A Harmonisation of Intellectual Property Law in EU and ASEAN

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A Harmonisation of Intellectual Property Law in EU and ASEAN

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Abstract

This thesis is a comparative study analysing the development of intellectual property (IP) harmonisation in the EU and ASEAN. The purpose of this study is to investigate whether there is a need for ASEAN to harmonise its IP laws at a regional level and, if there is the need, what would be a feasible way for ASEAN to achieve a greater level of IP harmonisation and further develop a harmonised regional IP system. ASEAN had a strong commitment to deepen and broaden economic integration through the establishment of the ASEAN Economic Community (AEC), which enables the free flow of goods, services, capital and workers. The establishment of the AEC in 2015 is considered to be a milestone in ASEAN's history of moving towards a highly integrated community. Consequently, a harmonisation of the IP laws of the ASEAN members has become more necessary in order to ensure a well-functioning common market and a move towards a highly competitive economic region. IP harmonisation has been prioritised as one of the essential tasks that needs to be accomplished. Notwithstanding, due to the disparities of the member states' backgrounds, especially in economic, social, and legal aspects, standardising the IP laws of the member states remains challenging.

To examine the prospect of ASEAN achieving a higher degree of IP harmonisation, and thereby be able to propose an appropriate solution for ASEAN to develop a regional IP regime, a comparative approach is required and inevitable, while using the EU as a point of reference. The major factors which are impeding and delaying an IP harmonisation process in ASEAN, the disparities in IP standards among the ASEAN members, the development gap between the older and newer members, and ASEAN's practice and institutional structure, are discussed. At the end, a strategic plan providing a framework for developing an ASEAN regional IP system is proposed.

Firstly, it is suggested that the traditional ‘ASEAN Way’ should be modified in order to serve as facilitator of regional cooperation. Secondly, more assistance from well-off countries in helping less developed members to catch up with the rest of ASEAN is needed to promote prosperity of the region as a whole. Thirdly, national IP laws of the member states should be approximated to be in line with international standards. Fourthly, an ASEAN-wide IP system should be incrementally developed through the combined use of hard and soft laws. Finally, a regional IP court should be established to move towards a more rule-based organisation. This would help ASEAN finally move towards achieving its goals of establishing a well-functioning common market and deepening regional economic integration.

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Statement of Copyright

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Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

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ASEAN Free Trade Area (AFTA)

ASEAN-Australia-New Zealand Free Trade Agreement

Australia-United States Free Trade Agreement

Berne Convention for the Protection of Literary and Artistic Works

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure

EU/ACP Cotonou Agreement

EU-South Korea Free Trade Agreement

European Patent Convention

General Agreement on Tariffs and Trade (GATT)

Hague Agreement Concerning the International Registration of Industrial Designs

International Convention for the Protection of New Varieties of Plants (UPOV Convention)

Madrid Agreement Concerning the International Registration of Marks

Memorandum of Understanding for Cooperation on IP between ASEAN and China

Memorandum of Understanding between IPOS and Cambodia's Ministry of Industry and Handicrafts

Memorandum of Understanding on the Singapore-Myanmar Integrated Legal Exchange between Singapore's Law Ministry and the Union's Supreme Court

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks

North American Free Trade Agreement (NAFTA)

Paris Convention for the Protection of Industrial Property

Patent Cooperation Treaty (PCT)

Protocol Relating to the Madrid Agreement Concerning International Registration of Marks

Regional Comprehensive Economic Partnership (RCEP) agreement

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)

Transatlantic Trade and Investment Partnership (TTIP)

Singapore Treaty on the Law of Trade Marks (STLT)

Trans-Pacific Partnership (TPP) agreement

United States-Cambodia Bilateral Trade Agreement

United States-Jordan Free Trade Agreement

United States-Singapore Free Trade Agreement

United States-Uruguay Bilateral Investment Treaty

United States-Vietnam Bilateral Trade Agreement

Universal Copyright Convention (UCC)

WIPO Copyright Treaty (WCT)

WIPO Performances and Phonograms Treaty (WPPT)

List of Abbreviations

ACP	African, Caribbean and Pacific
ADB	Asian Development Bank
ADF	ASEAN Development Fund
AEC	African Economic Community
AEC	ASEAN Economic Community
AFTA	ASEAN Free Trade Area
AIF	ASEAN Infrastructure Fund
ARIPO	African Regional Industrial Property Organization
ASEAN	Association of Southeast Asian Nations
ASEAN-ISIS	ASEAN Institute of Strategic and International Studies
ASPEC	ASEAN Patent Search and Examination Cooperation
AU	African Union
AWGIPC	ASEAN Working Group on IP Cooperation
BIPs	Bilateral IP Agreements
BITs	Bilateral Investment Treaties
CARICOM	Community of Caribbean States and Common Market
CJEU	Court of Justice of the European Union (Formerly known as European Court of Justice (ECJ))
CL	Compulsory Licensing
CLM	Cambodia, Lao PDR, and Myanmar
CLMV	Cambodia, Lao PDR, Myanmar, and Vietnam
CPVO	Community Plant Variety Office
CPVR	Community Plant Variety Rights
CTM	Community Trade Mark
DRM	Digital Rights Management
DSB	WTO Dispute Settlement Body
EC	European Community
ECAP I	ASEAN-EU Patents and Trademarks Programme
ECAP III	EU-ASEAN Project on the Protection of IP Rights

ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EDSM	Enhanced Dispute Settlement Mechanism
EEC	European Economic Common Market
EFTA	European Trade Association
EMU	European Monetary Union
EPAs	Economic Partnership Agreements
EPC	European Patent Convention
EPO	European Patent Office
ERDF	European Regional Development Fund
ESF	European Social Fund
EU	European Union
EUIPO	European Union Intellectual Property Office (Formerly known as Office for Harmonization in the Internal Market (OHIM))
EUTM	European Union Trademark
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GCI	Global Competitiveness Index
GDP	Gross Domestic Product
GIs	Geographical Indications
GNI	Gross National Income
HDI	Human Development Index
HPA	Hanoi Plan of Action
IAI	Initiative for ASEAN Integration
ICC	International Chamber of Commerce
ICJ	International Court of Justice

INPI	National Industrial Property Institute
INTA	International Trademark Association
IP	Intellectual Property
IPOPHL	Intellectual Property Office of Philippines
IPOS	IP Office of Singapore
ISP liability	Internet Service Provider's liability
ISPs	Internet Services Providers
IT	Information Technology
JPO	Japan Patent Office
MEPs	Members of the European Parliament
MFN	Most-Favoured-Nation
MIH	Ministry of Industry and Handicraft
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NBT	Non-Tariff Barriers
OAPI	African IP Organization
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OED	Oxford English Dictionary
OHIM	Office for Harmonization in the Internal Market
PAIPO	Pan-Africa IP Organization
PCT	Patent Cooperation Treaty
PVRs	Plant Variety Rights
QMV	Qualified Majority Voting
R&D	Research and Development
RCEP	Regional Comprehensive Economic Partnership
RTAs	Regional Trade Agreements
SMEs	Small and Medium Enterprises
STLT	Singapore Treaty on the Law of Trade Marks

TEU	Treaty on European Union
The Framework Agreement	ASEAN Framework Agreement on IP Cooperation
The Green Paper	Green Paper on Copyright and the Challenge of Technology
TTIP	Trade and Investment Partnership
TPP	Trans Pacific Partnership
TRIPs	Agreement on Trade-Related Aspects of IP rights
UCC	Universal Copyright Convention
UN	United Nation
UNDP	United Nations Development Programme
UPC	Unified Patent Court
UPOV	International Union for the Protection of New Varieties of Plants
US	United States
USTPO	United States Patent and Trademark Office
Vientiane Protocol	ASEAN Protocol on Enhanced Dispute Settlement Mechanism
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WJP	World Justice Project
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

A HARMONISATION[1] OF INTELLECTUAL PROPERTY (IP) LAW IN EU AND ASEAN

CHAPTER 1 INTRODUCTION

1.1 Research Background

To achieve a deep regional economic integration, the establishment of the ASEAN Economic Community (AEC) has been set as one of the key objectives of the Association of Southeast Asian Nations (ASEAN). ASEAN, which consists of ten member states, namely Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao PDR, Myanmar, and Cambodia, was established in order to encourage economic growth, social progress and cultural development, and promote regional collaboration, peace and stability.[2] Being inspired by the European Union (EU), ASEAN has officially launched the AEC in 31 December 2015 in order to strengthen the region's economy.[3] Similar to the EU, establishing a single market and production base is clearly stated as a major goal of the AEC.[4] The AEC aims to unify ASEAN into a single market to allow the free movement of goods, services, capital and labour. However, the full-scale implementation of the AEC is still an on-going process. There are still commitments which remain to be fulfilled. These unfulfilled commitments under the previous AEC Blueprint and the post 2015 economic vision of ASEAN are incorporated into AEC Blueprint 2025, which serves

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[1] According to the Oxford English Dictionary (OED), 'harmonise' is defined as 'make or form a pleasing or consistent whole'.
[2] ASEAN, 'Overview' <http://www.asean.org/asean/about-asean> accessed 28 May 2013
[3] Association of Southeast Asian Nations, *ASEAN Economic Community Blueprint* (ASEAN Secretariat 2008) 2.
[4] ASEAN, 'ASEAN Economic Community' <http://www.asean.org/communities/asean-economic-community> accessed 27 March 2016.

as ASEAN's roadmap for transforming ASEAN into a single market and production base.

To ensure that goods can freely move within the community, both tariff and non-tariff trade barriers (NTBs) must be removed. Significant progress has been made in tariff reduction.[5] Nevertheless, removing NTBs remains challenging and thereby is considered as the major impediment to achieving a single market.[6] According to ASEAN Community Vision 2025, ASEAN is strongly committed to eliminating NTBs in order to establish a highly integrated community by 2025.[7] One of the most common NTBs to trade that can limit the free movement of goods are IP rights.[8] A lack of adequate and effective IP protection can obstruct cross-border trade. Moreover, IP rights are essentially territorial and can be protected by the individual countries that have granted these rights.[9] In other words, IP rights can be obtained and enforced on a country-by-country basis. Hence, the territorial nature of IP rights can be used to create barriers to cross-border trade.[10] Furthermore, since IP rights are limited to national jurisdiction, the disparities of IP laws between the member states can impede the free flow of goods, and thus adversely affect the operation of an internal market.[11]

When analysing regional integration around the world, the EU is perceived as a model for regional economic integration. Among all regional groupings, the EU has

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[5] ASEAN, *A Blueprint for Growth ASEAN Economic Community 2015: Progress and Key Achievements* (n 3) 10.
[6] Sanchita Basu Das and others, *The ASEAN Economic Community: A Work in Progress* (Institute of Southeast Asian Studies 2013).
[7] ASEAN, *ASEAN 2025: Forging Ahead Together* (ASEAN Secretariat 2015) 15.
[8] Helen Norman, *Intellectual Property Law* (OUP 2014) 23.
[9] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4edn OUP 2014) 6.
[10] Norman (n 8) 23.
[11] ibid.

achieved the highest level of integration, and thereby has successfully established a well-functioning internal market. To ensure that IP rights will not become barriers to trade within the community, harmonisation of IP laws among the EU members has become one of the EU's priorities. For well over a decade, there have been strong and continuous efforts to harmonise IP laws within the EU. It is recognised that disparities in IP laws of the member states could have a negative impact on cross-border trade, and could thereby partition the EU internal market.[12] Generally, harmonisation can be accomplished by either increasing or decreasing IP standards to a certain level. However, the harmonisation in the EU primarily occurred through a strengthening of IP standards among its member countries in order to encourage economic development and take advantage of new technology.[13] The harmonisation of IP laws in the EU resulted from two separate approaches and areas of focus which were harmonisation through EU legislation and harmonisation through international conventions. Nevertheless, the core measures, which were used are the enactment of directives and regulations.[14] To reduce disparities in substantive IP laws between member states, various harmonisation directives covering major areas of IP rights have been approved. This helped the EU standardise national IP laws of the member states, which resulted in stronger and more effective IP protection and enforcement.[15] However, merely adopting a series of harmonisation directives could not solve the issue of territoriality of IP rights.[16] Consequently, a community-wide IP system was

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[12] Norman (n 8) 23.
[13] Ville Oksanen and Mikko Valimaki, 'Some Economic Aspects of the European Harmonization of Intellectual Property Rights in Software and its Impact to Eastern EU' (2004) Helsinki Institute for Information Technology (HIIT), 5 <http://www.dklevine.com/archive/refs4122247000000000448.pdf> accessed 27 May 2015
[14] Norman (n 8) 23.
[15] Oksanen and Valimaki (n 13) 5.
[16] Estelle Derclaye and Trevor Cook, 'An EU Copyright Code: what and how, if ever?' (2011) 3 IPQ 259, 262.

developed through the issuance of regulations. As of now, the EU-wide systems cover most major areas of IP rights namely, trademarks, designs, plant variety rights (PVRs), and geographical indications (GIs). Moreover, by 2017 the unitary patent system will come into operation.[17] Proceeding in accordance with this timeframe will leave copyright as the only remaining fragmented sector of IP rights. In addition to the creation of secondary legislation, IP protection in the EU has been standardised by the effectiveness and successes of international conventions. A noteworthy example is the European Patent Convention (EPC)[18], which all the EU member states have adopted and of which all are contracting parties. The EPC harmonised certain aspects of national patent laws of the member states. However, the rights granted under the EPC are included in a bundle of national patent rights, unlike the grant of single patent right that is valid throughout the European territory.[19] This requires that the European patents granted by the European Patent Office (EPO) must still rely on the national patent laws of the contracting states.[20] For this reason, this is considered partial harmonisation. A fragmented system such as this can still partition the internal market. Therefore, in 2011, a proposal to adopt a unitary patent was introduced.[21] If the unitary patent system is firmly established, it would allow an applicant to obtain a European patent with unitary effect.[22] This would be a significant step towards developing complete IP harmonisation in the EU. Furthermore, to ensure effective IP

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[17] Clive Cookson, 'Unitary European patent system is a few steps closer' <http://www.ft.com/cms/s/2/0780e2ee-f4cb-11e4-8a42-00144feab7de.html#axzz3igmd4MGE> accessed 13 August 2015.
[18] Ulrich Loewenheim, 'Harmonization and Intellectual Property in Europe' (1995-1996) 2 CJEL 481, 484.
[19] Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar Publishing 2013) 91.
[20] ibid.
[21] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection' COM (2011) 215 final 2011/0093 (COD), 3.
[22] ibid 3-4.

protection for their nationals' rights overseas, the EU actively pursues international IP cooperation through the adoption of major international IP treaties. In addition to legislation, institutions have been playing an important role in harmonising IP laws in the EU. Apart from regional institutions that are directly involved in making the EU law, namely the European Commission, the Council of the European Union, and the European Parliament, the Court of Justice of the European Union (CJEU) has also been playing a vital role in the development of IP harmonisation in the EU through its case law. This is also known as negative integration.[23] The existence of the CJEU can ensure a uniform interpretation and application of the EU law[24], and thereby removing distortion to competition and facilitating a higher level of harmonisation.

