2017-committee-business-investment-promotion-launch/> (last accessed May 4, 2018)).

44. Burrone & Jaiya, *supra* note 40, at 11.

## II. INTELLECTUAL PROPERTY IN THE ASEAN ECONOMIC COMMUNITY

As the sectoral body of the ASEAN mandated to undertake cooperative activities in the field of IP,<sup>45</sup> the AWGIPC is composed of officials from the IP Offices of each AMS which are then tasked to coordinate on the implementation of initiatives formalized in regional IPR action plans.<sup>46</sup> The ASEAN Regional IPR Action Plans set out agreed-upon strategic goals and specific initiatives which are aligned to the overarching objectives of the AEC.<sup>47</sup>

In 2004, the work of the AWGIPC was based on the ASEAN IPR Action Plan 2004–2010. It was formulated to:

- (1) help accelerate the pace and scope of IP asset creation and commercialization inside and outside ASEAN, and the formation of domestic and cross-border linkages in [science and technology (S&T)] fields and [research and development] activities[;]
- (2) develop and harmonize an enabling IPR registration, protection[,] and enforcement framework of policies and institutions in the region[;]
- (3) promote greater public awareness, and build up human resources and institutions relating to IP and IPR in [the] ASEAN[; and]
- (4) further empower the national IP Offices in collaborative provision of [business development services] in support of the above objectives.<sup>48</sup>

When the realization of the ASEAN Community was accelerated to 2015, the AWGIPC was tasked to prepare a new work plan as part of the revised AEC 2015 blueprint.<sup>49</sup> As Chair of the AWGIPC during such time, the Philippines led the crafting and adoption of the ASEAN IPR Action

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45. ASEAN Intellectual Property Portal, About, *available at* <https://www.aseanip.org/About> (last accessed May 4, 2018).

46. *Id.*

47. Association of Southeast Asian Nations, Intellectual Property, *available at* <http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/intellectual-property/> (last accessed May 4, 2018) [hereinafter ASEAN Intellectual Property].

48. Association of Southeast Asian Nations, ASEAN Intellectual Property Rights Action Plan 2004–2010, *available at* [http://asean.org/?static\\_post=asean-intellectual-property-right-action-plan-2004-2010](http://asean.org/?static_post=asean-intellectual-property-right-action-plan-2004-2010) (last accessed May 4, 2018) [hereinafter ASEAN IPR Action Plan 2004–2010].

49. AEC 2025, *supra* note 25, B3, ¶ 45, i–v.



Plan 2011–2015.<sup>50</sup> This Action Plan was intended “to develop an ASEAN IP System that takes into account the different levels of capacity of the Member States, balances access to IP and protection of IPR, and responds to the current needs and anticipates future demands of the global IP system.”<sup>51</sup>

The culmination of ASEAN economic integration in 2015 then led to the crafting of a new ASEAN IPR Action Plan for 2016–2025,<sup>52</sup> aligned with the Post-2015 Vision of the ASEAN Community.<sup>53</sup> The new Action Plan was intended to build upon the work accomplished under the 2011–2015 Action Plan, and also to move forward with specific focus on strengthening regional economic integration.<sup>54</sup> The Action Plan provides for four strategic goals, namely:

- (1) A more robust ASEAN IP System is developed by strengthening IP [O]ffices and building IP infrastructures in the region;
- (2) Regional IP platforms and infrastructures are developed to contribute to enhancing the [AEC];
- (3) An expanded and inclusive ASEAN IP Ecosystem is developed; and
- (4) Regional mechanisms to promote asset creation and commercialization, particularly geographical indications and traditional knowledge, are enhanced.<sup>55</sup>

Throughout the years, each ASEAN IPR Action Plan has been more comprehensive, both in terms of depth and scope of coverage, than the last. This is because, as the IP regimes of the AMS evolve, so do global protection standards which are derived from simultaneously-evolving best

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50. See Thitapha Wattanaputtipaisan, ASEAN Cooperation in Intellectual Property Rights (IPRs), *available at* <http://www.aec.com.mm/download/ASEAN%20Intellectual%20Property%20Rights.pdf> (last accessed May 4, 2018).

51. Association of Southeast Asian Nations, ASEAN Intellectual Property Rights Action Plan 2011–2015 at 1.0, *available at* <https://www.aseanip.org/Portals/o/PDF/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf> (last accessed May 4, 2018) [hereinafter ASEAN IPR Action Plan 2011–2015].

52. Association of Southeast Asian Nations, ASEAN Intellectual Property Rights Action Plan 2016–2025: Meeting the Challenges of “One Vision, One Identity, One Community” through Intellectual Property at 2, *available at* [https://www.aseanip.org/Portals/o/ASEAN%20IPR%20ACTION%20PLAN%202016-2025%20\(for%20public%20use\).pdf?ver=2017-12-05-095916-273](https://www.aseanip.org/Portals/o/ASEAN%20IPR%20ACTION%20PLAN%202016-2025%20(for%20public%20use).pdf?ver=2017-12-05-095916-273) (last accessed May 4, 2018) [hereinafter ASEAN IPR Action Plan 2016–2025].

53. *Id.*

54. *Id.*

55. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 2.

practices.<sup>56</sup> The ubiquitous nature of IP has also resulted in its expanded relevance in terms of cross-cutting issues such as e-commerce, financial transactions, ease of doing business, and investment environments.<sup>57</sup>

As the roadmap, which represents the agreement of the AMS on what they envision the future state of IP in ASEAN to be, the Action Plans provide for quite a comprehensive list of regulatory, legal, policy, and stakeholder engagement aspects that are sought to be enhanced in the region.<sup>58</sup> These initiatives include the strengthening of the capacities of AMS in terms of IP administration and improving service delivery,<sup>59</sup> the establishment of regional platforms and mechanisms,<sup>60</sup> the expansion of the IP ecosystem through the engagement of other sectors,<sup>61</sup> and cross-cutting issues such as innovation, geographical indications, and traditional knowledge.<sup>62</sup>

### III. CONVERGENCE OF PRACTICES

As an integral component of regional integration, the AWGIPC's work is primarily focused on the convergence of regulatory practices on IPR, particularly in terms of patents, trademarks, industrial designs, and copyright.<sup>63</sup> Since the minimum standards of IP protection are already well-established in multilateral IP agreements, a logical first step is to assess the AMS' membership and compliance with such treaties.

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56. Christopher M. Kalanje, *Role of Intellectual Property in Innovation and New Product Development* (A Document Published by the World Intellectual Property Organization) at 2, available at [http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_innovation\\_development.pdf](http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_innovation_development.pdf) (last accessed May 4, 2018).

57. See, e.g., World Intellectual Property Organization, *Understanding How Intellectual Property (IP) Relates to E-Commerce*, available at [http://www.wipo.int/sme/en/e\\_commerce/ip\\_ecommerce.htm](http://www.wipo.int/sme/en/e_commerce/ip_ecommerce.htm) (last accessed May 4, 2018).

58. See generally ASEAN IPR Action Plan 2016-2025, *supra* note 52.

59. *Id.* at 4.

60. *Id.* at 5.

61. *Id.* at 6.

62. *Id.* at 5.

63. *Id.* at 3.

Among these international IP treaties, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>64</sup> provides for the most comprehensive set of commitments on the adoption of IP protection standards by Contracting Parties. It establishes minimum standards and principles regarding the availability, scope, and use of trade-related IPR;<sup>65</sup> but, while all AMS are members of the TRIPS Agreement,<sup>66</sup> compliance with its provisions remains varied. This is especially true for Least Developed Countries which are provided transition periods under Article 66 of the TRIPS Agreement.<sup>67</sup>

Preceding the TRIPS Agreement, the Paris Convention<sup>68</sup> also contains substantive provisions on the protection of industrial property, such as patents, trademarks, industrial designs, utility models, geographical indications, and the repression of unfair competition.<sup>69</sup> All AMS, except for Myanmar, are also members of the Paris Convention.<sup>70</sup>

In the realm of copyright, the Berne Convention<sup>71</sup> sets out minimum standards of protection relative to the works and rights to be protected, as

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64. Agreement on Trade-Related Aspects of Intellectual Property Rights, *opened for signature* Apr. 15, 1994, 1869 U.N.T.S. 233 [hereinafter TRIPS Agreement].

65. *Id.* arts. 9-40.