Harmonisation of IP laws is essential to facilitate the free movement of goods, one of the fundamental principles of the internal market. A high degree of IP harmonisation is clearly linked to the EU's success in creating a properly functioning internal market. Since ASEAN shares similar interests with the EU in creating an internal market, it would not be possible for ASEAN to unify the national markets into an internal market if IP rights are still treated differently from country to country.[25] Therefore, in order to help ASEAN achieve a higher degree of IP harmonisation and further develop a regional IP system, the EU should be used as a benchmark. Both

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[23] The EU internal market is established through both negative and positive integration. In addition to integrate the internal market through positive integration which can only be achieved through European legislation, the CJEU chose to integrate the internal market negatively through its case law. See John Pinder, 'Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC' (1968) 24 The World Today 24, 88; Robert Schütze, *European Constitutional law* (2nd edn, Cambridge University Press 2016) 17; José M. Magone, *Routledge Handbook of European Politics* (Routledge 2014) 267; Robert Schütze, *European Union Law* (Cambridge University Press 2015) 474-475.

[24] Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015) 80

[25] Koo Jin Shen, 'No regional IP system that covers all of ASEAN' The Brunei Times (Bandar Seri Begawan, 13 March 2015) <http://www.bt.com.bn/business-national/2015/03/13/'no-regional-ip-system-covers-all-asean'#sthash.6ZMmyOTX.qHxMqeIt.dpbs> accessed 17 July 2016.

success and difficulties can be learned from the EU's experience. The most important lesson that ASEAN can learn from the EU is that the IP harmonisation process in the EU has been pursued through both legislation and institutions. The adoption of the harmonising directives and international IP laws can help approximate national IP laws of the member states, particularly in the areas that directly affect the operation of the internal market. This results in decreasing disparities between national IP regimes between the EU members and reducing impediments to the operation of the internal market, and thereby paving the way for the EU to establish an EU-wide IP system through the regulations. Additionally, the CJEU has developed case law in relation to IP. National courts can refer question regarding the interpretation and application of the EU law to the CJEU for a preliminary ruling. The CJEU's judgements on EU law is formally binding among the parties. However, in practice national courts and legislators are influenced by the CJEU's decisions.[26] This can help provide guidelines, and thereby diminish disparity in interpreting and applying the EU law between the member states and facilitate a higher degree of harmonisation.

Unlike the EU, a low level of IP harmonisation has been achieved in ASEAN. After the adoption of the Framework Agreement on IP Cooperation, ASEAN member countries agree to strengthen regional IP cooperation and provide a standard of protection consistent with international standards.[27] This agreement also commits ASEAN to explore the prospect of creating a regional IP system, particularly an ASEAN trademark and patent system, including an ASEAN trademark and patent

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[26] Ulrich Loewenheim, 'Harmonization and Intellectual Property in Europe' (1995-1996) 2 CJEL 483.
[27] 'World Intellectual Property Report' (1996) vol.10, number 5, at 127-8 (as cited in Assafa Endeshaw, *Intellectual Property in Asian Emerging Economies: Law and Policy in the Post-Trips Era* (Ashgate Publishing 2010) 57.

office.[28] However, up to now, this goal has never been achieved. Despite the adoption of various action plans providing a framework for regional IP cooperation, IP harmonisation in ASEAN still lags behind schedule. The adoption and implementation of some initiatives relating to IP harmonisation has not been accomplished before the deadline established in ASEAN IPR Action Plan 2011-2015. It is quite obvious that the level of a country's development has a correlation with IP protection. Therefore, one of the major constraints would be a wide development gap between ASEAN countries, which results in different levels of IP standards. For instance, Singapore, the only developed country in the region, has very strong and effective IP laws, whereas other ASEAN countries, particularly the least developed country members such as Myanmar, Lao PDR and Cambodia, have weak IP protection that still falls below international standards. Consequently, harmonising IP laws at the regional level would not be a task that can be achieved easily or in a short period of time. Additionally, ASEAN's practice, also known as the 'ASEAN Way', could be considered as another impediment. Strongly emphasising national sovereignty and non-interference with other states' affairs would lead to loose regional cooperation in the area of IP harmonisation and a low level of institutionalisation, and thereby make the harmonisation process fall further behind schedule.

It can be clearly seen that harmonisation of IP laws in ASEAN is still challenging. In order to help ASEAN move towards achieving a higher level of IP harmonisation, there are many factors, particularly disparity in IP standards among the ASEAN members, development gap between the older and newer members as well as

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[28] ibid.

ASEAN's practice and institutional structure, that should be seriously addressed. These factors have all contributed to limitations for ASEAN to achieve progress in IP harmonisation following on the EU footsteps. Therefore, this research aims to answer whether there is a need to harmonise IP laws among the ASEAN members. If there is a need, and by using a comparative analysis with the EU, the only regional economic integration that has successfully achieved a considerable degree of IP harmonisation, what would be an effective and appropriate measure for ASEAN to use to devise a single regional IP regime. Determining this would finally help ASEAN move towards achieving its goal of establishing a well-functioning common market and deeper regional economic integration.

1.2 Research Objectives

1) To study and explain the development of harmonisation of IP laws in the EU and ASEAN.
2) To examine the needs and reasons for a harmonisation of IP law in ASEAN.
3) To examine the prospect of the harmonisation of IP law in ASEAN by considering the disparities in the level of development between the ASEAN members and ASEAN's practice.
4) To investigate what obstacles ASEAN faces in its attempt to achieve its goal in harmonising IP law.
5) To propose a feasible solution for ASEAN to devise a single regional IP system.

1.3 Research Questions

1) Would it be necessary for ASEAN to harmonise its IP laws between member states?

2) What would be an effective and appropriate measure to allow ASEAN to move towards greater harmonisation of its IP laws at a regional level?

1.4 Research Methodology

This research will be conducted using a comparative approach to investigate the prospect of a harmonisation of IP laws in ASEAN by comparing ASEAN with the EU. The research will use a documentary research method based on study and analysis of legislation, international agreements, articles, journals, monographs, case reports, a policy document from a government/organisation, and websites that relate to IP harmonisation in the EU and ASEAN. These legal resources can be accessed via library and online databases such as Westlaw, Hein online, and LexisNexis. Additionally, many primary and secondary sources in foreign jurisdictions may be required. These sources can be accessed via Thai government organisations and university libraries in Thailand. The obtained information will be applied and analysed in order to investigate the prospect of harmonising IP laws in ASEAN. A comparative analysis of the development processes of IP harmonisation in the EU and ASEAN will be carried out in order to be able to propose recommendations regarding effective measures for ASEAN to pursue to achieve a greater level of IP harmonisation and devise a regional IP system.

1.5 Research Framework

This research will focus on the prospect of creating a single regional IP system in ASEAN. The research will examine the development and the impact of an IP harmonisation at the regional level on various issues, particularly legal and economic. Furthermore, the research will fully analyse the development of harmonisation of IP law in the EU and see what lessons can be learned to help ASEAN. This research will be categorised into six chapters as follows;

Chapter 1 Introduction

This chapter will provide research background of the problems concerning the developments of a harmonisation of IP laws in ASEAN. In addition, this chapter will demonstrate how harmonising IP standards is important for ASEAN in order to establish a genuine common market and be able to compete strongly in the global economy, and why ASEAN should create a single regional IP system. In addition, the objectives of the study, research questions, methodology and scope of the study and contributions are discussed in this chapter.

Chapter 2 The Significance of Harmonisation of IP Laws

This chapter will focus on the core concept of IP harmonisation. At the beginning, this chapter will discuss the general concept of IP harmonisation. Then, the development of IP harmonisation at multilateral, regional, and bilateral levels will be examined. The role of dispute settlement mechanism in IP harmonisation will also be discussed. Finally, the differences in the legal and economic effects of IP harmonisation in developed and developing countries will be analysed.

Chapter 3 The Development of IP Harmonisation in the EU

This chapter will investigate historical backgrounds and objectives of IP harmonisation in the EU in order to demonstrate how this process is significant to the establishment of a genuine single market. In addition, the IP system of the EU, which was primarily developed through secondary legislations and international agreements in six major areas, namely copyright, patents, trademarks, designs, GIs and PVRs, will be examined. In order to analyse the overall impact of IP harmonisation in the EU, its legal and economic impact will be addressed.

Chapter 4 The Development of IP Harmonisation in ASEAN

In this chapter, the historical background of ASEAN and the objectives of IP harmonisation in ASEAN will be examined. Additionally, the development of IP protection in ASEAN member states will be addressed. Four major areas of IP rights, namely copyright, patents, trademarks, and GIs will be examined. In this section, the ASEAN members will be categorised into three groups based on their levels of development, ‘developed’, ‘developing’, and ‘least developed’ countries. Moreover, cooperation between the ASEAN members in standardising an IP system within the region will be addressed. In this section, the adoption of ASEAN IP cooperation initiatives, as well as the significant progress and achievement in IP harmonisation in ASEAN will be examined.

Chapter 5 The Prospect of Devising a Regional IP System in ASEAN

In order to investigate the possibility of ASEAN having a harmonised system of IP protection, major factors that impede the IP harmonisation process need to be considered. This chapter will examine diversity gaps among the ASEAN members,

particularly the development gap between the older and newer ASEAN member countries. ASEAN's practice, which is commonly known as the 'ASEAN Way', as well as ASEAN's institutional structure, will also be addressed. After that, disparity in IP protection among ASEAN members will be examined. Finally, feasible solutions that would help ASEAN move towards the creation of a harmonised regional IP system will be proposed.

Chapter 6 Conclusion

This chapter will present an overall analysis of the research and provide some recommendations based on the conclusions reached.

1.6 Research Contribution

This research contributes to providing a solution for ASEAN to further harmonise its IP laws at a regional level through an analysis of the ASEAN members' IP regimes with a view toward the implementation of an overarching harmonised IP system. The findings and proposals, which are substantially outlined in Chapter 5, could be used as an academic reference for authorities and policy makers to help ASEAN move towards a greater harmonisation of IP laws between members and further develop a regional IP regime. This thesis also discusses the significance of IP harmonisation to cross-border trade and the formation of a common market. Its development at an international level and at the EU level are also examined. Ultimately, this research contributes to the enhancement of IP protection and enforcement within ASEAN, and thus positively affects regional economic growth and prosperity.

CHAPTER 2 THE SIGNIFICANCE OF HARMONISATION OF IP LAWS

In examining the significance of IP harmonisation to international trade, this chapter will first investigate the general concept of harmonisation of law in the field of IP. Then, the development of IP harmonisation at various levels, namely multilateral, regional, and bilateral levels will be explored. After that, both legal and economic effects of IP harmonisation in the perspective of developed and less-developed countries will be examined. As discussed in the previous chapter, the purpose of this research is to investigate whether it is necessary for ASEAN to harmonise its IP laws at a regional level and what would be a feasible way for ASEAN to achieve a greater level of IP harmonisation. Therefore, the results of the analysis conducted in this chapter will show that there is a need for ASEAN to harmonise IP laws between the member states. IP has been used as an important tool to promote economic growth and the establishment of knowledge-based economy. The development of IP harmonisation at all levels has provided significant legal and economic impacts on the countries involved and thereby facilitating cross-border trade. More consistency in IP standards can help enhance legal certainty, and thereby provide more investment friendly environment. This could help provide various economic benefits such as increased GDP and employment, attract FDI, and technology transfer. Furthermore, this chapter also provides available harmonisation methods and approaches that ASEAN can adopt to pursue a greater level of IP harmonisation.

2.1 The Concept of Harmonisation of IP

Various legal scholars and policy makers have used the term ‘harmonisation’ to refer to a process of creating a common standard in a particular area of law. Harmonisation

is derived from the word 'harmonise' which is defined in the Oxford English Dictionary as 'make or form a pleasing or consistent whole'. The concept of harmonisation of law can refer to both the harmonisation of various legislation within one legal system and the harmonisation of laws between different legal systems.[1] In other words, the harmonisation of law can occur at both domestic and international levels. However, a prominent example can be found in regional and international levels.[2] Harmoisation of laws of different countries was defined as 'replacing, to respective degrees, the existing national laws with common rules'.[3] This process has always taken place between countries since disparity of laws is considered as obstacle to trade.[4] When laws between countries are harmonised, the disparities in law and enforcement would decrease. Therefore, a higher level of legal certainty and predictability would be achieved, and thereby facilitate cross-border trade. Based on these advantages, there have been continuous efforts from regional integrations such as the EU and institutions such as the United Nations Commission on International Trade Law (UNCITRAL) and International Institute for the Unification of Private Law (UNIDROIT) to achieve the harmonisation of laws.[5] The level of harmonisation can range from minimum harmonisation to complete harmonisation.[6] Under the minimum harmonisation approach, it leaves some discretion to member states to

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[1] Michael G. Faure, 'The Harmonization, Codification and Integration of Environmental Law: A Search for Definitions' (2000) 9 Eur Envt'l L Rev 174, 174.
[2] Gülüm Bayraktaroglu, 'Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization' (2003) 5 Eur J L Reform 127, 127.
[3] Marcel Fontaine, 'Law harmonization and local specificities – a case study: OHADA and the law of contracts' (2013) 18 Unif. Law Rev 50, 50.
[4] ibid.
[5] ibid.
[6] For a more detailed analysis, see Bartlomiej Kurcz, 'Harmonisation by means of Directives - never-ending story?' (2001) European Business Law Review 287.

adopt higher standard than minimum standard. Whereas no derogation is allowed from member states under the complete harmonisation.[7]

Harmonisation is often pursued in certain areas of laws, particularly IP law. There were movements towards IP harmonisation dating back 100 years.[8] It can be considered as a process that continuously occurs at various levels, namely multilateral, regional and bilateral levels. The definition of 'harmonisation', however, is not clear. Peter Drahos describes the process of IP harmonisation as a 'global IP ratchet'.[9] In his view, the ratchet for IP rights moves only in one direction and is controlled by industrialised countries like the US and those in the EU.[10] In addition, it was opined that since the IP standard always flows outward from developed countries, the harmonisation of IP law can be defined as 'a means adopted by stronger nations of imposing higher standards of IP on nations in a poorer bargaining position'.[11] According to him, IP harmonisation could be identified as the adaptation or implementation of the higher level of IP standard imposed by developed countries on developing countries.

The harmonisation of IP rights usually occurs at an international level. In the era of globalisation, IP rights have become an important factor in the global economy. IP laws can be used as a tool to promote the creativity of artistic works and technological advancement.[12] However, in order to achieve this goal, effective and adequate IP

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[7] ibid.
[8] Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (Report of the Commission on Intellectual Property Rights, 2002) 5.
[9] Peter Drahos 'Intellectual Property and Pharmaceutical Markets: A Modal Governance Approach' (2004) 77 Temp L Rev 401, 406.
[10] Owen Morgan, 'Harmonisation of Intellectual Property: Issues in the South Pacific' (2010) 4 Int J of Bus Glob 237, 247.
[11] ibid 237.
[12] WIPO, *Understanding Copyright and Related Rights* (WIPO Publication 2005) 4.

protection is required. In the EU, appropriate level of IP protection is considered as essential factor in promoting growth and competitiveness of the EU economy.[13] On the contrary, a weak and ineffective IP standard could result in a limitation of economic growth and development of a country. Excessively weak IP protection could reduce innovation since it fails to provide investors with adequate returns.[14] Therefore, developed countries, in particular the US and those in the EU, are willing to strengthen IP protection at the international level in order to protect their economic interests and nationals' rights. In addition, developed countries tend to promote harmonisation of IP laws by encouraging developing countries to upgrade their IP standards in accordance with the level of developed countries regardless of their needs, interests and capacities.[15] Although the reformation of law may be burdensome, developing countries tend to adopt higher levels of IP protection in the hope that IP would help generate economic growth. That said, by having an adequate and effective IP standard, developing countries expect that it would help attract a greater number of foreign investment.[16] If foreign direct investment (FDI) increases, developing countries as host states would directly benefit in various ways, such as in increased technological transfer, improvements in human capital and institutions, and stimulating domestic investment.[17] Notwithstanding, there are some cases where developing countries may not really want to amend their laws in accordance with

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[13] Florence Hartmann-Vareilles, 'Intellectual property law and the Single Market: the way ahead' (2014) 15 ERA Forum 159, 159.
[14] Keith E. Maskus, 'Intellectual Property Rights and Economic Development' (2000) 32 Case W Res J Int'l L 471, 474 <http://scholarlycommons.law.case.edu/jil/vol32/iss3/4> accessed 20 April 2016.
[15] Morgan (n 10) 245.
[16] Emmanuel Hassan, Ohid Yaqub, and Stephanie Diepeveen, 'Intellectual Property and Developing Countries: A review of the literature' (Prepared for the UK Intellectual Property Office and the UK Department for International Development, RAND Cooperation 2010) 4. <http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR804.pdf> accessed 23 December 2015.
[17] Shiva S. Makki and Agapi Somwaru, 'Impact of Foreign Direct Investment and Trade on Economic Growth: Evidence from Developing Countries' (2004) 86 Am J Agr Econ 795, 795.

international standards. Under the pressure from developed countries, developing countries have been pushed to adopt strict IP regimes that may not match their needs and interests. When a national IP system is locked to other countries' models, flexibility in devising and developing its own IP policy will dramatically decrease. This could result in a loss of the potential benefits that could derive from having appropriate IP standards.

All in all, there is no clear definition of IP harmonisation. However, according to international practices, the process of IP harmonisation is likely to occur at an international level and has been used as a tool by developed countries to impose their IP standards on other states which usually have less bargaining power or ability to protect their own economic interests. The outcome is usually a higher level of IP protection and greater enforcement in less-developed countries.

2.2 The Development of IP Harmonisation

In the era of globalisation, it is acknowledged that IP rights play an important role in stimulating the creation of knowledge, invention and technological development, which are considered as crucial factors in generating economic growth of a country. There have been ongoing attempts to harmonise and strengthen IP systems worldwide. The WIPO (World Intellectual Property Organization), WTO (World Trade Organization), including industrialised countries have been playing major roles in standardising IP rights at the international level through international trade and IP agreements. The development of IP law harmonisation occurs at the three levels described below.

2.2.1 Multilateral Level

2.2.1.1 IP Harmonisation through WIPO-Administered Treaties

The WIPO is regarded as one of the primary international institutions dealing with IP rights. WIPO was established in order to develop an international legal IP framework at the multilateral level to promote IP rights and satisfy the need to have effective international protection of IP. To achieve these goals, several agreements on IP administered by WIPO have been ratified and amended since 1883 to govern various types of IP rights, particularly copyright, patents and trademarks. Some treaties such as the Paris and Berne Convention harmonised both substantive and procedural rules, which could help standardise both substantive and procedural aspects of the national IP laws of the contracting states. Meanwhile, some other treaties, particularly the Patent Cooperation Treaty (PCT), the Madrid Agreement and the Madrid Protocol, harmonised procedures for filing patents and trademarks in multiple countries, whereas substantive laws in these areas were not addressed and were left unharmonised. Although the ratification of these treaties did not result in complete harmonisation, international IP standards at certain levels have been established with strong and continuous support of the WIPO. Moreover, these WIPO-administered treaties can help facilitate nationals of the contracting states obtaining IP protection in foreign countries, and thereby promote IP harmonisation at the multilateral level together with generating economic growth and development among the contracting states. In addition, it also encourages harmonisation at regional levels since some agreements allow intergovernmental organisations to become party to the agreements. Therefore, it would be true to say that a certain degree of IP harmonisation at the multilateral level has been achieved through the adoption of international IP agreements with strong support from WIPO. One issue to note is that compared with

the WTO, dispute settlement mechanism of WIPO is quite weak.[18] There is no 'full-scale dispute resolution mechanism' to deal with international disputes over IP.[19] Unlike WTO, WIPO contains no dispute settlement mechanism to deal with non-compliance with treaties.[20] Consequently, failure of the member states to implement IP standards in accordance with WIPO-administered treaties can not be challenged.[21]

Among various WIPO-administered treaties that have been adopted, there are seven agreements that play an essential role in shaping an international legal framework for IP rights. These agreements are the Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works**,** Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Patent Cooperation Treaty, WIPO Copyright Treaty, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, and International Convention for the Protection of New Varieties of Plants.

(a) The Paris Convention for the Protection of Industrial Property (Paris Convention)

The Paris Convention, the first IP agreement administered by WIPO, was adopted in 1883. It was the first international agreement dealing with the protection of industrial

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[18] Fukunaga Yoshifumi, 'Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements' (2008) 23 Berkeley Tech LJ 867, 869.
[19] Andrew Larrick, 'Resource Guide for Researching Intellectual Property Law in an International Context' <http://library.law.columbia.edu/guides/International_Intellectual_Property#Arbitration_and_Mediation.2C_and_Dispute_Resolution_for_Domain_Names> accessed 9 June 2016.
[20] Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Routledge 2010) 132.
[21] ibid.

property. The agreement was reached in order to facilitate the grant of industrial property rights covering inventions (patents), trademarks and industrial designs.[22] Currently, the Convention has 176 contracting states.[23] Before the existence of the Paris Convention, obtaining protection in the area of industrial property rights was quite difficult due to disparities in national IP laws of each country.[24]

By virtue of Articles 2 and 3 of the Paris Convention, the principle of national treatment was established. This means that when an applicant files an application for patent or trademark protection in a foreign country that is a party to the convention, the applicant will receive the same treatment as nationals of that country. In addition, when IP rights are granted, the owners will be accorded the same standard of protection and the same legal remedies if there is an infringement of their IP rights as if they were national owners of these rights. The principle of most-favoured nation (MFN) was not included in the Paris Convention.[25] However, the existence of a national treatment principle ensured that each contracting state will afford the same protection to foreigners of other contracting states as to its own nationals.[26]

According to Article 4 of the Convention, apart from standardising IP standards in the member states of the union, the Paris Convention also provided the right of priority, otherwise known as the 'Convention priority right', 'Paris Convention priority right',

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[22] WIPO, 'WIPO Treaties - General Information' <http://www.wipo.int/treaties/en/general/> accessed 6 January 2013
[23] WIPO, 'Contracting Parties' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2> accessed 7 October 2015.
[24] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (WIPO Publication 2004) 241.
[25] Ruth L. Okediji, 'Public Welfare and the International Patent System' in Ruth L. Okediji and Margo A. Bagley (eds), *Patent Law in Global Perspective* (OUP 2014) 22.
[26] ibid.

or 'Union priority right'.[27] This means that when an applicant, who is eligible for the Convention benefits, files a first regular application for patent, trademark or industrial design protection in any member state of the union, the applicant can file a subsequent application in other member countries and use the filing date of the first application as the effective filing date of the subsequent applications. This provides benefits to all the patent, trademark, and industrial design applicants in the countries that are contracting states to the Paris Convention. That said, these applicants would be prioritised over other applicants who would like to file applications for the same or closely similar invention, mark or industrial design in that country. Furthermore, in the context of patent protection, the convention priority right is quite important since the novelty of the invention within the member countries will be preserved during the priority period regardless of the type of novelty-destroying events.[28]

The Paris Convention also provides common rules covering various areas such as patents, trademarks, industrial designs, trade names, and unfair competition that all the contracting states are obliged to follow.[29] However, the Convention provides very limited provisions addressing substantive laws and minimum standards of protection. Therefore, areas such as the determination of most aspects of patent law and the conditions for the filing and registration of marks are left to the domestic law of each contracting state to address. This can still lead to a disparity in the level of protection of industrial rights among the contracting states. The limited substantive provisions is one of the major criticisms of the Paris Convention. Due to the lack of an established

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[27] Seth M. Reiss, 'Commentary on the Paris Convention for the Protection of Industrial Property' (OUP and the Center of International Legal Studies, 2008 – 2010) 4 <www.lex-ip.com/Paris.pdf> accessed 6 January 2013.
[28] ibid.
[29] WIPO, 'Summary of the Paris Convention for the Protection of Industrial Property (1883)' <http://www.wipo.int/treaties/en/ip/paris/summary_paris.html> accessed 6 July 2016.

level of minimum standard of protection, a contracting state may deny to grant protection as long as it does not violate the national treatment principle.[30]

Generally, the Paris Convention provides a flexible framework in the area of industrial rights. Although this did not lead to a high degree of harmonisation, the Paris Convention is an important first step toward IP harmonisation, particularly in the area of patents and trademarks at the global level. The existence of the national treatment principle could help eliminate discrimination at the national level by requiring the contracting states to provide the same industrial rights protection to foreigners as they provide to their own nationals. These common standards can also help develop consistency of certain levels of industrial rights protection among the contracting parties. This outcome can lead to further development in the IP harmonisation process at the international level in other areas of IP rights.

(b) The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)

The Berne Convention for the Protection of Literary and Artistic Works, usually known as 'the Berne Convention', is an IP agreement that governs copyright protection. It was concluded in 1886 and the resulting agreement has been ratified by more than 168 countries.[31] It is considered to be the first international agreement that brings copyright into the international arena.[32] Instead of providing uniform international protection covering all aspects of copyright, the Berne Convention sets

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[30] Jay Dratler and Stephen M. McJohn, *Intellectual Property Law: Commercial, Creative, and Industrial Property* (Law Journal press 1991) 1-100.
[31] WIPO, 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 7 October 2015.
[32] WIPO, 'WIPO Treaties - General Information' (n 22).

forth minimum standards of copyright protection, such as types of work protected, scope of exceptions and limitations, and duration of protection, while allowing the contracting parties to provide more extension protection.[33] It also provides that the creation of an expressive work is automatically protected without requiring registration or notice a condition to copyright protection.[34] Despite subsequent revisions, its basic structure remains unchanged.[35] Compared to the Paris Convention, the Berne Convention is 'a more complete legal instrument'.[36] It is considered to be a model and a template for other international copyright law and related rights conventions.[37]

Similar to the Paris Convention, there was no MFN provision in the Berne Convention.[38] One of the most important principles underlining under the Berne Convention is the principle of national treatment. The national treatment provision essentially provides an 'equal protection clause of international copyright law'.[39] The national treatment principle was established in order to broaden international copyright protection.[40] According to Article 5 of the convention, there is an obligation to give the same protections in other member countries as given to works originating in one of the member countries. In other words, subject to some limitations, member countries are obliged to provide the same copyright protection to nationals of other

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[33] Junji Nakagawa, *International Harmonization of Economic Regulation* (OUP 2011) 144.
[34] Frederick M. Abbot, 'Intellectual Property Rights in World Trade' in A. Guzman and A. Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar 2007) 452.
[35] Jane C. Ginsburg and Edouard Treppoz, *International Copyright Law: U.S. and E.U. Perspectives: Text and Cases* (Edward Elgar Publishing 2015) 20.
[36] Abbot (n 34) 451.
[37] Ginsburg and Treppoz (n 35) 21.
[38] Susy Frankel, *Test Tubes for Global Intellectual Property Issues: Small Market Economies* (Cambridge University Press 2015) 35.
[39] Graeme B. Dinwoodie, 'The Development and Incorporation of International Norms in the Formation of Copyright Law' (2001) 62 Ohio St L J 733, 737.
[40] Monica E. Antezana, 'The European Union Internet Copyright Directive as Even More Than it Envisions:Toward a Supra-EU Harmonization of Copyright Policy and Theory' (2003) 26 BC Int'l & Comp L Rev 415, 419.

contracting states as they provide to their own nationals. This can facilitate nationals of the contracting parties to obtain copyright protection outside their national borders.