66. See World Intellectual Property Organization, Contracting Parties/Signatories to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), *available at* [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22) (last accessed May 4, 2018).

67. The World Trade Organization (WTO), which administers the TRIPS Agreement, recognizes the Least-Developed Countries (LDCs) as designated by the United Nations. TRIPS Agreements, *supra* note 64, art. 66, ¶ 1. In ASEAN, LDCs include Cambodia, Laos, and Myanmar (or CLM). United Nations Committee for Development Policy, Development Policy and Analysis Division, Department of Economic and Social Affairs, List of Least Developed Countries as of June 2017, *available at* [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc\\_list.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf) (last accessed May 4, 2018).

68. Paris Convention for the Protection of Industrial Property, *entered into force* Sep. 27, 1965, 828 U.N.T.S. 305.

69. *Id.*

70. See World Intellectual Property Organization, Total Contracting Parties — Paris Convention-Stockholm Act, *available at* [http://www.wipo.int/treaties/en/ActResults.jsp?act\\_id=31](http://www.wipo.int/treaties/en/ActResults.jsp?act_id=31) (last accessed May 4, 2018).

71. Berne Convention for the Protection of Literary and Artistic Works, *entered into force* Aug. 1, 1951, 1161 U.N.T.S. 3.

well as the duration of protection.<sup>72</sup> Almost all AMS are members of the Berne Convention, except for Cambodia and Myanmar.<sup>73</sup> However, in the matter of related rights or neighboring rights, there are fewer consensuses among the AMS on the appropriate rights to be granted to performers, phonogram producers, and broadcasting organizations, as only the Philippines and Vietnam are members of the Rome Convention.<sup>74</sup>

The above state of the membership of the AMS in the major IP treaties provides for a general overview of the prospects for convergence in terms of adopting harmonized IP standards in ASEAN. However, since the adoption of these treaties, subsequent agreements and multilateral frameworks which go beyond minimum standards for the grant of IPR have already been developed. An increasing trend in the modern IP agreements is the establishment of international platforms that facilitate seeking protection in multiple jurisdictions, such as through the standardization of formality requirements for certain IPR and the sharing of examination results which avoid duplication of work.<sup>75</sup> International agreements have gone into the realm of regulatory and administrative procedures,<sup>76</sup> and these represent the next step of regional IP convergence for the AMS. Nevertheless, it should also be emphasized that membership in international agreements is not an end in itself, as accession to a treaty does not guarantee uniform or effective implementation. Thus, the AWGIPC also undertakes cooperation activities between the AMS themselves and with its Dialogue Partners, specifically on

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72. *Id.* arts. 5 & 7.

73. See World Intellectual Property Organization, Total Contracting Parties — Berne, available at [http://www.wipo.int/treaties/en/ActResults.jsp?act\\_id=26](http://www.wipo.int/treaties/en/ActResults.jsp?act_id=26) (last accessed May 4, 2018).

74. See Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting organizations, *opened for signature* Oct. 26, 1961, 496 U.N.T.S. 43 & World Intellectual Property Organization, Total Contracting Parties — Rome Convention, available at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17) (last accessed May 4, 2018).

75. See generally Raymundo Valdés & Maegan McCann, Intellectual Property Provisions in Regional Trade Agreements: Revision and Update (A Staff Working Paper Published by the World Trade Organization, Economic Research and Statistics Division), available at [https://www.wto.org/english/res\\_e/reser\\_e/ersd201414\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201414_e.pdf) (last accessed May 4, 2018).

76. *Id.* at 5.

information and best practices sharing, exchange of technical experts, and human resources development and capacity-building.<sup>77</sup>

In a research survey conducted by the Economic Research Institute for ASEAN and East Asia (ERIA) in 2013, multinational corporations (MNCs) from Japan, China, South Korea, the US, and the EU were asked about the issues and concerns they face regarding the IP systems in the ASEAN countries.<sup>78</sup> The purpose of the study was to determine the general factors related to IP that MNCs consider in investing or locating their businesses in the region.<sup>79</sup> The study was intended to provide political recommendations for the improvement of the IP systems in ASEAN, with a view to promoting foreign direct investment (FDI) in the region.<sup>80</sup>

The results of the research provided important insights on the motivations for FDI, including that “IP-related issues are not usually critical factors before expanding to ASEAN countries, but they are perceived as major problems after expansion.”<sup>81</sup> Among the business concerns before expansion into the region, the costs of obtaining IPR and the lengthy process to secure such protection were considered as primary areas for administrative improvement.<sup>82</sup> The availability and effectiveness of legal remedies for immediate IPR enforcement were also concerns raised by the MNCs,<sup>83</sup> together with the lack of a well-structured IP-related information system that could provide transparency and greater predictability in IP administration procedures.<sup>84</sup> Finally, harmonization of IP examination systems was considered as an important factor for businesses.<sup>85</sup>

In many ways, the work of the AWGIPC, especially under the ASEAN IPR Action Plan 2011-2015 and 2016-2025, seeks to address the concerns

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77. ASEAN Intellectual Property Portal, *supra* note 45.

78. See Economic Research Institute for ASEAN and East Asia, Reforming the Intellectual Property System to Promote Foreign Direct Investment in ASEAN (ERIA Research Project Report 2013-16) at 4-6, available at <http://www.eria.org/ERIA-RPR-FY2013-16.pdf> (last accessed May 4, 2018) [hereinafter ERIA Research Project Report].

79. *Id.* at 1-4.

80. *Id.* at 4.

81. *Id.* at xviii.

82. *Id.* at xix.

83. *Id.* at xviii.

84. ERIA Research Project Report, *supra* note 78, at 166.

85. *Id.* at 191.

which were highlighted in the ERIA study.<sup>86</sup> Although the initiatives contained in the Action Plans are the outcomes of agreements by the AWGIPC members, and are not necessarily the product of the ERIA study, the research does provide quantitative data to support the necessity of undertaking such initiatives.

As outlined below, initiatives related to the convergence of practices on IPR therefore revolve around the themes of harmonization through membership in international filing systems and treaties, strengthening capacities of IP regulators so that the quality of IP administration in the region would be elevated, establishing information systems to promote transparency in IP procedures, and coordinated efforts to enhance the IPR enforcement system in the region, consistent with the issues and concerns of the IP stakeholders in the region.

#### *A. Patents*

##### 1. Approximation and Convergence of Patent Practices

In the matter of patents, accession by the AMS to the Patent Cooperation Treaty (PCT)<sup>87</sup> is one of the initiatives under the ASEAN IPR Action Plan, starting from the 2004-2010 Action Plan, which was later carried over to the 2011-2015 and 2016-2025 Action Plans.<sup>88</sup> The PCT provides for an international framework by which a person seeking patent protection could file a single international application which has the effect of filing national applications in multiple countries.<sup>89</sup> Nine AMS are members of the PCT, with Myanmar planning to accede upon passage of its domestic IP legislation.<sup>90</sup> As an agreement that seeks to provide a simplified and more economical mechanism through which patent protection could be secured across several jurisdictions,<sup>91</sup> the PCT presents various advantages for ASEAN stakeholders. Aside from encouraging ASEAN inventors to protect

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86. See generally ASEAN IPR Action Plan 2011-2015, *supra* note 51 & ASEAN IPR Action Plan 2016-2025, *supra* note 52.

87. Patent Cooperation Treaty, *ratified* Feb. 5, 2001, 9 I.L.M. 978 [hereinafter PCT].

88. See ASEAN IPR Action Plan 2004-2010, *supra* note 48.

89. PCT, *supra* note 87, ch. I.

90. See World Intellectual Property Organization, Total Contracting Parties — Patent Cooperation Treaty, *available at* [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=6](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=6) (last accessed May 4, 2018).

91. PCT, *supra* note 87, pmbl.

their inventions worldwide due to the ease and economy of obtaining patent protection, the PCT system also benefits the AMS by providing more opportunities for inbound technology transfer and the development of new domestic technology-based industries, royalties income from technology exports, and increased participation in the patent system which raises the quality of IP administration work by the patent offices.<sup>92</sup> In fact, two AMS have already been designated as International Search Authority and International Preliminary Examination Authorities (ISA/IPEA) under the PCT system, namely Singapore and the Philippines. This is in light of their strong institutional capacities to carry out the work of search and examination of patents. Since 2000, almost 15,000 PCT applications have originated from ASEAN countries and were filed in the 152 Contracting States to the treaty.<sup>93</sup> These circumstances show the elevated status of some AMS as global players in the international patent system.