Although the Berne Convention did not result in a complete harmonisation of copyright laws, it can help to increase the level of certainty in copyright protection and make efforts to standardise copyright protection in the contracting states more consistent with each other. In addition, by providing harmonised substantive and procedural rules pertaining to copyright protection, it can facilitate the protection of artistic works at the international level. An author in one of the member country can automatically obtain copyright protection in other member countries in the same way as in their own countries. Thus, this could ensure that local authors from member countries would be able to enjoy economic benefit from outside their countries.

(c) The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations is generally referred to as 'The Rome Convention'. It was concluded in 1961 and the resulting agreement came into effect in 1964. To date, there are 92 contracting states.[41] The Convention was established to deal with the protection of rights related to copyright in response to technological advancement, especially the development of the phonogram industry.[42] The protection of related rights was created in order to protect 'people or organisations that add substantial

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[41] WIPO, 'Contracting Parties' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=17> accessed 3 April 2016.
[42] The International Bureau of WIPO, 'International Protection of Copyright and Related rights', 7 <http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/international_protection.pdf> accessed 13 October 2015.

creative, technical or organisational skill in the process of bringing a work to the public'.[43] In other words, the Rome Convention aims to protect particular persons and legal entities involved in making works available to the public rather than protecting the works themselves. Therefore, performers can enjoy the protection of their performances, producers of phonograms the protection of their recordings, and radio and broadcasting organisations the protection of their programmes. The protection is also extended to persons or legal entities who produce subject matter that does not otherwise qualify for copyright protection under national law, but which contains sufficient skill to fulfil the requirements of 'a copyright-like property right'.[44]

The Rome Convention is considered to have been the first agreement to deal with the protection of related rights.[45] The nature of the Rome Convention is quite different from other conventions. It was established to set a new international standard in an area that barely existed at the national level at the time, whereas the goal of other conventions was to syntesise then-existing national regulations.[46] Hence, it was typically referred to as a 'pioneer convention'.[47] Since then, many countries have become more concerned about the protection of related rights and eager to implement regulations dealing with this issue.[48] Article 1 of the Convention clearly states that the protection granted under the Rome Convention will not interact with and affect the protection of the copyright of literary and artistic works. This is also known as a

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[43] Introduction to IP (DL-101), World IP Organization/WIPO Worldwide Academy, Module 3: Related Rights, 2 (as cited in Alhaji Tejan-Cole, 'International Copyright Law – PART II: The Rome Convention, 1961 (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations)', 1 <http://www.belipo.bz/wp-content/uploads/2011/12/romeconvention.pdf> accessed 5 April 2016.
[44] The International Bureau of WIPO (n 42) 16.
[45] ibid 17.
[46] ibid.
[47] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (n 24) 319.
[48] ibid

'safeguard clause'.[49] In other words, the provisions under the Rome Convention could not be interpreted in a way that prejudices copyright protection. Therefore, when copyrighted work requires the authorisation of the author, this will not be affected by the Rome Convention.[50] Similar to the Berne Convention, the principle of national treatment is firmly established in the Rome Convention. National treatment should be granted to performers, producers of phonograms and broadcasting organisations if the required conditions are met in accordance with Articles 4, 5 and 6. However, according to Article 2(2), national treatment is subject to the minimum standard of protection and the limitations provided under this Convention. To become party to the Rome Convention, states must be members of the United Nations (UN), as well as the Berne Convention or the Universal Copyright Convention. Since various requirements have to be met in order for a country to become a contracting party of this Convention and there is a clear link between the Rome Convention and other Copyright Conventions, the Rome convention is sometimes referred to as a 'Closed' Convention.[51]

The Rome Convention is considered to be an important Convention that sets the international standard of protection of related rights. Apart from granting protection to actual works, this Convention encourages the world to be more concerned about the rights of performers, producers of phonograms and broadcasting organisations. As a result, a standard for the protection of related rights could be established at both the national and international levels. However, since the contracting states of the Rome Convention must not only be members of the UN but also of the Berne Convention or

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[49] The International Bureau of WIPO (n 42) 8.
[50] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (n 24) 315.
[51] The International Bureau of WIPO (n 42) 8.

the Universal Copyright Convention, this could result in there being fewer contracting parties compared with other conventions, and this could potentially reduce the degree of harmonisation of the related rights protection at an international level.

(d) The Patent Cooperation Treaty (PCT)

The PCT came into force in 1978. There are now 148 contracting parties.[52] It is considered to be 'a special agreement under the Paris Convention'.[53] Only the countries that are members of the Paris Convention can enter into the treaty. The PCT was created to complement the Paris Convention.[54] The purpose of this Treaty is to reduce duplication of patent application filings and examinations by patent offices at the national level. In order to obtain a patent under the national patent system, applicants need to file applications in every country that they would like to obtain protection.[55] This is time-consuming for both applicants and patent offices. As a result, they would have to spend much time preparing to file applications in each country since each country's forms are usually different and in different languages. This would also increase the expense for applicants. Furthermore, patent offices in each country would have to consider every single patent application and examine whether they meet all the criteria of patentability.[56] The international patent procedure was established under the PCT in order to address these problems. Therefore, the PCT is considered the most significant advance in international cooperation in patents

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[52] WIPO, 'Contracting Parties' <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=6> accessed 10 October 2015
[53] World Intellectual Property Organization, *Introduction to Intellectual Property, Theory and Practice* (Kluwer Law International 1997) 396.
[54] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (n 24) 277.
[55] ibid 276.
[56] ibid 277.

since the adoption of the Paris Convention.[57] Pursuant to the PCT, filing an application at the local national office establishes the priority date. In order to obtain patent protection in other contracting states, the applicant is required to file only one application within the priority year (within one year from the priority date established upon filing at the local national office). As provided by the Paris Convention, this is accomplished by using an application in the identical form and the same language as originally submitted to his national patent office.[58] In addition, a single patent office was established to examine international patent applications. However, international applications can also be filed at national patent offices and international bureaus, which may act as receiving offices.[59]

A PCT application would be processed through two background stages, namely an international phase and a national or regional phase. In the international phase, PCT applications are subject to both search and examination, and an International Preliminary Report on Patentability (IPRP) is issued for all PCT applications. It should be noted that the IPRP is a non-binding opinion given based on the core patentability requirements, namely novelty, inventiveness and industrial applicability.[60] Although it is non-binding, it provides a useful assessment for the applicant to consider when deciding whether or not to continue the process by entering the national or regional phase. In the national or regional phase, the applications are examined by each country to decide whether or not a patent should be granted.

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[57] ibid.
[58] ibid 283-284.
[59] ibid 278.
[60] WIPO, *Summaries of Conventions, Treaties and Agreements Administered by WIPO* (WIPO 2013) 23 <http://www.wipo.int/edocs/pubdocs/en/intproperty/442/wipo_pub_442.pdf> accessed 15 May 2016.

The conclusion of the PCT can be regarded as another significant step toward harmonisation of the patent system at the international level. Nevertheless, this could be considered as partial harmonisation. The PCT system only provides a uniform procedure in filling patent application. The decision whether to grant or reject a patent is left to the national patent system of each contracting state subjecting the patentability to disparities in national patent laws. However, by providing a centralised search and examination process before entering the national or regional phase, it can provide an applicant useful information for assessing the prospect of getting a patent granted. This could help save both cost and time which would otherwise be incurred in preparing and filing separate applications in multiple countries. In addition, patents are considered to provide economic incentives that encourage knowledge and technological development. Therefore, the number of patent applications would tend to increase substantially since the PCT facilitates individuals obtaining international patents in a practical way. The PCT seems likely to go much further than the Paris Convention. By establishing an international patent filing system, the certainty of patent protection at the international level would increase. Additionally, it would be beneficial to the contracting parties, especially developing countries, since the PCT could enhance the opportunities to access new inventions and technology.[61] It would also help relive burden of conducting patent examination in developing countries.[62] By offering a relatively low cost for inventors to obtain carefully examined patents in various countries, it could provide incentive

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[61] Nefissa Chakroun, *Patents for Development: Improved Patent Information Disclosure and Access for Incremental Innovation* (Edward Elgar Publishing 2016) 181-182.

[62] William Lesser and others, 'Intellectual Property Rights, Agriculture, and the World Bank' in Uma Lele, William Lesser and Gesa Horstkotte-Wesseler (eds), *Intellectual Property Rights in Agriculture: the World Bank's Role in Assisting Borrower and Member Countries* (World Bank Publications 1999) 14.

for innovation in developing countries.[63] Thus, this could help the harmonisation of patents in more effective ways.

(e) The WIPO Copyright Treaty (WCT)

Due to technological developments, there is a need to reform the copyright law. The WCT was adopted in response to the challenges of the internet and digital technology.[64] Moreover, due to a strong concern over harmonising global copyright laws, apart from extending copyright protection into the digital domain, this treaty was adopted in order to standardise copyright law at the international level.[65] Since this treaty was agreed to after the adoption of an Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), it aims to address areas that are not covered by TRIPs.[66] Although the WCT may not provide as significant international influence as TRIPs, it can provide guidelines that significantly influence law reform in copyright law.[67] The Treaty entered into force in 2002. Currently, there are 94 contracting parties.[68] Apart from allowing the Member States of WIPO to become parties to this treaty, an intergovernmental organisation is also acceptable as party to the treaty in accordance with Article 17 of the WCT. Currently, the EU is a party to the WCT. Other intergovernmental organisations may be admitted to become party to

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[63] ibid.
[64] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (n 24) 269.
[65] Jeffrey P. Cunard and others, 'WIPO Treaties Raise International Copyright Norms' (1997) NYLJ, s4.
[66] ibid.
[67] Mira T. Sundara Rajan, 'Moral Rights and Copyright Harmonization: Prospects for an 'International Moral Right'' (April 5, 2002) 17th BILETA Annual Conference Proceedings <http://ssrn.com/abstract=1809619> accessed 9 May 2015.
[68] WIPO, 'Contracting Parties' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16> accessed 3 April 2016.

the Treaty.[69]

The WCT is considered to be a special agreement ratified within the scope of Article 20 of the Berne Convention. Article 1 of the WCT clearly sets forth that the interpretation of the WCT, which may result in lowering the standard of protection provided under the Berne Convention, is not acceptable. This means that if the level of copyright protection provided under the WCT is higher than the Berne Convention, it would not be contrary to Article 20 of the Berne Convention. Additionally, it is undeniable that the WCT was adopted in respect to the Berne convention, since Article 1(4) of the treaty clearly states that 'Contracting parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention'. Furthermore, the existence of the WCT will not derogate from any obligations provided under the Berne Convention in accordance with Article 1(2). The WCT aims to ensure effective copyright protection, which builds on copyright standards set out under the Berne Convention. More importantly, in order to increase effectiveness of harmonisation, this treaty was ratified to cover other areas of copyright law in response to the digital era. This would extend copyright protection to cover new types of work and thus increase the level of copyright protection at the international level. Furthermore, allowing intergovernmental organisations to become parties to the treaty would help promote the harmonisation of IP rights, particularly in the area of copyright at the regional level. This would enhance the possibility of harmonising copyright law at a regional level since regional integration organisations could become contracting parties to the treaty. Therefore, the common goal of achieving a certain level of copyright harmonisation in the region could be achieved.

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[69] WIPO, 'Summary of the WIPO Copyright Treaty (WCT) (1996)' <http://www.wipo.int/treaties/en/ip/wct/summary_wct.html> accessed 15 May 2016.

(f) The Protocol Relating to the Madrid Agreement Concerning International Registration of Marks (Madrid Protocol)

The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, known as the 'Madrid Protocol' came into effect in 1996. Currently, it consists of 97 contracting states.[70] The Madrid Protocol was adopted in order to govern the system of international registration of marks. Additionally, the major purpose of this agreement was to make the Madrid system more widely acceptable.[71] The Madrid system was initially established in 1891 and functions under the Madrid Agreement, which was created to harmonise standards and procedures in registering trademarks. However, some countries playing important roles in trademark fields, such as the UK and US were not part of the agreement at that time. Therefore, in order to make the Madrid system more acceptable and effective, the Madrid Protocol provides more options than the Madrid Agreement. The Madrid system for the International Registration of Marks is generally governed by both the Madrid Agreement and the Madrid Protocol. The countries that would like to participate in the Madrid System can accede either to the Madrid Agreement or to the Madrid Protocol. Nevertheless, it has been pointed out that most new members prefer to join the Madrid Protocol, which is more modern.[72]

By setting up international registration of marks, it provide a means for the owner of the mark to have his trademark protected in the several countries that are members to the Madrid system by directly filing one application in one language at his own

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[70] WIPO, 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=8> accessed 3 April 2016.
[71] WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (n 24) 287.
[72] INTA, 'The Madrid System for the International Registration of Marks' (December 2000) 1. <http://www.inta.org/Advocacy/Documents/INTAMadridProtocol2000.pdf> accessed 9 May 2015.

national or regional trademark office.[73] It should be noted although termed as international registration, the rights granted are a bundle of national rights. However, as an alternative to pursuing a national procedure, the Madrid system could help facilitate and simplify the trademark registration process in multiple countries. By allowing an applicant to register a trademark in several countries with one single procedure, it would help the applicant save the time and cost which would normally be spent filing applications in each country. Furthermore, the opportunity for an intergovernmental organisation which has an office for registering marks with effect in its territory to become a contracting party if the required conditions are fulfilled,[74] would help enhance the possibility of trademark harmonisation at other levels, particularly the regional level. For instance, since the EU is a contracting party to the Madrid Protocol, it would be possible for an applicant to designate the EU in an international registration application and thereby obtain a European Union Trademark, which would be effective throughout the EU.

The Madrid Agreement and the Madrid Protocol, which provide harmonised rules governing trademark registration procedures, cannot be classified or considered to be substantive harmonisation treaties.[75] Although they provide a means for an applicant to obtain trademark protection in multiple countries with a single application, filed with a single office, in one language and with one set of fees, the decision on whether or not to grant trademark protection still remains the right of each country or contracting party designated for protection. Due to disparities in national trademark

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[73] WIPO, 'Madrid System for the International Registration of Marks' <http://www.wipo.int/madrid/en/> accessed 6 January 2013

[74] WIPO, *Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement: Objectives, Main Features, Advantages* (WIPO Publication, 2010) 4

[75] USPTO, 'Madrid protocol' <http://www.uspto.gov/trademark/laws-regulations/madrid-protocol> accessed 9 May 2015.

legislation of each country, the outcome of an application might vary. Consequently, this can only be considered to be partial harmonisation. However, the establishment of the Madrid system can be regarded as a significant step toward trademark harmonisation at a multilateral level. An increasing number of contracting parties demonstrates that the Madrid System is arguably an effective route to obtain international trademark registration, and thereby promote trademark harmonisation at a multilateral level.

(g) International Convention for the Protection of New Varieties of Plants (UPOV Convention)

The UPOV Convention was first adopted in 1961 in order to provide an effective *sui generis* system of plant variety protection and encourage the development of new varieties of plants. This created international harmonised standards for plant variety protection. Stronger emphasis was given to breeders' rights.[76] To protect better the interests of commercial plant breeders, the UPOV Convention was amended several times, which took place in 1972, 1978 and 1991. Currently, it has 74 contracting states.[77] By acceding to UPOV Convention, all breeders in UPOV contracting states enjoy the same level of protection. Having a harmonised effective *sui generis* system for plant variety protection at international level can help reduce barriers to trade and stimulate transfer of technology.[78]

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[76] Ira Matuschke, *Adoption and Impact of Proprietary Seed Technologies in Staple Food Crops: The Case of Hybrid Wheat and Pearl Millet in India* (Cuvillier Verlag 2007) 19.
[77] WIPO, 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=27> accessed 13 June 2016.
[78] UPOV, 'International Harmonization is Essential for Effective Plant Variety Protection, Trade and Transfer of Technology' UPOV Position based on an intervention in the Council for TRIPS, on September 19, 2002.

According to TRIPs, WTO members are required to protect new plant varieties using patent rights, a *sui generis* system or some combination thereof. Most of the WTO members preferred to adopt a *sui generis* system, which provides more flexibility in designing system for such protection.[79] However, it was argued that the UPOV system is inappropriate for developing countries.[80] Adopting UPOV 1991 can adversely affect food security in developing countries.[81] Strengthening plant breeders' rights can have a negative impact on small-scale farmers to save, use and exchange seeds.[82] It was suggested that developing countries should develop an alternative *sui generis* plant variety system that is consistent with TRIPs requirements and suitable for the seed and agricultural systems in their countries.[83]

Generally, the UPOV Convention can help standardise plant variety protection at international level. However, UPOV's one-size-fits-all system might not be the best solution for harmonising plant variety protection globally. It is still controversial whether this system is suitable for all counties whose conditions vary considerably. This has led to further development in designing an alterative harmonised plant variety system that is suitable for developing countries.

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[79] Matuschke (n 76) 19.
[80] Carlos M. Correa, 'Plant Variety Protection in Developing Countries: A Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative to UPOV 1991' (APBREBES 2015).
[81] Bradly J. Condon and Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (OUP 2013) 145.
[82] Correa (n 80) 10.
[83] ibid.

2.2.1.2 IP Harmonisation through International Trade Agreements

Significant developments in IP harmonisation have been the result of international trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of IP rights (TRIPs). Initially, the GATT took an important step toward tying IP issues with international trade, and this made IP rights, which had traditionally been a matter of national concern, one of the essential issues in the international trade arena. After that, when the world had become more concerned about strengthening IP protection in order to promote technological development and economic growth, the TRIPs agreement was adopted and used as an important tool in efforts to standardise IP laws at the international level. Since IP protection varies from state to state due to the varying levels of development in different countries, an attempt to harmonise IP through TRIPs has been made to fulfil the needs of the contracting states, particularly developing and least developed countries. Rather than solely impose an obligation on the contracting parties to improve their IP standards in accordance with the TRIPs, an extra transition period was granted to developing and least developed countries to implement the TRIPs into their national laws. Developed countries were also obliged to provide assistance to developing and least developed countries in order to facilitate the implementation of the TRIPs agreement. Consequently, it is undeniable that the GATT and TRIPs are considered to be the most important international trade agreements leading to the establishment of a framework for global harmonisation of IP protection. A certain level of IP harmonisation at the international level would not be possible without the establishment of the GATT and TRIPS Agreements.

(a) The General Agreement on Tariffs and Trade (GATT)

The GATT was a multilateral agreement dealing with international trade. It was established in 1947 and lasted until 1994, when it was replaced by the WTO in 1995. According to its preamble, the aim of the GATT was to reduce and eliminate tariffs and other barriers to world trade. Although the GATT was known to be an agreement, in reality, it functioned as an organisation. Eight rounds of trade negotiations were conducted during it existence,[84] the most significant of which was the Uruguay Round, since it was in this particular negotiation that the WTO was created and the issue of IP rights was first addressed.

The WTO, which is considered to have been the successor to the GATT,[85] came into being in 1995. It was established in order to implement the GATT, set and enforce rules governing international trade, provide a forum for negotiating the further reduction of trade barriers, and set policy for the resolution of trade disputes.[86] There are currently 162 member countries.[87] According to the preamble to the Agreement to establish the WTO, the purpose of its establishment was to reduce barriers to trade and promote free trade. Although the objectives of the WTO were the same as those of the GATT, the WTO extended its focus to other areas of international trade, such as foreign investment and IP rights, rather than solely focusing on goods.

The issue of IP protection emerged from multilateral negotiations in the Uruguay Round of the GATT in response to the effect of technological advancements and the

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[84] Duke Law, 'GATT/WTO' <http://law.duke.edu/lib/researchguides/gatt/> accessed 6 February 2013.
[85] WTO, 'The WTO in Brief: Part 1' <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm> accessed 6 February 2013.
[86] Duke Law (n 84).
[87] WTO, 'Understanding the WTO: The Organization' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 15 May 2016.

globalisation of commercial transactions in the world economy, which stimulated the need for stronger IP protection.[88] In other words, the GATT was concerned with strengthening IP rights to promote an adequate and effective IP standard to ensure that IP law and enforcement would not become barriers to legitimate trade.[89] The Agreement on Trade-Related Aspects of IP rights (TRIPs) was established to achieve this goal. At first, the majority of developing countries opposed the inclusion of IP rights in the GATT.[90] It can be assumed that, at that time, developing countries may have feared that they were not ready for a higher level of IP protection. According to F. M. Scherer, 'when we were a developing nation we systematically appropriated other people's technology. So that was the way we developed'.[91] That said, from the perspective of developing countries, strengthening IP protection could cause the loss of some benefits and decrease their opportunity to learn and access new knowledge and technology from developed nations. However, developed countries claimed that stronger IP laws would not have an adverse affect on developing countries; rather, a greater level of IP standard would help increase foreign direct investment (FDI) and the transfer of technology to developing countries.[92] In addition, as importers of technologies, developing countries recognised that they might have incurred continuing costs if their national laws were reformed to be in accord with the

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[88] Model United Nations Far West, 'Intellectual Property rights' <http://www.munfw.org/archive/47th/ecosoc1.htm> accessed 9 February 2013

[89] Surendra J. Patel, 'Intellectual Property Rights in the Uruguay Round: A Disaster for the South?' (1989) 24 Econ Polit Wkly 978, 978 <http://www.jstor.org/stable/4394763> accessed 10 February 2015.

[90] Faizel Ismail 'Rediscovering the role of developing countries in GATT before the Doha round' (Research and Information System for Developing Countries 2008) 20.

[91] All quotes from F. M. Scherer are from a December 1998 interview with Charan Devereaux (as cited in Charan Devereaux and others, *Case Studies in Us Trade Negotiation: Making the Rules* (Peterson Institute 2006) 45.)

[92] Robert Weissman, 'Patent Plunder: TRIPping the Third World' (1990) 11 The Multinational Monitor <http://www.multinationalmonitor.org/hyper/issues/1990/11/weissman.html> accessed 7 February 2013.

international standard.[93] On the other hand, developed countries were extremely keen to strengthen IP rights since they claimed that a strong IP standard would have a positive impact on international trade.[94] In addition, developed countries believed it would benefit all countries, regardless of their current stage of development.[95] However, despite the controversy among developed and developing countries about the inclusion of IP rights in the GATT, TRIPs was established in 1994 at the end of the Uruguay Round. It was claimed that the establishment of TRIPs showed a strong effort from developed countries in integrating IP rights into international free trade.[96]

The protection of IP rights in the GATT consists of two essential principles, namely the principle of national treatment and the principle of most-favoured-nation (MFN) treatment.[97] These two principles are considered to be the most important in the international trade arena and are normally included in international agreements to prevent discrimination in international trade.[98] According to the national treatment principle, similar to the IP conventions established by the WIPO, contracting states are obliged to treat their own nationals and foreigners equally in line with Article 3 of the TRIPs. The MFN principle, which originally only related to goods in the GATT, ensures that nationals of all contracting states will obtain equal treatment, and when extended to the area of IP, that foreigners will be granted the same advantages,

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[93] Sheila Page, 'Developing Countries in GATT/WTO Negotiations' (2002) Working paper No. 20, Overseas Development Institute, 16.
[94] Emmanuel Hudson and others, 'Intellectual Property and Developing Countries: A review of the literature' (Prepared for the UK Intellectual Property Office and the UK Department for International Development, RAND Cooperation 2010) 12-14.
[95] Duke Law (n 84).
[96] Wei Shi, *Intellectual Property in the Global Trading System: EU-China Perspective* (Springer 2008) 45.
[97] WTO, 'Understanding the WTO: The Agreements <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> accessed 8 February 2013.
[98] Yannick Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'' (2007) 18 Eur J Int Law 757.

favours, privileges or immunity as the nationals of the contracting parties in accordance with Article 4 of the TRIPs.

The GATT played an important role in bringing IP rights into the international trade arena before it was replaced by the WTO in 1995. In addition, the establishment of the TRIPs in the Uruguay Round enabled the inception of IP harmonisation at an international level through international trade agreements. Therefore, the TRIPs can be considered to be the first agreement that incorporated IP rights into the international trade arena.

(b) The Agreement on Trade-Related Aspects of IP rights (TRIPs)

The TRIPs agreement came into force on 1 January 1995.[99] It was ratified as part of the Uruguay Round of diplomatic conferences in 1994 and administered by the WTO.[100] The TRIPs was widely perceived as being a significant international instrument of IP rights. It specified the minimum standard of IP protection at an international level, and obliged all WTO member countries to comply with it and implement it in their national legislation.[101] TRIPs allows member countries to provide additional protection for IP rights provided under the agreement, or initiate new protection for the rights not covered by TRIPs.[102] Since the scope of IP protection was subject to the domestic law of each country, TRIPs attempted to provide a certain minimum standard of IP rights, and thereby decrease the disparity in

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[99] WTO, 'TRIPS**:** A More Detailed Overview of the TRIPS Agreement' <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 7 February 2013.
[100] Dratler and McJohn (n 30) 1A-8.
[101] David L. Blenkhorn, *Competitive Intelligence and Global Business* (Greenwood Publishing Group 2005) 137.
[102] Christopher Heath, 'Methods of Industrial Property Harmonisation – The Example of Europe' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 46.

the IP law between countries. It was claimed that the minimum standard of IP rights provided in the TRIPs was established to further improve IP protection.[103] Additionally, according to Article 7, the objective of the TRIPs was to contribute to the transfer of technology and thus, facilitate economic development. This demonstrates that apart from establishing a global minimum standard of IP rights, the TRIPs aimed to encourage the dissemination of technology from developed to developing and least developed countries in order to further their economic development.

The contents of the TRIPs cover various areas of IP rights, including copyright and related rights, trademarks, geographical indications (GIs), industrial designs, patents, integrated circuits, undisclosed information, and anti-competitive licences. The general provisions of the TRIPs contain the principle of national treatment and the MFN. This ensures that the IP rights of nationals and non-nationals are treated with same standard. According to Articles 2(1) and 9(1), the TRIPs also obliges member countries to comply with substantive elements of the Paris and Berne Conventions; therefore, countries that are not party to the Paris and Berne Conventions are still obliged to comply with some of the provisions in them. Some parts of the TRIPs were developed based on substantive provisions provided in the original IP conventions established by the WIPO.

In addition, TRIPs makes disputes between WTO members regarding compliance

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[103] WT/GC/W/193 (as cited in Michael Blakeney, 'TRIPs After the Doha Ministerial Declaration' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 13).

with obligations under TRIPS part of the WTO dispute settlement.[104] In its preamble, TRIPs clearly states that the agreement was established in order to 'reduce distortions and impediments to international trade'. Therefore, the ultimate objective of taking a dispute to the WTO Dispute Settlement Body (DSB) is to decide whether the national law or policy of the related WTO member creates 'distortions and impediments to international trade'. [105] Unlike the WIPO, the WTO offers dispute settlement mechanism to deal with cases of non-compliance.[106] When the WTO members fail to comply with the TRIPs requirements, these states could be subject to trade sanctions and litigation before the Court of Justice (ICJ).[107] TRIPs is therefore considered as more powerful than WIPO-administered treaties.[108] Compared with the WIPO, the WTO is a more desirable forum to solve international disputes in the field of IP.[109]

Since WTO members consist of developed, developing and least developed countries, the authorised transition period for implementing TRIPs at the domestic level varied, and could be divided into three distinctive phases. The authorised transition period for developed countries was one year following the effective date of the WTO Agreement in accordance with Article 65(1). Developing countries were granted a transition period of one year following the effective date of the WTO Agreement, plus an additional four years to implement other general provisions apart from the principle of national treatment and the principle of MFN treatment in accordance with Article

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[104] Anne Hiaring, 'Fish or Fowl? The Nature of WTO Dispute Resolution under TRIPS' (2006) 12 Ann Surv Int'l & Comp L 269, 270.
[105] ibid.
[106] Dutfield (n 20) 132.
[107] Robin Gross, 'World Intellectual Property Organisation (WIPO)' in Association for Progressive Communications (APC), *Global Information Society Watch 2007* (APC and ITeM 2007) 66 <https://www.apc.org/fr/system/files/GISW2007_EN.pdf> accessed 23 December 2015.
[108] Albert K.W. Yeung and G. Brent Hall, *Spatial Database Systems: Design, Implementation and Project Management* (Springer 2007) 242.
[109] Fukunaga (n 18) 869.