Aside from membership in the international agreements relative to patents, the AMS have also undertaken measures to improve the quality of IP administration in the region by establishing enhanced service delivery platforms, such as the ASEAN Patent Examination Cooperation (ASPEC) Programme.<sup>94</sup> The ASPEC Programme aims to reduce the duplication of search and examination procedures among the AMS' patent offices by providing for an expedited procedure and work-sharing mechanism.<sup>95</sup> Under ASPEC, a patent applicant who has already filed an application in one AMS, and desires to also file in other AMS,<sup>96</sup> would enjoy substantial time and cost savings. ASPEC applications are prioritized by the AMS' patent offices and are advanced out of turn until grant.<sup>97</sup> Search and examination

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92. See Rajeev Ranjan, *PCT System and Its Impact on the Developing Countries*, 8 J. INTELL. PROP. RTS. 50, 57 (2003).

93. This is based on statistics from the WIPO IP Statistics Data Center, on the total number of Patent Cooperation Treaty (PCT) applications by filing date, from the years 2000 to 2017, originating from the 10 ASEAN Member States (AMS). These statistics may be accessed through the WIPO IP Statistics Data Center Search Engine. World Intellectual Property Organization, WIPO IP Statistics Data Center, *available at* <https://www3.wipo.int/ipstats/index.htm> (last accessed May 4, 2018) [hereinafter WIPO IP Statistics Data Center].

94. Participating ASEAN Member States Intellectual Property Offices, ASEAN Patent Examination Cooperation (ASPEC), *available at* [http://asean.org/storage/2017/12/6a.-May-2017-ASPEC-English\\_email1.pdf](http://asean.org/storage/2017/12/6a.-May-2017-ASPEC-English_email1.pdf) (last accessed May 4, 2018) [hereinafter ASPEC Programme].

95. *Id.*

96. *Id.* All AMS except Myanmar are participating IP Offices in the ASPEC Programme. *Id.*

97. *Id.*

are also expedited because examiners in the subsequent IP Offices could refer to the results of the earlier search and examination conducted by the office of first filing.<sup>98</sup> ASPEC applicants also save on translation costs, as the program operates in the English language in all participating AMS IP Offices.<sup>99</sup> Under the 2016–2025 ASEAN IPR Action Plan, the continued implementation of the ASPEC program falls under the strategic goal of developing a more robust ASEAN IP system.<sup>100</sup>

## 2. Improved Patent Administration Capacities and Procedures

To be successful in encouraging for an increase in the number of ASPEC applicants and usage of the program, there is, however, a need to address some of the challenges posed by the work-sharing framework. Although there are tremendous benefits in the program as a kind of replacement for a harmonized patent system, the AMS' national IP Offices have different capacities in terms of search and examination, which also affects the trust accorded by other IP Offices in their outputs.<sup>101</sup> Since some AMS have stronger patent examination systems — in terms of the training, search tools, experience, and expertise of their examiners — examination search results emanating from such IP Offices are given more credence than those from other IP Offices. Since the reference or reliance by the second IP office's patent examiner to the results of the first IP office's examination is not mandatory,<sup>102</sup> it has been noted that the effectiveness and expediency of applications filed under ASPEC is not always guaranteed.<sup>103</sup>

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98. ASPEC Programme, *supra* note 94.

99. *Id.* See also Intellectual Property Office of the Philippines, Annex: Overview of the Requirement, Procedures and Services at the Participating AMS IP Offices in Relation to the ASPEC Programme, available at [http://ipophil.gov.ph/images/Patents/Annex\\_-\\_Table\\_on\\_the\\_ASPEC\\_Requirements\\_and\\_Procedures\\_in\\_AMS\\_IP\\_Offices\\_30April2012.pdf](http://ipophil.gov.ph/images/Patents/Annex_-_Table_on_the_ASPEC_Requirements_and_Procedures_in_AMS_IP_Offices_30April2012.pdf) (last accessed May 4, 2018).

100. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 3.

101. See ALEXANDER DEGELSGER, ET AL., ASEAN ECONOMIC COMMUNITY AND INTELLECTUAL PROPERTY RIGHTS: AN ASSESSMENT OF FRAMEWORK CONDITIONS FOR INNOVATION 3 (1st ed. 2016).

102. See, e.g., Intellectual Property Office of the Philippines, Amended Rules of Procedure or the ASEAN Patent Examination Cooperation (ASPEC) Program, Office Order No. 13–124, Series of 2013, § 7 (July 15, 2013).

103. DEGELSGER, ET AL., *supra* note 101, at 58.



These challenges are being addressed by the extensive efforts of the AMS to capacitate their patent examiners and build up their examination competencies. One example is the Regional Patent Examination Training (RPET) Program<sup>104</sup> under the auspices of the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) Economic Cooperation Support Program.<sup>105</sup> RPET is an intensive 600-hour training program that spans two years, and targets the patent examiners of AMS, who conduct patent search and examination work based on international PCT standards.<sup>106</sup> The training program seeks to improve the quality standards of ASEAN patent examination,<sup>107</sup> and boasts of one-on-one mentoring with an experienced examiner from IP Australia,<sup>108</sup> as well as the use of modern e-learning technologies.<sup>109</sup> To ensure the sustainability of the capacity-building program, RPET graduates have been engaged to become mentors themselves of their national IP office colleagues, through the RPET Mentoring (RPEM) program.<sup>110</sup> The foregoing initiatives on patent administration also pave the way for building a Community of Practice network, led by the ASPEC Task Force, among the patent examiners of the ASEAN national patent offices and those of the ASEAN Dialogue Partners.

### 3. Enhanced Transparency and Access to Patent Information

On the other hand, the AWGIPC has also undertaken the establishment of regional patent platforms that not only foster transparency, but also serve as important patent reference tools for inventors, researchers, and other IP

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104. See generally ASEAN-Australia-New Zealand FTA Economic Cooperation Work Program & World Intellectual Property Organization, Regional Patent Examination Training (RPET): Program Overview and Syllabus, *available at* [http://www.wipo.int/edocs/mdocs/pct/en/pct\\_mia\\_21/pct\\_mia\\_21\\_www\\_267898.pdf](http://www.wipo.int/edocs/mdocs/pct/en/pct_mia_21/pct_mia_21_www_267898.pdf) (last accessed May 4, 2018) [hereinafter RPET Program Overview and Syllabus].

105. *Id.* See also Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (with annexes), *opened for signature* Feb. 27, 2009, 2672 U.N.T.S. 3 [hereinafter AANZFTA].

106. AANZFTA, *supra* note 105.

107. *Id.* at 17.

108. *Id.* at 2.

109. *Id.* at 6.

110. See ASEAN-Australia-New Zealand Free Trade Area, Improving the Quality Standards of ASEANs Patent Examination based on International Standards and Best Practices, *available at* <http://aanzfta.asean.org/improving-the-quality-standards-of-aseans-patent-examination-based-on-international-standards-and-best-practices/> (last accessed May 4, 2018).

stakeholders. The ASEAN Patentscope<sup>111</sup> is an online platform where technological information is made available to the public through online access to published patent information and data in the region.<sup>112</sup> In partnership with the World Intellectual Property Organization (WIPO),<sup>113</sup> the platform offers free access to hundreds of thousands of ASEAN patent documents with searchable functionalities, such as bibliographic data search, patent family data, multilingual support, and translations in national languages, among others.<sup>114</sup>

Another initiative under the ASEAN IPR Action Plan 2016–2025 that serves as an important step towards regional harmonization of patent administration is the crafting of the ASEAN Common Guidelines on Patent Examination.<sup>115</sup> The Common Guidelines is being crafted pursuant to the Action Plan initiative on identifying the similarities and differences in practices on patent administration in the AMS.<sup>116</sup> The results of this initiative will then be developed into a reference guide on the common principles of examination that will be adopted by the ASEAN IP Offices.<sup>117</sup> The objective of the Common Guidelines is to enhance the quality and transparency in the examination of patents across ASEAN.<sup>118</sup> Once finalized, the Common Guidelines could have the effect of focusing the practices of the AMS' patent offices to enable a higher level of consistency in the decisions of examiners, enhance the quality of examination results through the sharing and adoption of ASEAN-wide best practices, and also provide a

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111. See Association of Southeast Asian Nations, ASEAN Patentscope, *available at* <http://ipsearch.aseanip.org/> (last accessed May 4, 2018). The ASEAN PATENTSCOPE project was initiated by the ASPEC Task Force in 2012 and endorsed by the AWGIPC in 2015 in order to enhance regional collaboration on research and development activities and to encourage technological development among ASEAN countries. *Id.*

112. ASEAN Intellectual Property Portal, Public Rollout of ASEAN PATENTSCOPE Service, *available at* <https://www.aseanip.org/News-Events/Latest-News-Events/ctl/Details/mid/1956/aid/52> (last accessed May 4, 2018).