65(2). Lastly, according to Article 66(1) the authorised transition period for least developed countries was eleven years following the date the WTO Agreement was effective with the possibility of an extension.[110] Up to now, the transition period for least developed countries has been extended twice. In 2005, the transition period was extended to 1 July 2013, and on 11 June 2013, it was extended until 1 July 2021.[111] This means that least developed countries will not have to provide IP protection in accordance with TRIPs until 2021. Regarding the transition period for pharmaceutical patents in least developed countries, which expired on 1 January 2016, the WTO Committee agreed to grant a further 17-year transition period of exemption. The new expiration date, which is renewable, has been set for 1 January 2033. This means that the least developed countries are not obliged to comply with provisions on pharmaceutical patents until January 2033. This flexibility will allow least developed countries to develop their technology and thereby increase their ability to manufacture their own medicine.[112] By providing least developed countries an extended TRIPs transition period for pharmaceutical patents, countries such as Cambodia, Rwanda and Uganda are able to make use of this transition period to reform their laws and manufacture medicine, and thereby increase access to affordable medicine, particularly HIV-related medicine.[113] Additionally, in order to promote and encourage the transfer of technology to least developed countries, developed countries were

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[110] WTO, 'TRIPS: FAQs' <http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Transition> accessed 11 February 2013

[111] WTO, 'Responding to Least Developed Countries' Special Needs in Intellectual Property' <https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm> accessed 9 May 2015.

[112] UNAIDS, 'Extended TRIPS Transition Period for Pharmaceutical Products' <http://www.unaids.org/en/resources/presscentre/featurestories/2015/november/20151112_TRIPS> accessed 9 February 2016.

[113] UNAIDS Technical Brief, *Implementation of TRIPS and access to medicines for HIV after January 2016: Strategies andoptions for least-developed countries* (UNAIDS 2011) 5.

obliged to provide incentives and technical assistance to least developed countries, as required by Articles 66(2) and 67.

Thus, all the provisions of the TRIPs should already have been implemented and be enforceable in the national laws of developed and developing countries, while the least developed countries still have time to implement all the TRIPs obligations. There is significant concern about disparity in the readiness of each member country to reform its laws to comply with the TRIPs standard. Since it is admitted that fully complying with the IP standards provided in the TRIPs may impose a greater burden on developing and least developed countries than developed countries, the transition period is classified by considering member countries' level of development.

From an overall perspective, the major purpose of TRIPs is to harmonise the protection of IP rights at a global level. However, this agreement also provides some degree of flexibility. This can be clearly seen from Article 27 that allows member states to exclude certain inventions from patentability. The optional exclusions show that even the harmonisation at the international level can lead to flexibility thereby causing a lack of a certain degree of harmonisation. Moreover, since implementing all the TRIPs obligations within one year of the effective date of the Agreement may be burdensome for some member countries, developing and least developed countries have been granted an additional period for the transition. This flexibility enables these countries to modernise their administrative capacity and infrastructure and prepare for the promulgation of new IP laws. By the end of the transition period, all WTO member countries are expected to have a similar IP system and standard, thus reducing the disparity of IP law among developed, developing and least developed countries. Although TRIPs does not contain sufficient detail to achieve a complete

harmonisation,[114] it can be considered to be a large-scale harmonisation of IP law since the TRIPs covers a wide range of IP matters. It also provides measures of enforcement, dispute settlement, and a transitional period, which can facilitate member countries to reform their laws to comply with the TRIPs. Furthermore, the TRIPS resulted from trade negotiations in which WTO member countries with different levels of development participated. Thus, the establishment of the TRIPs has been an important step in harmonising IP law at a multilateral level through the ratification of international trade agreements.

2.2.2 Regional Level

2.2.2.1 Regional Economic Integration and IP Harmonisation

In order to build prosperity and wealth, various countries, which are normally located in the same area, decide to co-operate and work closely together. This process is known as 'regional economic integration'. Among the processes of regional integration around the world, the EU is widely perceived as a 'model for regional economic integration'.[115] As a result, the process of regional integration in other areas of the world has referenced the EU as a model. Furthermore, to promote regionalism, the EU has stepped into a role in promoting regional integration in other regions, such

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[114] Heath (n 102) 48.
[115] Sanoussi Bilal, 'Can the EU Be a Model of Regional Integration? Risks and Challenges for Developing Countries' (Globalisation Studies Network (GSN) Second International Conference on Globalisation: Overcoming Exclusion, Strengthening Inclusion, Dakar, Senegal, 29-31 August, 2005) 3.

as Africa and South East Asia.[116] Doing so was one element of 'external action' of the EU since its inception.[117]

The major goal of economic integration is to create an internal market. In the EU, the creation of an internal market was clearly stated as the major objective in the original EC Treaty.[118] By doing so, goods, services, workers and capital can move freely around its territory. The EU is considered the most obvious example of regional economic integration that can successfully establish a well-functioning internal market. One of the major factors that help to ensure the free movement of goods within the community could be the EU's success in harmonising IP laws between its members. The EU has recognised that disparity in national IP laws among the member states can adversely affect the establishment of a well-functioning internal market.[119] In addition to the EU, the countries in Africa and ASEAN also recognise that IP harmonisation is an essential factor in regional economic integration. These countries believe that to be successful and achieve a deeper economic integration, discrepancies in national IP laws in each member states should be minimised as much as possible. Consequently, countries in Africa and ASEAN have been enthusiastic about creating an effective regional IP system with the aim of promoting regional economic growth.

Among these three regional groupings, the EU is considered to be the best example of regional economic integration having achieved a considerable level of IP harmonisation. The EU's success in creating a unitary IP system in many areas such

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[116] Serena Garelli, 'The European Union's Promotion of Regional Economic Integration in Southeast Asia: Norms, Markets or Both?' (Bruges Political Research Papers No. 25 2012) 4-5.
[117] Karen E. Smith, *European Union Foreign Policy in a Changing World* (Polity Press 2008) 109
[118] Elizabeta Zirnstein, 'Harmonization and Unification of Intellectual Property in the EU' (2005) Intellectual Capital and Knowledge Management 293, 299.
[119] ibid 296.

as trademarks, designs, PVRs and GIs is viewed as a crucial element in the establishment of an EU internal market. However, despite its protracted efforts in this area, IP harmonisation in the EU is still an ongoing process. At first, harmonisation of IP laws was not authorised under the European Community (EC) Treaty.[120] This view was changed when it was realised that differences in IP protection could obstruct the free movement of goods in the community, and thus adversely affect the proper function of the internal market.[121] Since then, the EU has become more concerned and enthusiastic about harmonising IP laws and strives for a strong and effective IP regime in order to reduce the negative impact on the internal market.[122] To further harmonise its patent system, the proposal of the unitary patent was introduced.[123] The regulations providing unitary patent protection consisted of two EU regulations and one international agreement between participating EU member states addressing the creation of a Unified Patent Court (UPC).[124] When a unitary patent system is firmly established, it would allow an applicant to obtain a European patent with unitary effect.[125] This could be considered a significant development by the EU since both the granting and the enforcement of a EU patent would be harmonised, thereby helping the EU move towards establishing a single regional IP system.[126]

Although a high degree of harmonisation in IP in Africa and ASEAN has not been achieved as has been achieved by the EU, significant progress has been made in these regions, particularly in the African Union (AU). The formation of the AU is

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[120] Heath (n 102) 40.
[121] ibid 40-41.
[122] Zirnstein (n 118) 296.
[123] ibid.
[124] European Commission, 'Patents' <http://ec.europa.eu/internal_market/indprop/patent/index_en.htm> accessed 5 February 2013.
[125] ibid.
[126] Up to date, all EU member states except Spain and Croatia have participated in the enhanced cooperation on the Unitary Patent.

considered to be one of the most significant developments in regional integration in Africa. It is viewed as 'an event of great magnitude in the institutional evolution of the continent'.[127] Similar to the EU, one of the policies adopted by the AU was the creation of the single market of Africa.[128] Harmonisation of laws, particularly in the area of trade and commercial laws, is seen as an important element that fosters regional economic integration.[129] In order to ensure the free movement of goods, harmonising IP laws in the member countries became one of the key factors in establishing the common market in Africa.[130] One of the remarkable successes in this area was the establishment of the African IP Organisation (OAPI). Established primarily by French-speaking African countries in accordance with the Bangui agreement, the OAPI was established in 1962 and contains both substantive and procedural provisions covering various areas of IP rights.[131] By virtue of this Agreement, an applicant can apply for IP protection that can be enforced in every member state of OAPI by filing only one application at the OAPI office. By becoming member states of OAPI, these countries are treated as one state. This could be compared to the EU-wide trademarks, designs, PVRs and GIs systems in the EU, which provide a unitary effect throughout the European territory. This was the initial and a significant development of IP harmonisation in Africa that could lead to a further degree of harmonisation.

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[127] African Union, 'AU in a Nutshell' <http://www.au.int/en/about/nutshell> accessed 7 April 2013
[128] Adebambo Adewopo, 'Developments in Intellectual Property in Africa' International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), 2.
[129] Muna Ndulo, 'The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)' (1996) Cornell Law Faculty Publications, Paper 60, 211 <http://scholarship.law.cornell.edu/facpub/60> accessed 1 May 2016.
[130] ibid.
[131] WIPO, 'African Intellectual Property Organization (OAPI)' <http://www.wipo.int/wipolex/en/details.jsp?id=3376> accessed 8 April 2013

Among regional grouping around the world, other than the EU, ASEAN can be considered 'the most advanced of these efforts'. [132] Similar to the EU, the establishment of a single market and one production base is one of the major objectives of the ASEAN Economic Community (AEC). [133] In order to transform ASEAN into an innovative and competitive region, ASEAN recognised that strengthening IP rights cooperation at regional level was necessary.[134] Moreover, to attract greater FDI, it was essential for ASEAN to provide strong and effective IP protection in the region.[135] To achieve this goal, various frameworks and cooperation among the ASEAN members and joint projects between ASEAN and its dialogue partners were established. However, when compared to other regions, especially the EU, ASEAN seems to have achieved only a minimal level of IP harmonisation. Due to various constraints, particularly legal and economic disparity among the member countries, ASEAN departed from its ambitious goal in developing a regional IP system. More flexible IP cooperation policy under the ASEAN IPR Action Plan 2011-2015 would imply that creating an ASEAN-wide IP system is not realistic at the moment. Notwithstanding, to ensure that disparities within the domestic IP laws of member states do not obstruct the free movement of goods within a common market, a higher level of IP harmonisation is indispensable.

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[132] Fraser Cameron, 'The European Union as a Model for Regional Integration' (Council on Foreign Relations Press, New York: Council on Foreign Relations 2010) <http://www.cfr.org/eu/european-union-model-regional-integration/p22935> accessed 5 March 2016.
[133] ASEAN, 'ASEAN Economic Community' <http://www.asean.org/communities/asean-economic-community> accessed 27 March 2016.
[134] ASEAN, *ASEAN Economic Community Blueprint 2025* (ASEAN Secretariat 2015) 14.
[135] ibid.

2.2.2.2 IP Harmonisation through Regional Trade Agreements (RTAs)

RTAs have become an important tool in seeking IP harmonisation at the regional level. Commitments regarding IP rights are usually a part of an RTA in response to the need to protect new technology and enhance access to the world market. As a result, there has been an increasing number of RTAs with IP right provisions worldwide.

Free Trade Area of the Americas (FTAA) is perceived as 'one of the most important current regional trade negotiations'.[136] In order to eliminate barriers to trade and ensure the free movement of goods, countries in the same region decided to establish regional free trade areas by adopting regional free trade agreements. In addition to provide provisions regarding elimination of tariffs, these agreements usually address IP protection and enforcement in order to ensure that IP rights do not become barriers to trade. By including provisions concerning IP rights, IP protection in contracting states would be standardised, and thereby the discrepancies in domestic IP laws would be minimised. Furthermore, inclusion of an IP provision in an RTA can help promote innovation and the transfer of technology.[137] This would attract a greater number of foreign investors, and thus have a positive effect on economic growth.

There are various RTAs in the Americas that include a section requiring contracting parties to comply with provisions addressing IP rights such as the Andean Community, G-3 Free Trade Agreement, NAFTA, MERCOSUR, and SEICA.[138] The most remarkable example is the North American Free Trade Agreement (NAFTA).

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[136] David Vivas-Eugui, 'Regional and Bilateral Agreements and a TRIPs-plus world: the Free Trade Area of the Americas (FTAA)' (TRIPs Issues Papers, Quaker United Nations Office (QUNO) 2003) 3.
[137] ibid 11.
[138] Vivas-Eugui (n 136) 6.

NAFTA is a free trade agreement signed by the United States (US), Canada and Mexico with the purpose of eliminating barriers to trade in order to ensure the free flow of goods in the NAFTA community.[139] The Agreement has been in force since 1994.[140] NAFTA clearly states that one of its objective is to provide adequate and effective protection and enforcement of IP rights.[141] Provisions regarding IP are specifically detailed in Chapter 17 of NAFTA. This chapter provides a uniform minimum standard of protection and enforcement covering various areas of IP rights namely copyright, sound recordings, encrypted program-carrying satellite signals, trademarks, patents, layout designs of semiconductor integrated circuits, trade secrets, GIs, industrial designs, and enforcement of IP rights that oblige the member states to implement in their domestic laws.[142] By providing substantive provisions addressing various essential areas of IP rights, Chapter 17 of NAFTA is very similar to the TRIPs Agreement.

NAFTA, however, contains provisions, which enhance the level of IP protections beyond the global minimum standard of IP rights established by the TRIPs. This is known as the 'TRIPs-Plus standard'.[143] It has been stated that 'NAFTA is a watershed in the history of protection of IP rights, standing on the shoulders of the Dunkel TRIPS Text and vastly increasing the level of protection afforded to holders of such

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[139] George Y. Gonzalez, 'An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement' (1993) 34 Harv Int'l L J 305.
[140] Office of the United States Trade Representative, 'North American Free Trade Agreement (NAFTA)' <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> accessed 10 May 2013
[141] Article 102 of NAFTA.
[142] Article 1705-21 of NAFTA.
[143] Cynthia Ho, *Access to Medicine in the Global Economy: International Agreements on Patents and Related Rights* (Oxford Scholarship Online 2011).

rights'.[144] In other words, the section on IP rights in NAFTA was based on the substantive provisions in the TRIPs but expanded them by strengthening the levels of protection in some areas. For instance, in the area of copyright, Article 1705(1) of NAFTA expands the copyright protection of TRIPs by including 'any other works that embody original expression' within the meaning of the Berne Convention. Therefore, the scope of copyright protection under NAFTA extends to new types of work that meet the qualification requirement of 'embodying original expression' although not explicitly specified in the Agreement. Furthermore, in the area of patent, while TRIPs provides the minimum standard for the term of protection to be at least 20 years from the date of filing application, Article 1709(12) of NAFTA provides an additional option for the term of protection to be 17 years from the date of the patent grant. It was opined that this is more beneficial to the patent holder in the case where the patent application process takes quite a long time.[145] Although NAFTA significantly improves existing international IP agreements, particularly the TRIPs Agreement, it fails to address the areas of gray market and parallel importation.[146]

Similar to the Berne, Paris, Rome Convention, and the TRIPs Agreement, the principle of national treatment was an important principle under NAFTA. Nevertheless, NAFTA provides a well-known national treatment exemption known as the 'cultural industries exemption' to Canada in accordance with Article 2106. It should be noted that before NAFTA came into force, the cultural industries exemption was already included in the Canada-US Free Trade Agreement (FTA). The cultural

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[144] Charles S. Levy and Stuart M. Weiser, 'NAFTA: A Watershed for Protection of Intellectual Property' (1993) 27 Int'l L 671, 672.
[145] Walter G. Park, 'Technology Trade and NAFTA' (2007) American University, Department of Economics, Working Paper, 4 <http://www.american.edu/cas/faculty/wgpark/upload/NA-Patent-Zone.pdf> accessed 13 May 2013.
[146] Neil Jetter, 'NAFTA: The Best Friend of an Intellectual Property Right Holder Can Become Better' (1994) 9 Fla J Int'l L 331, 332.

industries exemption in NAFTA is limited to cultural industries as previously defined in the Canada and US FTA.[147] By providing this exemption, Canada was allowed to exempt most music, video, film, and television from the provisions of NAFTA.[148] This could help Canada maintain its authority in regulating policy over the cultural industries in its country. However, allowing such exemptions might be contrary to NAFTA's objective of establishing free trade between member countries and supporting the principle of national treatment in essence.[149] This would delay NAFTA's goal of eliminating tariffs and other barriers to trade. When prospective contracting parties have equal bargaining power, the framework on negotiating RTAs can more easily be adjusted by the parties to suit their needs and interests.

Additionally, since the US, which is acknowledged as a country with a high standard of IP protection and is a party to NAFTA, NAFTA was perceived as the agreement that aimed to oblige Canada and Mexico to enhance their level of IP protection in accordance with the standard set by the US.[150] This is because the burden in adjusting the US national law would be less than that of Canada or Mexico. A developing country like Mexico would have the greatest burden in adjusting its law to the NAFTA standards.[151]

NAFTA presents a significant development in IP harmonisation through RTA.

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[147] The Canadian Conference of the Arts, 'Why Canadian Cultural Industries Need Effective Legislation and Enforced Regulation to Maximize Competition' (Submission to the Competition Policy Review Panel 2008) 8 <http://ccarts.ca/wp-content/uploads/2008/03/CCA-SubmissiontoCompetitionPanel110108.pdf> accessed 13 May 2013.
[148] Jetter (n 146) 332.
[149] Therese Anne Larrea, 'Eliminate the Cultural Industries Exemption from NAFTA' (1997) 37 Santa Clara L Rev 1107, 1149.
[150] Arthur Wineburg, "*NAFTA to Break Down* Barriers," Legal Times, October 26, 1992, 21 (as cited in George Y. Gonzalez, An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement (1993) 34 Harv Int'l L J 305, 306).
[151] Park (n 145) 4.

Although NAFTA cannot be considered to have accomplished complete harmonisation since it fails to address some areas of IP rights, NAFTA brings major improvement to the protection of IP rights. Furthermore, by setting out uniform IP provisions which provide a higher level of protection than TRIPs, it reaffirms the principle that in IP, TRIPs protections are considered as the floor, not the ceiling.

The TRIPs-Plus provisions can also be found in a number of trade agreements in the Asia-Pacific region which consists of countries that have different economic backgrounds and IP protection standards.[152] Agreements imposing higher level of IP right obligations are generally initiated and pursued by developed countries. Although the US is considered as 'the most active TRIPs-plus promoter',[153] other developed countries such as Japan and members of the European Trade Association (EFTA), which are perceived to be the countries with a strong IP standard and enforcement and the crafters of the TRIPs[154] have been playing an active role in pursuing the TRIPs-Plus standard. Other than seeking strengthened IP standards and enforcement beyond TRIPs, these agreements usually commit the contracting parties to make accession to international IP treaties.[155] For instance, The FTA between the Member States of the EFTA and the Republic of Korea, which came into effect in 2006, required accession to the Rome Convention, WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT) by 2008.[156] By ratifying trade agreements, developed countries can raise the IP standards of contracting states in particular areas in accordance with their own needs.

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[152] Beatrice Lindstrom, 'Scaling Back TRIPs-Plus: An Analysis of IP Provisions in Trade Agreements and Implications for Asia and the Pacific' (2010) 42 NYU J Int'l L & Pol 917, 920.
[153] ibid.
[154] ibid.
[155] ibid 929.
[156] ibid 933.

IP rights matters can also be found in the Cotonou Partnership Agreement between the European Union (EU) and African, Caribbean and Pacific countries. By virtue of this agreement, Economic Partnership Agreements (EPAs) between the EU and African, Caribbean and Pacific (ACP) countries were established in order to promote cross-border trade between the two groupings. Since the agreement was adopted between the EU and developing countries, it also aims to reduce and eliminate poverty while firmly integrating ACP countries into the global economy.[157] Similar to other trade agreements, the EU addressed IP rights to provide stronger IP rights protection beyond TRIPs in the EPAs negotiations.[158] However, it was claimed that the EU had no legal right to force the ACP countries to implement such a high level of IP protection.[159] According to Article 46 of the Cotonou Agreement, since the provision uses the word 'may', it can be assumed that there is no legal obligation for the contracting parties to include higher IP rights provisions in EPAs. Nevertheless, the EU argued that the ACP countries committed to increase their IP protection by relying on Article 46.4 of the Cotonou Agreement which discusses further agreements in the area of trademarks and GIs.[160] However, similar to Article 46, the word used in this Article is still not mandatory, therefore it was claimed that the contracting states are not obliged to pursue further agreement negotiations on trademarks and GIs.[161] Although there is still ambiguity in provisions regarding IP rights protection, the EU

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[157] European Commission, 'Economic Partnerships' <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/> accessed 12 May 2013.
[158] Geoff Tansey, 'Hidden Threats: An Analysis of IP Rights in EU-ACP Economic Partnership Agreements: Unveiling the Hidden Threats to Securing Food Supplies and Conserving Agricultural Biodiversity' (UK Food Group 2009) 5 <http://www.ukfg.org.uk/docs/HIDDEN_THREATS.pdf> accessed 13 May 2013.
[159] ibid 6.
[160] Dalindyebo Shabalala and others, 'Intellectual Property in European Union Economic Partnership Agreements with the African, Caribbean and Pacific Countries: What way forward after the Cariforum EPA and the interim EPAs?' (Center for International Environmental Law 2008) 3. <http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf > accessed11 May 2013.
[161] ibid.

made a strong effort to expand the reach of EPAs to include TRIPs-Plus provisions in those agreements.

Recently, negotiations on the Trans Pacific Partnership (TPP) were concluded. The TPP is considered as 'one of the most ambitious free trade agreements ever attempted'.[162] It has been suggested that if this regional trade agreement can be finally ratified and adopted, it will 'set the standard for 21st-century trade agreements going forward'. [163] Currently, twelve countries, namely Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, United States, Singapore and Vietnam are participating in the negotiations of the TPP.[164] Other countries, particularly those in Southeast Asia such as Thailand and Philippines are interested in joining the TPP to follow the four other ASEAN members, namely Brunei Darussalam, Malaysia, Singapore and Vietnam that already engaged in current TPP negotiations.[165] It is expected that the adoption of the TPP will help deepen economic relations and promote free trade between these countries. [166] Regarding IP protection, TRIPs-Plus obligations are also present in TPP negotiations. There has been a request from the US to include TRIPs-Plus provision in this agreement.[167] Such request has been widely criticised; however, it has not resulted in

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[162] 'TPP: What is it and why does it matter?' (BBC News, 14 March 2013) <http://www.bbc.co.uk/news/business-21782080> accessed 13 October 2015.
[163] Office of the United States Trade Representative, 'TPP Statements and Actions to Date' <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2009/december/tpp-statements-and-actions-date> accessed 13 October 2015.
[164] Office of the United States Trade Representative, 'Overview of TPP' <https://ustr.gov/tpp/overview-of-the-TPP> accessed 13 October 2015.
[165] Prashanth Parameswaran, 'Does Thailand Really Want to Join the TPP? (*The Diplomat*, 16 September 2015) <http://thediplomat.com/2015/09/does-thailand-really-want-to-join-the-tpp/> accessed 13 October 2015.
[166] As of now, the TPP has not yet been ratified.
[167] Helen Walls and others, 'Trade and Global Health' in Johanna Hanefeld (ed), *Globalisation and Health* (McGraw-Hill Education 2015) 108.

a change.[168] The US still insists to include TRIPs-Plus provisions in the TPP. Too stringent IP protection in some areas such as in the field of patented medicines can adversely affect access to medicine in developing countries, and thus undermine public health. Consequently, if the TPP is ultimately ratified, stronger IP protection through TRIPs-Plus provisions might impose a heavy burden on developing countries with obligations relating to IP protection which might be disproportionate to their levels of development. Apart from the TTP, the Transatlantic Trade and Investment Partnership (TTIP), which mirrors the TTP, is being negotiated between the EU and US. Concerning IP protection, particularly in the area of pharmaceutical patents, the EU has expressed concern that this agreement may result in high prices for medicine, and thereby adversely affect access to medicine by its citizens.[169]

In general, developed countries, particularly the US and those in the EU, tend to use regional treaties to promote TRIPs-Plus standards. By doing so, it confirms that strong and effective IP law is essential to international trade and the global economy. RTAs can be considered to be important tools in the process of harmonisation that developed countries can use used to seek stronger IP protection. By entering into RTAs, contracting states with lower bargaining power are obliged to implement higher IP standards in accordance with international and developed countries' standard. Moreover, by virtue of the MFN principle under the TRIPs Agreement, the WTO member countries that entered into agreements with TRIPs-Plus provisions are

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[168] ibid.
[169] European Commission, 'Pharmaceuticals in TTIP' 3 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153010.4.7%20Pharmaceuticals.pdf> accessed 25 December 2015.

obliged to extend the same treatment to all WTO members.[170] This could also result in the harmonisation of IP rights at a multilateral level. Due to increasing number of TRIPs-Plus RTAs, more countries in the world will be bound by the TRIPs-Plus obligations. Consequently, the acceptance of more extensive protection than is required by TRIPs as a result of regional agreements could soon become the global standard.[171] However, due to the disparity in economic and legal make-up of each country, strong IP rights may not serve the best interest of some countries, particularly developing countries. In some cases, it can have adverse effects on the public interest in developing countries.[172] It could be too burdensome for developing countries to significantly amend their domestic laws to conform to the standards set by developed countries. However, some developing countries have decided to agree to RTAs with TRIPs-Plus provisions in exchange for deeper market access and a transfer of technology. Thus, before making a decision to sign an RTA with TRIPs-Plus obligations, less developed countries should take into account their readiness and capacity, including the possible negative consequences in order to achieve the utmost benefits to all parties.

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[170] UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development, 'Intellectual Property Rights: Implications for Development' (Policy Discuss Paper 2003) 44 <https://www.iprsonline.org/unctadictsd/Policy%20Discussion%20Paper/PP_Introduction.pdf.> accessed 10 May 2016.

[171] Anke Dahrendorf, 'Global Proliferation of Bilateral and Regional Trade Agreements: A Threat for the World Trade Organization and/or for Developing Countries' in Jana Hertwig and others (eds), *Global Risks: Constructing World Order Through Law, Politics and Economics* (Peter Lang 2010) 57.

[172] Anselm Kamperman Sanders, 'The Development Agenda for Intellectual Property' in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and Free Trade Agreements* (Hart Publishing 2007) 7.

2.2.3 Bilateral Level

2.2.3.1 IP Harmonisation through Bilateral Trade Agreements (BTAs)

BTAs can be seen as the current trend used by developed countries, especially the US and those in the EU, in order to ratchet up the global IP standard. The TRIPs-Plus standard is normally integrated into BTAs as one of the permanent sections. In doing so, the scope of IP rights is widened from the minimum standards provided in the TRIPs Agreement. This also decreases discretion of the signatory states in regulating IP protection in their countries.

The harmonisation of IP rights at a bilateral level could set up a new global standard in some areas in accordance with the MFN treatment obligation in Article 4 of TRIPs.[173] By signing BTAs, WTO members that accept TRIPs-Plus obligations in the agreements have to extend these commitments to nationals of all other WTO members. Moreover, similar to RTAs, when more countries have to be bound by TRIPs-Plus commitments, the bilateral standard could become the global standard.[174] As a result, all WTO members would have consistent IP standards consistent with the TRIPs-Plus standard as provided in the FTAs. This may have an adverse effect on developing and least developed countries since it would be quite burdensome for them to immediately incorporate TRIPs-Plus provisions into their national laws. The TRIPs-Plus standard could also adversely affect access to pharmaceuticals in these countries. This could infringe the right to health.[175] However, most developing, and least-developed countries agreed to enter into FTAs although doing so may not suit

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[173] UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development (n 162) 44.
[174] Dahrendorf (n 171) 57.
[175] UNHRC, Report of the Special Rapporteaur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, ¶ 108, U.N. Doc. A/HRC/11/12 (Mar. 31, 2009).

their interests in exchange for access to the market of their contracting parties. Thus, in order to satisfy and protect the interests of all contracting parties, bilateral trade agreements should consider the readiness of the contracting states, the balance of IP right holders, and the public interest.