113. *Id.*

114. *Id.*

115. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 3.

116. *Id.*

117. *Id.*

118. *Id.*

sense of predictability in the examination procedures for prospective patent applicants.

## B. Trademarks

### 1. Approximation and Convergence of Trademark Practices

Akin to the PCT for patents, the Madrid Protocol<sup>119</sup> provides for a simplified and cost-effective system for the registration of trademarks in multiple jurisdictions.<sup>120</sup> Under the Madrid Protocol, trademark owners from a Contracting Party doing or seeking to do business in foreign markets will have access to a global mechanism that allows the filing of multiple trademark applications in different countries, through a single Madrid Protocol application.<sup>121</sup> For the AMS, participation in the Protocol system aligns their trademark filing procedures with those of the other AMS, as well as the region's major trading partners. There may also be increased incentives for foreign trademark owners to invest in the region as they explore new markets, since they can be assured of IP protection for their brands in the region. To date, almost all AMS have already acceded to the Madrid Protocol, with Malaysia and Myanmar planning accession upon completion of their domestic procedures and enactment of the IP legislation.<sup>122</sup> From 2000 to 2017, 4,800 applications under the Madrid Protocol have been filed by nationals or residents of the ASEAN Member States,<sup>123</sup> which show the high usage of the system in light of its benefits and advantages for trademark owners.

### 2. Improved Trademark Administration Capacities and Procedures

To build up the examination capabilities of the trademark examiners in the AMS' IP Offices, cooperation activities are also being undertaken in the region in terms of training and sharing of examination best practices. In

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119. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, *adopted* June 27, 1989, 828 U.N.T.S 389 [hereinafter Madrid Protocol].

120. *Id.* arts. 3 & 4.

121. *Id.* art. 5ter.

122. World Intellectual Property Organization, Total Contracting Parties — Madrid Protocol, *available at* [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=8](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=8) (last accessed May 4, 2018).

123. This is based on statistics from the WIPO IP Statistics Data Center, on the total number of PCT applications by filing date, from the years 2000 to 2017, originating from the 10 AMS. See WIPO IP Statistics Data Center, *supra* note 93.

partnership with the European Union IP Office (EUIPO) through the EU-ASEAN Project on the Protection of Intellectual Property Rights Phase III (ECAP III),<sup>124</sup> and the AANZFTA Economic Cooperation Support Program,<sup>125</sup> pre-accession activities and training for examiners of IP Offices who have yet to join the Madrid Protocol system have been undertaken, as well as post-accession training for examiners in AMS which are already Madrid members. In both cases, the initial focus on trademark examination practices eventually developed into establishing the groundwork needed to set-up the organizational structure of the examining unit and efficiently operationalizing the system upon accession. Mentoring and on-the-job training programs were also conducted by IP Offices with experience in implementing the Madrid Protocol, with trademark examiners from IP Offices who were in the process of accession. In addition, awareness-raising activities were also conducted for potential and existing Madrid Protocol stakeholders, such as IP practitioners, the business sector, and Small and Medium Enterprises (SMEs), apart from government officials.

### 3. Enhanced Transparency and Access to Trademark Information

To complement the efforts to simplify the filing procedures and requirements across the region, the AWGIPC, through the Task Force on Trademarks, has also completed the work on the ASEAN Common Guidelines for the Substantive Examination of Trademarks.<sup>126</sup> The Common Guidelines sets out the common trademark examination practices observed by the AMS, and cites examples of actual cases and examined applications in order to illustrate the implementation of national trademark regulations.<sup>127</sup> This is meant to address the need for clarity and transparency on the standards of examination in ASEAN, especially for businesses seeking more IP information in their decision-making process for investing in the

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124. EU-ASEAN Project on the Protection of Intellectual Property Rights Phase III, About ECAP III, *available at* <http://www.ecap3.org/about/ecap-iii-phase-ii> (last accessed May 4, 2018).

125. *See* AANZFTA Economic Cooperation Support Program, AANZFTA Economic Cooperation Support Program Economic Cooperation Support Program (AECSP) at a Glance, *available at* [http://anzfta.asean.org/wp-content/uploads/2017/06/AECSP-At-A-Glance-Highlights-of-Key-Activities\\_AECSP-Communications-Package\\_2017.pdf](http://anzfta.asean.org/wp-content/uploads/2017/06/AECSP-At-A-Glance-Highlights-of-Key-Activities_AECSP-Communications-Package_2017.pdf) (last accessed May 4, 2018).

126. ASEAN SECRETARIAT, COMMON GUIDELINES FOR THE SUBSTANTIVE EXAMINATION OF TRADEMARKS (1st ed. 2017).

127. *Id.*

region.<sup>128</sup> Although some divergence remains in the national trademarks laws of the AMS, the development of the Common Guidelines is intended to stimulate harmonization of the examination standards in the region.<sup>129</sup> Nevertheless, as examination practices are continuously evolving, the Common Guidelines is meant to be a living document, and part of the ASEAN Action Plan initiatives is to regularly update the document through the Trademarks Task Force.<sup>130</sup>

The AWGIPC has also established trademark-related IT tools that aim to assist trademark filers in the region. The ASEAN TMclass<sup>131</sup> is an online database that contains the terms accepted by the AMS' IP Offices for the identification of goods and services in the corresponding trademark applications.<sup>132</sup> The tool enables trademark owners to search for the correct classification of their goods and services in accordance with the Nice Agreement,<sup>133</sup> an international treaty concerning the standardized classification of goods and services for the purpose of registering trademarks and service marks.<sup>134</sup> This would assist trademark filers in preparing their applications to cover the exact goods or services they intend, with the assurance that these terms will be accepted by the concerned IP office. The database also provides for search functionalities to ensure correctness of the terms, as well as translations to get the equivalent of those terms in the working language of the IP office.<sup>135</sup>

Another tool providing better access to trademark information in the region is the ASEAN TMview,<sup>136</sup> an online database that makes ASEAN trademark information accessible to the public.<sup>137</sup> The database contains

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128. *Id.*

129. *Id.*

130. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 3.

131. ASEAN TMclass, About, available at <http://www.asean-tmclass.org/ec2/> (last accessed May 4, 2018) [hereinafter ASEAN TMclass]. ASEAN TMclass is an online, multi-lingual, consultation tool offering free-of-charge access to a database of terms accepted by the participating ASEAN IP Offices as suitable to identify goods and services for the purposes of the registration of marks. *Id.*

132. *Id.*

133. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, *entered into force* Sep. 6, 1986, 550 U.N.T.S. 45.

134. *Id.* art. 1.

135. *Id.* art. 1, ¶ 6.

136. ASEAN TMview, About, available at <http://www.asean-tmview.org/tmview/welcome> (last accessed May 4, 2018).

137. *Id.*

information on trademark registrations and applications having effects in all AMS, except Myanmar, together with the bibliographic details and status of each application and registration.<sup>138</sup> As a free online tool, the platform is an important source of information on the trademark landscape in the region, and enables stakeholders to verify trademark information, such as on the covered products or services; to conduct a preliminary check for available trademarks; and to monitor the statuses of their own registrations.<sup>139</sup> The participating AMS directly and regularly upload their trademark information into the system, thereby making it accurate and up-to-date. The ASEAN TMclass and ASEAN TMview platforms were developed with the support of the EUIPO under the ECAP III Program, but the maintenance of the databases is now being undertaken by the AMS themselves. To date, there are more than 3.6 million trademark documents contained in the ASEAN TMview database,<sup>140</sup> and more than 33,000 terms in the ASEAN TMclass database.<sup>141</sup>

### C. Industrial Designs

#### I. Approximation and Convergence of Industrial Design Practices

In the field of industrial designs, there appears to be less participation by the AMS in international treaties, as only three AMS<sup>142</sup> are members of the Hague Agreement Concerning the International Registration of Industrial Designs (Hague Agreement).<sup>143</sup> Similar to the Madrid Protocol for trademarks and the PCT for patents, the Hague Agreement is an international registration system which offers the possibility of filing a single international application and seeking protection in multiple countries that are members of such Agreement.<sup>144</sup> In the same manner as the international

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138. *Id.*

139. *Id.*

140. *Id.*

141. ASEAN TMclass, *supra* note 131.

142. See World Intellectual Property Organization, Total Contracting Parties — Hague Agreement–Geneva Act, *available at* [http://www.wipo.int/treaties/en/ActResults.jsp?act\\_id=7](http://www.wipo.int/treaties/en/ActResults.jsp?act_id=7) (last accessed May 4, 2018).

143. Hague Agreement Concerning the International Registration of Industrial Designs, *concluded* Feb. 7, 1999, 2279 U.N.T.S. 156.

144. World Intellectual Property Organization, Hague Guide for Users: Guide to the International Registration of Industrial Designs at 11, *available at*

applications for trademarks and patents are processed, the Hague system merely facilitates the filing of an application, and any substantive aspects of protection of such industrial designs are subject to the domestic legislation of each designated country.<sup>145</sup> These include the principles and standards of examination, particularly as to whether an IP office conducts a substantive examination of design applications.<sup>146</sup> Nevertheless, accession to the Hague Agreement is a regional initiative identified under the ASEAN IPR Action Plan,<sup>147</sup> as it also poses advantages for design owners originating from the AMS which wish to protect their designs abroad, as well as those filers seeking to enter the ASEAN market. Efforts at the regional level continue to raise awareness on the Hague system, but, to date, there have only been 100 international applications filed by industrial design owners who are nationals or residents of the 10 AMS.<sup>148</sup> Perhaps with the future increased membership of the AMS in the Hague Agreement, these filings would also improve as more ASEAN design owners take advantage of the ease of protecting their designs globally.

## 2. Enhanced Transparency and Access to Industrial Design Information

Parallel efforts in terms of identifying the differences and similarities in the examination of applications are also being undertaken by ASEAN in the field of industrial designs. In this regard, work on the ASEAN Common Guidelines on Designs<sup>149</sup> is near conclusion, as a result of regional design workshops and consultation meetings with the design experts of all AMS that have been conducted since 2013, in partnership with the EUIPO under the ECAP III Program. Among the AMS, there appears to be some divergence in industrial design practices, as some countries conduct substantive examinations of design applications, while others only conduct formality examinations. Like the Common Guidelines on Trademarks, the Design Guidelines is meant to supplement the current internal regulations on examination adopted by each AMS, and is therefore not binding since the decision on individual applications remains subject to the determination of

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[http://www.wipo.int/export/sites/www/hague/en/guide/pdf/hague\\_guide.pdf](http://www.wipo.int/export/sites/www/hague/en/guide/pdf/hague_guide.pdf)  
f (last accessed May 4, 2018).

145. *Id.* at 103.

146. *Id.* at 13.

147. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 4.

148. This is based on statistics from the WIPO IP Statistics Data Center, on the total number of PCT applications by filing date, from the years 2000 to 2017, originating from the 10 AMS. See WIPO IP Statistics Data Center, *supra* note 93.

149. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 3.

each IP office.<sup>150</sup> Nevertheless, the Guidelines may serve as an important reference document, and could be the basis for training and capacity-building on designs administration not only for ASEAN IP Offices, but also for design owners and IP practitioners.

As the design counterpart of the ASEAN TMview platform, the ASEAN Designview<sup>151</sup> is also an online platform containing published information on the industrial design applications and registrations of all AMS except Myanmar.<sup>152</sup> For IP stakeholders in and out of the region, the platform is a convenient tool for checking the “state of design” in ASEAN, identifying the owners of designs which may be the subject of licensing agreements, conducting due diligence searches, monitoring the status of their own applications or validity of their registrations, and serving as a reference for verifying conflicting designs.<sup>153</sup> To date, there are more than 162,000 design documents available in the ASEAN Designview database, and the AMS regularly upload their respective published design data in the platform.<sup>154</sup>

#### *D. Copyright and Related Rights*

##### *I. Approximation and Convergence of National Copyright Regimes*

Tracing the history of ASEAN IP Cooperation, as discussed above, regional programs on copyright developed later than the initiatives on trademarks and patents. Whereas exploring the possibility of ASEAN patent and trademark systems was already set out in the ASEAN Framework Agreement on IP Cooperation of 1995,<sup>155</sup> copyright information exchange and enforcement had only been included in the recommendations of the High-Level Task Force on ASEAN Economic Integration as adopted in the Bali Concord II of 2003.<sup>156</sup> Taken in light of the well-established principle that copyright protection does not depend on any formalities or administrative procedures,

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150. World Intellectual Property Organization, *supra* note 144, at 103.

151. ASEAN Designview, About, available at <http://www.asean-designview.org/designview/welcome#> (last accessed May 4, 2018).

152. *Id.*

153. South-East Asia IPR SME Helpdesk, How to Guide on ASEAN Designview, available at [http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/How\\_to\\_Designview.pdf](http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/How_to_Designview.pdf) (last accessed May 4, 2018).

154. ASEAN Designview, *supra* note 151.

155. ASEAN Framework Agreement, *supra* note 8.

156. Bali Concord II, *supra* note 12.



regional cooperation on copyright was thus focused on updating national regimes through accession to copyright treaties, addressing enforcement issues, and exchanging information on best practices for collective management.

In this regard, several international agreements have emerged relating to copyright and related rights, but ASEAN membership thereto has not been as immediate. These agreements include the WIPO Copyright Treaty (WCT)<sup>157</sup> and the WIPO Performance and Phonograms Treaty (WPPT).<sup>158</sup> Both treaties were intended to “update and supplement the major existing WIPO treaties on copyright and related rights, namely the Berne Convention and the Rome Convention, primarily in order to respond to developments in technology and in the marketplace.”<sup>159</sup>

To achieve this objective, the treaties require Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures used by authors, performers or producers of phonograms to restrict unauthorized acts, as well as against the alteration of rights management information of such rights holders.<sup>160</sup> Although only five AMS<sup>161</sup> are members of the two agreements collectively termed as the WIPO Internet Treaties, at least some of the AMS which have not yet acceded do apparently have national legislation that implements their provisions to some degree.<sup>162</sup> In this regard, the

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157. World Intellectual Property Organization Copyright Treaty, *opened for signature* Dec. 20, 1996, 36 I.L.M. 65.

158. World Intellectual Property Organization Performances and Phonograms Treaty, *opened for signature* Dec. 20, 1996, 36 I.L.M. 76.

159. International Bureau of WIPO, The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (A Document Prepared by the International Bureau of WIPO), *available at* [http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages\\_wct\\_wppt.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf) (last accessed May 4, 2018).

160. *Id.* at 3.

161. See World Intellectual Property Organization, WIPO Copyright Treaty (Total Contracting Parties: 96), *available at* [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16) (last accessed May 4, 2018) & World Intellectual Property Organization, WIPO Performances and Phonograms Treaty, Status on January 15, 2018, *available at* <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wppt.pdf> (last accessed May 4, 2018).

162. Michael Schlesinger, TPMs: Treaties Requirements and ASEAN Member Implementation (Presentation at the ASEAN-USPTO Symposium on Digital Copyright Issues), *available at* <http://www.asean.org/uploads/archive/21391-1.pdf> (last accessed May 4, 2018).

AANZFTA also provides that each Contracting Party shall endeavor to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”<sup>163</sup>

More recent international agreements regarding copyright and related rights may also have an impact on the national copyright regimes of the AMS, such as the Marrakesh Treaty<sup>164</sup> which provides for copyright limitations and exceptions in favor of the blind, visually-impaired, or otherwise print-disabled,<sup>165</sup> and the Beijing Treaty<sup>166</sup> which provides for substantive rights for performers of audiovisual works.<sup>167</sup> However, since only the Marrakesh Treaty has entered into force,<sup>168</sup> it may take time for the AMS to determine the appropriateness of acceding to the treaties or adopting their provisions into domestic legislation.

## 2. Establishment of Regional Copyright Networks

Under the ASEAN IPR Action Plan 2016-2025, a new initiative on the establishment of an ASEAN Copyright Notifications/Recordation Network will also be undertaken by the AWGIPC.<sup>169</sup> Although the parameters and mechanisms for implementation of the new initiative have not yet been publicized, regional recordation could pose various benefits for ASEAN’s copyright stakeholders, users, and creators alike. A regional copyright recordation database, as a first step, could be a useful tool for identifying the ownership of recorded works for the purpose of entering into licensing agreements. The platform could also provide useful information on the subsistence of copyright protection, and, possibly, the identification of works whose terms of protection had already lapsed into public domain. Similar to the ASEAN TMview and Designview databases, a copyright database could

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163. AANZFTA, *supra* note 105, ch. 13, art. 5, ¶ 2 (b).

164. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, *opened for signature* June 27, 2013, 52 I.L.M. 1309.

165. *Id.* art. 12.

166. Beijing Treaty on Audiovisual Performances, June 24, 2012, 51 I.L.M. 1211.

167. *Id.* arts. 5-12.

168. See World Intellectual Property Organization, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled Entry into Force, Marrakesh Notification No. 21, *available at* [http://www.wipo.int/treaties/en/notifications/marrakesh/treaty\\_marrakesh\\_21.html](http://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_21.html) (last accessed May 4, 2018).

169. ASEAN IPR Action Plan 2016-2025, *supra* note 52, at 3.

also assist enterprises doing due diligence work in relation to the acquisition of IP assets or corporate mergers, and even provide valuable information on the chain of transfer. Such a database could also serve as an additional incentive for more copyright owners to deposit their copyrighted works, which may indirectly help in disseminating the content of such works.

### 3. Promoting Collective Management Best Practices

The existence and functioning of Collective Management Organizations (CMOs) serve the important purpose of enabling copyright owners to administer their rights in an efficient and cost-effective manner, so that they are able to reap the full economic benefits of their creations.<sup>170</sup> CMOs, therefore, play a critical role in driving the underlying principle of the copyright system, that is, spurring creativity by incentivizing creators.<sup>171</sup> Moreover, CMOs provide an important service to users of copyrighted works by facilitating licensing arrangements for multiple works and/or copyright owners, thereby also benefitting the public.<sup>172</sup> Thus, ensuring the efficient and effective operation of collecting societies designated by copyright holders to exercise and enforce their economic or moral rights on their behalf is also a key element of improving the copyright regime in the region.<sup>173</sup>

Under the AANZFTA, parties to the Agreement, including the AMS, commit to “foster[ing] the establishment of appropriate bodies for the collective management of copyright and encourage such bodies to operate in a manner that is efficient, publicly transparent[,] and accountable to their members.”<sup>174</sup> The IPR Action Plan 2016–2025, therefore, provides for an initiative to promote excellence in the operations of CMOs, particularly in terms of transparency, accountability, and governance.<sup>175</sup> This initiative involves the increased participation of ASEAN in WIPO’s programs targeted for the creation of international quality assurance standards for such organizations.<sup>176</sup> For the IP Offices regulating CMOs, it would also entail

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170. Zhiqin Wu, A Legal Framework for Global Joint Copyright Management in Musical Works – Based on Rawls’s Theory of Justice, at 19 (July 2017) (published Ph.D. thesis, Lancaster University) (*available at* <http://eprints.lancs.ac.uk/88950/1/2017ZhiqinWuPhD.pdf> (last accessed May 4, 2018)).

171. *Id.* at 11.

172. *Id.* at 3.

173. *Id.* at 63.

174. AANZFTA, *supra* note 105, ch. 13, art. 5, ¶ 1 (c).

175. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 4.

176. *Id.*

developing a set of best practices or guidelines for the certification or accreditation of CMOs in the region.<sup>177</sup>

Despite some divergence in the nature of CMOs throughout the AMS, there is, nevertheless, widespread agreement that the efficient functioning of CMOs would promote creativity in the region by ensuring that copyright holders directly enjoy the economic benefits of copyright protection. To promote CMO effectivity, there are, however, some challenges that must be addressed by the AMS.<sup>178</sup> These include the reality that well-functioning collecting societies do not exist in all AMS, and that, in some countries where they do exist, the organizations are purely private undertakings in which there is no government intervention.<sup>179</sup> There have also been arguments raised that, in some jurisdictions, the operation of CMOs would more likely favor more popular foreign copyright owners who get a bigger share of the royalty proceeds compared to their local counterparts.<sup>180</sup>

For other countries, governments take a more proactive role in facilitating the execution of cross-border partnerships and agreements between CMOs to ensure that royalty payments for foreign artists or copyright owners would be efficiently remitted. Still, for other jurisdictions, copyright — as with any IP right — is a private right and, therefore, its enforcement should remain a private undertaking with no government intervention.<sup>181</sup> In any case, as earlier noted, copyright cooperation activities in ASEAN remain to be a work in progress at this time. It would, therefore, be interesting to see how these challenges would be overcome by the AMS as the modalities of cooperation on CMOs become more concrete.

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177. *Id.*

178. Carolyn Deere Birkbeck, *The Politics of Intellectual Property Reform in Developing Countries*, in *INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD* (Pedro Roffe & Edward Elgar eds., 2009) (citing United Kingdom Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* at 149, available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPR.fullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPR.fullfinal.pdf) (last accessed May 4, 2018)).

179. *Id.* at 149.

180. *Id.* at 15.

181. LOUIS T. HARMS, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: A CASE BOOK* 471 (3d ed. 2012).

*E. IPR Enforcement*

Although the 1995 Bangkok Framework Agreement had already set out that cooperation activities in the region should include IPR enforcement, particularly cross border measures and networking with judicial authorities,<sup>182</sup> detailed initiatives on enforcement were a new addition under the ASEAN IPR Action Plan 2011-2015.<sup>183</sup> The enforcement of IPR had long been identified as an aspect of IPR regimes that required further improvement by AMS, especially since this is a subject matter with expansive coverage under the TRIPS Agreement. However, for some AMS, compliance with TRIPS Agreement commitments on enforcement proved to be challenging, not only as regards the establishment of legal systems to provide adequate remedies, but also in terms of human resource and funding constraints required to ensure efficient functioning of enforcement infrastructures.

The negative impact of weak IPR enforcement has nevertheless been the subject of numerous studies.<sup>184</sup> It has been cited that counterfeiting and piracy do not only directly affect business enterprises, but also pose adverse effects on domestic economies and international trade.<sup>185</sup> For example, developing countries are particularly vulnerable to trade diversion and the development of illicit markets for products which represent the country's competitive advantage.<sup>186</sup> Infringement of products also has revenue effects in terms of tax and excise losses, not only from the clandestine trade of illegal goods which do not pay the correct taxes, but also from lower taxes paid by legitimate businesses which suffer from loss of profits.<sup>187</sup> It is, therefore, in the interest of the AMS that the region takes action on better IPR enforcement.<sup>188</sup>

To this end, the ASEAN IPR Action Plan 2011-2015 provided for the implementation of an ASEAN Action Plan on IPR Enforcement.<sup>189</sup> As country champion of IPR enforcement, the Philippines led the crafting of

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182. ASEAN Framework Agreement, *supra* note 8, art. 3.

183. ASEAN IPR Action Plan 2011-2015, *supra* note 51, ¶ 3.1.

184. *See, e.g.*, MICHAEL BLAKENEY, GUIDEBOOK ON ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (2005).

185. *Id.* at 8-12.

186. *Id.* at 8-9.

187. *Id.*

188. *Id.*

189. ASEAN IPR Action Plan 2011-2015, *supra* note 51, ¶ 3.1.

the Enforcement Action Plan,<sup>190</sup> which provides for specific deliverables that were agreed upon and to be collectively undertaken by the AMS.<sup>191</sup> The principles underlying the Enforcement Action Plan also reflect the values of the AWGIPC. First, the Enforcement Action Plan is intended to take on a holistic approach to IPR enforcement, both as to the actors and institutions that must be involved in the activities, as well as to the interests and policies that must be considered in adopting any plan of action.<sup>192</sup> For example, the activities involve not only the IPR holders who would perhaps have the biggest interest in enhancing regional IPR enforcement mechanisms, but also consumers who need to be educated about the dangers of patronizing counterfeit or pirated goods. In the same manner, there must also be strengthened capacities on the part of public authorities, as they have the burden of implementing the activities outlined in the Plan.<sup>193</sup> Finally, and perhaps most importantly, the Enforcement Action Plan also takes on a strategic approach, acknowledging the different levels of development among the AMS and the limited resources at their disposal.<sup>194</sup>

The Enforcement Action Plan sets out various deliverables, including the primary step of undertaking information and awareness-raising activities in partnership with the private sector.<sup>195</sup> Although each AMS may have its own outreach and awareness campaigns, programs at the regional level will be intensified. This would entail launching an ASEAN-wide IPR awareness campaign, starting with the adoption of common public information materials bearing a single theme or logo that would be visible in all points of entry and departure from AMS, and recognizable by the public. The intention is to convey that, as a region, ASEAN is taking action and is serious in enforcing IPR. However, a challenge to the implementation of this activity is the policy approach of each AMS to IPR enforcement, and how these policies could be reflected in the regional-wide campaign. For example, some AMS favor the softer approach to IPR enforcement through

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190. Association of Southeast Asian Nations, ASEAN Intellectual Property Rights (IPR) Enforcement Action Plan, *available at* <https://www.aseanip.org/Portals/0/ASEAN%20IPR%20Enforcement%20Action%20Plan.pdf?ver=2018-01-04-150134-093> (last accessed May 4, 2018) [hereinafter ASEAN IPR Enforcement Action Plan].

191. *Id.* at 3-4.

192. *Id.* at 2-3.

193. *Id.* at 2.

194. *Id.* at 3.

195. *Id.* at 3-8.

education and public awareness, while others prefer to highlight strict penalties and possible jail time as a deterrent to infringement.

In parallel, the Enforcement Action Plan also calls for the collection of statistical information relating to IP enforcement, including the status of IP cases pending before the judiciary.<sup>196</sup> This undertaking is not so easily implemented in the region, as not all AMS have mechanisms for monitoring arrests or seizures of infringing goods, and accurate statistical information may not be readily available.

Notably, on one hand, IPR enforcement in almost all countries is undertaken by various law enforcement and government agencies. On the other hand, the AWGIPC is composed of representatives from the IP Offices who may not necessarily have the mandate for IPR enforcement. This poses difficulties in coordinating information among the various national agencies. In light of the different legal regimes and political systems in the region, the status of pending cases before the judiciary may also not be readily accessible. However, this could be addressed by implementing the deliverable on establishing stronger linkages between the national IP office and the judiciary in each AMS. Despite these challenges, the initiative would truly foster transparency and credibility of the IP regimes in AMS, once accomplished. As a starting point, the AMS could explore the monitoring mechanisms adopted in other countries such as the US and the EU, including information technology tools that may be used to facilitate the collation of such information.

Aside from these, other enforcement deliverables are also outlined in the Enforcement Action Plan, such as monitoring the reduced movement of pirated and counterfeit goods into and between AMS,<sup>197</sup> crafting of national internal guidelines on enforcement,<sup>198</sup> and continuing to conduct capacity-building activities for enforcement officials.<sup>199</sup> But an important deliverable, which could also set the tone for the enforcement activities in the region, is the development of a coordination mechanism on IPR enforcement in the region.<sup>200</sup> Since the AWGIPC is composed of representatives from the national IP Offices, it is understandable that not all IP Offices have enforcement mandates and the technical expertise or practical experience that would be necessary in implementing the activities under the Enforcement Action Plan. Hence, the AMS established the ASEAN

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196. ASEAN IPR Enforcement Action Plan, *supra* note 190, at 4.

197. *Id.* at 6.

198. *Id.*

199. *Id.* at 7.

200. *Id.* at 7-8.

Network of IPR Enforcement Experts (ANIEE), which was mandated to undertake the implementation of the IPR Enforcement initiatives.<sup>201</sup>

On 11 September 2017, the milestone first meeting of the ANIEE was led by the Philippines as Chair.<sup>202</sup> The Network is composed of representatives from the IP Offices, the judiciary, customs agencies, police, and trade and commerce officials of the AMS,<sup>203</sup> acknowledging that there are various actors and government instrumentalities involved in enhancing the IPR enforcement ecosystem in the region. Through the future work of the ANIEE, it is envisioned that there will be increased regional coordination not just regarding enforcement policies and best practices, but hopefully also regarding joint enforcement operations against counterfeiters and pirates who employ cross-border channels to distribute their illegal merchandise and who evade detection by authorities.

#### IV. IP AND DEVELOPMENT: CROSS-CUTTING ISSUES

Going beyond IP administration, ASEAN IP Cooperation has also spilled over into other areas of concern in the region, particularly on cross-cutting issues related to spurring innovation, protecting traditional knowledge, and commercializing geographical indications. These initiatives reflect the developmental role of IP in not only promoting economic development, but also in protecting the national heritage of the AMS.

##### *A. Innovation*

During the ASEAN Chairmanship of the Philippines, the ASEAN Declaration on Innovation (Declaration on Innovation) was adopted in November 2017 in Manila.<sup>204</sup> The Declaration on Innovation cited the important role of science, technology, and innovation (STI) in fostering

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201. ASEAN Intellectual Property, *supra* note 47.

202. Intellectual Property Office of the Philippines, IPOPHL Leads Milestone 1st ASEAN IPR Enforcement Network Meeting, *available at* <http://www.ipophil.gov.ph/releases/2014-09-22-06-26-21/631-ipophil-leads-milestone-1st-asean-ipr-enforcement-network-meeting> (last accessed May 4, 2018).

203. *Id.*

204. Association of Southeast Asian Nations, ASEAN Declaration on Innovation (A Declaration signed on 13 November 2017), *available at* <http://asean.org/storage/2017/11/01-ASEAN-DECLARATION-ON-INNOVATION-as-of-Oct16-Final-for-Adoption-clean....pdf> (last accessed May 4, 2018).



“sustainable economic growth, job creation, and enhanced well-being,”<sup>205</sup> as well as in “driving the growth and competitiveness of industries in the region.”<sup>206</sup> The ASEAN countries thereby acknowledged the need for State policies to promote public research in order to strengthen the impact of STI. Among others, the promotion of the use of the IPR system to facilitate “research collaboration, technology commercialization[,] and an innovation culture”<sup>207</sup> was identified as among the State policies that contributed to the innovation agenda.

Even prior to the adoption of the Declaration on Innovation, the AWGIPC had already set in the IPR Action Plans the initiatives to be pursued in order to spur innovation in the region. Under the 2011–2015 and 2016–2025 Action Plans, the Philippines serves as the country champion for the initiative on establishing a network of patent libraries within schools and universities.<sup>208</sup> In line with the Technology and Innovation Support Centers (TISC) program of the WIPO, the establishment of the network of patent libraries is meant to increase access to global scientific and technology information for purposes of research and development.<sup>209</sup> As part of its Development Agenda, WIPO had launched the TISC program with the objective of reducing the knowledge gap between developed and developing countries by providing specialized databases with corresponding support for their usage.<sup>210</sup>

The Philippines had been actively participating in the WIPO program since its genesis, and thus in 2012, the Intellectual Property Office of the Philippines launched its own project to establish Innovation and Technology Support Offices (ITSO) or “Patent Libraries” within universities and higher education institutions all over the country.<sup>211</sup> The objective of the project was “to strengthen local institutional capacities to access patent information for use in research, education, idea generation, and general business development.”<sup>212</sup> At the same time, the ITSO were envisioned to help

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205. *Id.* at 1.

206. *Id.*

207. *Id.*

208. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 5.

209. World Intellectual Property Organization, Technology and Innovation Support Centers, *available at* <http://www.wipo.int/tisc/en/> (last accessed May 4, 2018).

210. World Intellectual Property Organization, About the WIPO Technology and Innovation Support Center (TISC) Program, *available at* <http://www.wipo.int/tisc/en/background.html> (last accessed May 4, 2018).

211. Innovation and Technology Support Offices (ITSO), About us, *available at* <http://info.ipophil.gov.ph/itso/index.php/about-us> (last accessed May 4, 2018).

212. *Id.*

address the challenges faced by a developing country to participate meaningfully in the international patent system.<sup>213</sup> This is achieved by the ITSO becoming “patent service providers in their local communities, conducting not only patent searches but also patent drafting, prosecution representation, advisory, training[,] and over-all IP management.”<sup>214</sup> With the success of the TISC and ITSO programs, best practices in the establishment and operation of such innovation centers in academic institutions were developed and served as the basis for expanding their implementation across the region.

Universities and research institutions indeed served as technology and innovation incubators, but it was necessary to go beyond the creation of IP and enhance the mechanisms for IP commercialization in the region. With this in mind, the AMS also intended to establish regional links to virtual IP marketplaces where inventors and creators could showcase their IP and find investors to enable them to commercialize such assets.<sup>215</sup> Regional IP fairs and technology marketplace events will also be organized in order to serve as platforms for IP commercialization, aside from comprehensive collaboration programs between the AMS IP Offices and the universities and research institutions, in order to help the latter identify, protect, and manage the IP which they are able to produce through their innovative research.<sup>216</sup>

### *B. Traditional Knowledge*

As a region with a rich history, biodiversity, and cultural heritage, the ASEAN has a keen interest in protecting its Traditional Knowledge (TK), Genetic Resources (GR) and Traditional Cultural Expressions (TCE).<sup>217</sup> The topic has also been the subject of long-standing discussions of the WIPO Inter-governmental Committee on IP, TK, GR, and Folklore (IGC) since 2001 in Geneva, Switzerland,<sup>218</sup> but because of diverging policies and national agendas, there has been little movement in building consensus among the WIPO Member States.

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<sup>213</sup>. *Id.*

<sup>214</sup>. *Id.*

<sup>215</sup>. *Id.*

<sup>216</sup>. *Id.*

<sup>217</sup>. World Intellectual Property Organization, Traditional Knowledge, *available at* <http://www.wipo.int/tk/en/> (last accessed May 4, 2018).

<sup>218</sup>. World Intellectual Property Organization, Intergovernmental Committee (IGC), *available at* <http://www.wipo.int/tk/en/igc/> (last accessed May 4, 2018).

Even among the AMS, there are divergences in the policy approaches to what constitutes GR, TK, and TCE, and, more so, the scope and modes of protection. Although all AMS are members of the Convention on Biological Diversity (CBD), the mode of implementation of the provisions thereof is left to the discretion of Contracting Parties, which has resulted to diverging practices and legal remedies. Among others, the CBD pursues the conservation of biological diversity by tasking Contracting Parties to “respect, preserve, and maintain knowledge, innovations[,] and practices of indigenous and local communities embodying traditional lifestyles ... and [to] encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations[,] and practices.”<sup>219</sup>

Due to the divergence in practices on the protection of GRs, TKs, and TCEs among ASEAN countries, the 2016–2025 Action Plan takes a pragmatic approach by setting out the conduct of a preliminary study, which would compare protection systems among interested AMS which have existing laws on the subject.<sup>220</sup> Technical or legal assistance could also be provided to AMS which seek to enact laws and establish such protection systems. However, an important deliverable is the development of a network of GR and TK databases, which would contain information on knowledge, innovations, and practices which an AMS considers as a genetic resource or as traditional knowledge.<sup>221</sup> Such a database — especially if made accessible online — would serve as an important reference tool for examiners in IP Offices, not just in ASEAN but all over the world, in determining originality, prior art, or novelty of an invention, design, work, or any subject matter of IPR. As a form of defensive protection against misappropriation, the database could prevent the obtainment of IPR by persons who do not truly own or are not entitled to the protection for such GR or TK. In achieving this deliverable, information sharing and the exchange of best practices could be undertaken with China and India which have some experience in the establishment of such databases.

### *C. Geographical Indications*

Under the TRIPS Agreement, Geographical Indications (GI) are defined as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation[,] or other characteristic of the good is essentially attributable to

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219. Convention on Biological Diversity art. 8, ¶j, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79.

220. ASEAN IPR Action Plan 2016–2025, *supra* note 52, at 7.

221. *Id.* at 8.

its geographical origin.”<sup>222</sup> The TRIPS Agreement provides for a three-tiered system of protection, starting from minimum standards of protection applicable to all GI regardless of nature and type of goods, then a higher level of protection for wines and spirits, and finally an even higher form of protection for wines.<sup>223</sup> It has been noted that this hierarchy reflects the conflict between the “old world countries” seeking higher standards of protection for all GI vis-à-vis “new world countries” which are not significantly producing GI.<sup>224</sup>

Across ASEAN, Member States adopt different protection systems for GIs, whether under a *sui generis* or a trademark system of protection.<sup>225</sup> But regardless of the mode of protection, countries do recognize the importance and benefits of GI protection beyond just complying with their TRIPS Agreement commitments.<sup>226</sup> Hence, the 2011-2015 Action Plan provided for the protection of GIs through the compilation of information on ASEAN GI protection systems, sharing of information and best practices in enhancing the value of local products, and increased participation of ASEAN, possibly via a consolidated position on GIs, in the ongoing discussions in the World Trade Organization forum.<sup>227</sup>

Under the 2016-2025 Action Plan, cooperation on GIs has moved beyond protection and now seeks to promote the actual commercialization of GIs by providing assistance to the productive sectors in the AMS so that they may develop protection and branding strategies, not only in the region but also abroad.<sup>228</sup> This involves organizing training programs for local producers so that they may be made aware of the market potential of GIs and how they may maximize the competitive advantage of their products, as well as assisting local producers in seeking protection in ASEAN and in foreign markets.<sup>229</sup> In fact, one milestone under the ECAP III Program of

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222. TRIPS Agreement, *supra* note 64, art. 22, ¶ 1.

223. *Id.*

224. Malobika Banerji, Geographical Indications: Which Way Should ASEAN Go? (Lecture Delivered at the Boston College Intellectual Property & Technology Forum 2012) at 1, available at [http://bciptf.org/wp-content/uploads/2012/06/Geographical\\_Indications.pdf](http://bciptf.org/wp-content/uploads/2012/06/Geographical_Indications.pdf) (last accessed May 4, 2018)).

225. *Id.*

226. *Id.*

227. ASEAN IPR Action Plan 2011-2015, *supra* note 51, at 5.

228. ASEAN IPR Action Plan 2016-2025, *supra* note 52, at 8.

229. *Id.*

the EUIPO was the registration of the Kampot Pepper as a GI in the EU, through the support provided to the Association for the Promotion of Kampot Pepper of Cambodia.<sup>230</sup>

#### V. CONCLUSION: PROSPECTS FOR IP IN ASEAN

Having outlined the progress of IPR regional integration in ASEAN, the author wishes to stress that, although there are challenges and issues to be overcome, the AMS have set out an ambitious roadmap to achieve their vision of a fully-integrated and highly-competitive ASEAN in 2025. An examination of the ASEAN IPR Action Plan 2016-2025 shows that there are still a significant number of initiatives and deliverables, which require substantial work for the AMS. It should, however, be noted that, unlike the 2004-2010 and 2011-2015 Action Plans, the current Action Plan is intended to cover a 10-year period.<sup>231</sup> Hence, it was envisioned by the crafters that the initiatives would be progressively implemented until 2025, in accordance with the priorities of the AWGIPC.

In the next eight years of implementation of the Action Plan 2016-2025, one may not see a completely established and operating ASEAN patent system or an ASEAN trademark system comparable to the community systems of the EU. However, the current progress of cooperation initiatives indicates that one may look forward to enhanced IP administration systems and the stronger pursuit of developmental programs in the region, particularly as regards innovation.

The process of harmonization and of convergence in IP practices appears to be a lengthy process of approximation, consensus building, and cooperation and technical assistance with Dialogue Partners — perhaps truly in keeping with the ASEAN Way. However, throughout the process, the critical element is that the ASEAN maintains ownership of the path of integration that it has set out for itself. Given a sufficient degree of political will, concerted efforts among the ASEAN countries, and support from the private sector and relevant stakeholders, the region presents great opportunities for growth that would contribute to economic development and progress for the Member States.

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230. European Union Intellectual Property Office, Closure of EU-ASEAN project on the Protection of Intellectual Property Rights, *available at* [https://euipo.europa.eu/ohimportal/en/news?p\\_p\\_id=csnews\\_WAR\\_csnewsportlet&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=columnn-1&p\\_p\\_col\\_count=2&journalId=3480631&journalRelatedId>manual/](https://euipo.europa.eu/ohimportal/en/news?p_p_id=csnews_WAR_csnewsportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=columnn-1&p_p_col_count=2&journalId=3480631&journalRelatedId>manual/) (last accessed May 4, 2018).

231. ASEAN IPR Action Plan 2016-2025, *supra* note 52, at 1.