Similar to the harmonisation of IP rights through RTAs, developed countries often seek stronger IP rights protection through the ratification of BTAs. The US and the EU are widely perceived to be aggressive parties that are enthusiastic in finalizing BTAs, particularly free trade agreements **(**FTAs**)** and bilateral investment treaties (BITs) with the inclusion of TRIPs-Plus provisions.

(a) FTAs

It is widely acknowledged that most FTAs are between developed and developing countries.[176] By adopting FTAs, developed countries can easily set the framework for trade negotiations in accordance with their interests and objectives, which may be difficult to pursue in WTO negotiations.[177] The issue of IP protection is usually addressed as a specific chapter in these agreements. The US is perceived to be the leading country in using FTAs to increase the level of IP protection.[178] The FTAs signed by the US normally provide TRIPs-Plus provisions that attempt to bring IP

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[176] Henning Gross Ruse – Khan, 'Protecting Intellectual Property under BITs, FTAs, and TRIPs: Conflicting Regimes or Mutual Coherence' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* **(**Cambridge University Press 2011) 496.
[177] Jakkrit Kuanpoth, 'TRIPS-Plus Rules under Free Trade Agreements: An Asian Perspective' in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and Free Trade Agreements*, (Hart Publishing 2007) 28.
[178] Khan 'Protecting Intellectual Property under BITs, FTAs, and TRIPs: Conflicting Regimes or Mutual Coherence' (n 176) 496.

standards of its contracting parties closer to those of the US IP law.[179] Moreover, an FTA, which is successfully ratified with one country can be used as a model for other rounds of trade negotiations.[180] For instance, in the FTA between the US and Australia, although Australia already had regulations regarding data exclusivity in its national law, the US still included provisions in this area in the FTA.[181] That said, in the point of view of the US, it is necessary to include the data exclusivity provision since the US aims to use this FTA as a model for trade negotiations with other countries.

Additionally, raising IP standards beyond the standards set by the TRIPs Agreement sometimes decreases the flexibility that TRIPs provides in particular areas, especially patent protection for pharmaceutical products on public health and access to medicine. According to TRIPs, although it obliges all WTO members to provide patent protection to pharmaceutical products, the least developed countries have been granted extensions for granting pharmaceutical patents until January 2033.[182] Additionally, according to Article 8 of TRIPs, in amending or reforming their national laws, the member countries are allowed to provide necessary measures in promoting the public interest. Therefore, it can be assumed that WTO members are allowed to limit IP protection in order to facilitate access to medicines for the benefit of the public interest.[183] This notion was also affirmed in the 'Doha Declaration on the TRIPs Agreement and Public Health', which clearly stated that 'the TRIPS Agreement does not and should not prevent members from taking measures to protect

[179] ibid.
[180] Kuanpoth (n 177) 28.
[181] ibid.
[182] WTO, 'TRIPS and Public Health' <http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm> accessed 14 May 2013.
[183] Khan, 'Protecting Intellectual Property under BITs, FTAs, and TRIPs: Conflicting Regimes or Mutual Coherence' (n 176) 490-491.

public health.'[184] This demonstrates that TRIPs tends to balance IP protection and the interests of member countries, and thereby provides flexibility in order to facilitate access to affordable medicine.

However, FTAs usually contain the TRIPs-Plus provisions that constrain the flexibility of TRIPs in the area of public health. For instance, in the FTA between the US and Bahrain, the period of patent protection can be extended beyond the twenty-year TRIPs minimum when there is an administrative or regulatory delay in granting a patent.[185] This could result in prolonging monopoly rights of patent holders and prevent generic competitors from entering the markets.[186] In this sense, the TRIPs-Plus provisions in FTAs might be contrary to the purpose of TRIPs that tends to provide flexibility to member countries as a method to mitigate the impact of the agreement on access to pharmaceutical products. This would be disadvantageous to developing and to the least-developed countries since most of the world's pharmaceutical patents are owned by developed countries. By providing too stringent standard on patent protection, it would allow the drug companies to have monopoly rights over pharmaceuticals, and prevent patients in developing and least-developed countries from accessing effective and affordable medicine.

Similar to the US, the EU also uses FTAs to increase levels of IP protection beyond the WTO standards.[187] Nevertheless, the type of provision on IP rights in traditional

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[184] WTO, 'Declaration on the TRIPS Agreement and Public Health' <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 14 May 2013.
[185] Article 14.9.6 of the US Bahrain FTA.
[186] UNDP, *The Potential Impact of Free Trade Agreements on Public Health* (UNAIDS 2012) 3-4.
[187] Ruth Mayne, 'Regionalism, Bilateralism, and "TRIP Plus" Agreements: The Threat to Developing Countries' (Human Development Report 2005) 10.

EU FTAs are different than in the US FTAs.[188] Instead of providing detailed provisions on IP protection in the FTAs, EU FTAs normally impose obligations on contracting states to make an accession to numerous international IP treaties.[189] Additionally, EU FTAs tend to address particular areas of IP rights such as GIs and PVRs.[190] For instance, the EU 'legislated extensively on GIs on the domestic level'.[191] Compared with TRIPs, the EU provides a more stringent standard, especially in the area of GIs protection for agricultural products.[192] However, despite lesser detailed provisions on IP protection, by virtue of the MFN principle of TRIPs, the EU can free ride on the TRIPs-Plus standard as a result of the US FTAs.[193]

From an overall perspective, it is obvious that the inclusion of IP provisions in FTAs tends to create IP standards beyond those provided by TRIPs. This can result in the reduction or elimination of TRIPs flexibility. Recently, however policy makers such as international organisations and NGOs have been more concerned about TRIPs flexibilities, particularly in the area of the public health and human right.[194] For instance, it was emphasised by the World Health Organization (WHO) that 'Bilateral trade agreements should not seek to incorporate TRIPS-Plus protection in ways that

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[188] Khan, 'Protecting Intellectual Property under BITs, FTAs, and TRIPs: Conflicting Regimes or Mutual Coherence' (n 176) 496.
[189] ibid 497.
[190] UNCTAD, 'Intellectual Property Provisions in International Investment Arrangements' (United Nations Conference on Trade and Development, UNCTAD/WEB/ITE/IIA/2007/1, 2007) 6.
[191] David Vivas-Eugui and Christophe Spennemann, 'The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements' (UNCTAD/ICTSD Project on Intellectual Property and Sustainable Development 2006) 9.
[192] ibid.
[193] Oxfam, 'Undermining access to medicines: Comparison of five US FTA's' (Oxfam Briefing Note 2004) 2.
[194] Henning Grosse Ruse-Khan, 'The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?' (2011) 18 J Intell Prop L 325, 329 <http://ssrn.com/abstract=1849204> accessed 12 May 2013.

may reduce access to medicine in developing countries'.[195] This emphasised the notion that FTAs with TRIPs-Plus provisions can have a negative impact on developing countries especially in the context of the public health. It was also opined by the UN Rapporteur that developing and least developed countries should not implement TRIPs-Plus provisions in their national IP laws. At the same time, developed countries should not force developing and least developed countries to enter into the FTAs with TRIPs-Plus provisions.[196] What is more important is that there were statements by developed countries like the US and those is the EU showing that the new template of FTAs would tend not to reduce or eliminate TRIPs flexibility particularly in the area of the public health.[197] Because of criticism from various sectors in the international arena, the US and the EU tend to conclude that FTAs would not prevent their contracting parties from using the flexibility provided in the TRIPs Agreement. This would be beneficial for developing and least-developed countries since they would be able to use TRIPs flexibility to take necessary measures to protect public health. This could also promote access to effective and affordable drugs in the developing world. Therefore, it can be implied that the adoption of FTAs with TRIPs-Plus provisions tends to be more friendly to developing and least developed countries.

(b) BITs

Nowadays, in addition to the ratification of FTAs, the number of BITs has been

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[195] World Health Organization (WHO), *Public Health, Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health* (World Health Organisation 2006) 182.
[196] UNHRC (n 175).
[197] Khan, 'The International Law Relation between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?' (n 194) 329.

increasing since they are perceived to be an effective way to promote foreign investment.[198] The issue of IP rights is addressed and included in the model BITs of most countries.[199] IP rights are typically included as an important aspect of investment. For instance, in the BIT between the US and Uruguay, it is clearly stated that IP rights can be considered as one form of investment.[200] Additionally, BITs sometimes address the IP issue by providing a list of different IP rights. Since the 1980s, the US used BITs as a tool to seek adequate and effective standards for IP rights.[201] In doing so, investors who used IP rights as a form of investment would be protected under a BIT. Furthermore, a strong IP standard can convince foreign investors to be confident that the host states are ready to provide a more investment friendly environment.[202] This implies that stringent IP standards would have a positive correlation to the volume of FDI.

Similar to TRIPs, the principle of national treatment and the MFN normally exist in BITs as essential and necessary treatment to protect foreign investors. By virtue of this, foreign investors would be accorded investment treatment no less favourable than the treatment the host states accord to their own nationals. Nevertheless, it was claimed that when the US ratified BITs between developing countries that have weak IP standards, the national treatment and the MFN obligations under those BITs 'are

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[198] UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (United Nations Publication, Switzerland 2010) 81.
[199] Lahra Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' (2010) OECD Working Papers on International Investment, 2010/01, OECD Publishing, 5-6 <http://dx.doi.org/10.1787/5kmfq1njzl35-en> accessed 4 April 2015.
'IP Rights in International Investment Agreements: An Overview' TDM (2009) Issue 1, 5-9.
[200] Article 1 of the US Uruguay BIT.
[201] Peter Drahos, 'BITs and BIPs: Bilateralism in Intellectual Property' (2001) 4 J World Intell Prop L 791, 793.
[202] Sanders (n 172) 6.

not of much use to US investors'.[203] Therefore, the US generally requires that prospective BITs contracting states make a commitment to implement the obligations under the TRIPs Agreement within a reasonable time.[204] In addition to the principle of national treatment and the MFN, by including IP into the definition of investment, IP rights could be subject to other protections for investors such as fair and equitable treatment (FET) and protection in case of expropriation. Furthermore, most BITs include a provision concerning dispute resolution between an investor and the host state. This would allow investors to bring a claim against host states in the case of a host state failing to protect their IP rights. This could help increase legitimacy of international IP protection policy making.

Compared to FTAs, provisions regulating IP rights are not precisely provided in BITs.[205] IP rights protection usually relies on the standards provided in other IP agreements. According to FET, which is considered as the core legal standard of international investment law, if the treatment is interpreted as part of the minimum standard of treatment under customary international law, it might affect the protection of IP rights under BITs. In other words, when investment relating to IP rights takes place, what can be considered as the minimum international standard of protection may come into question. In this sense, TRIPs Agreements, IP treaties administered by the WIPO, and the Chapter on IP rights under the FTA can be regarded as possible sources for the interpretation of the meaning of the minimum international

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[203] Drahos 'BITs and BIPs: Bilateralism in Intellectual Property' (n 195) 794.
[204] See US. Bilateral Investment Treaty Program: Fact Sheet, Released by the Office of Investment Affairs, Bureau of Economic and Business Affairs, 1 November 2000 <http://www.state.gov/www/issues/economic/7treaty.html> accessed 14 May 2013.
[205] Vivas-Eugui (n 136) 7.

standard.[206] As a result, the IP standard existing at the international level would be transformed into BITs. However, the most recent BITs clearly make reference to the 'highest international standard' rather than refer to the minimum international standard.[207] Instead of providing a specific standard of IP rights, BITs usually rely on the IP standard existing in other agreements. However, although IP protections are not implicitly regulated under BITs, they could heavily impact the contracting states regarding the implementation of the international IP standard into their national laws.

In some cases, the negotiation of a BIT is tied to the ratification of bilateral IP agreements (BIPs). This can be seen in the BIT between the US and Nicaragua wherein the signing of a BIP was made a condition of the finalisation of the BIT.[208] Other than using a BIT as a tool to ensure adequate and effective IP protection, developed countries also use the adoption of a BIT to compel its contracting parties to enter into a BIP.

2.2.4 Remarks

Different approaches at various levels have been being used to harmonise IP standards between countries. Despite the same objectives in standardising IP protection, the outcomes of using different approaches vary. Since IP and trade are admittedly interrelated, the ratification of trade and IP treaties at various levels are considered to be important tools in seeking IP harmonisation between countries. At a multilateral level, since various countries with different levels of development can

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[206] ibid 8.
[207] ibid.
[208] Peter Drahos, 'Developing Countries and International Intellectual Property Standard-setting' (2002) 5 J World Intell Prop 765, 785-786.

participate, IP harmonisation at this level usually results in providing a minimum standard that contracting states can build upon. Multilateral treaties usually provide a wide framework that can cover various aspects of IP rights. Moreover, some degree of flexibility is provided in order to accommodate the interests of many countries. Therefore, in some cases, the use of a multilateral approach would be more beneficial for less developed countries since there may be an opportunity for them to build a coalition, which can help enhance their bargaining power.[209] Consequently, IP harmonisation through a multilateral approach tends to proceed incrementally and provide more flexibility than other approaches. Meanwhile, to arrive at an agreement that reflects the true intention and objectives of the parties, regional and bilateral approaches are often pursued. These agreements address the issues and the decisions that cannot be reached at the multilateral level. This can be seen from an increasing number of RTAs and BTAs with TRIPs-Plus provisions that have been ratified between developed and less developed countries. The use of these approaches, particularly BITs, allows developed countries to use their bargaining power to prompt less developed countries to accept their conditions in exchange for trade benefits.[210] Despite difficulties in reforming their IP laws to accommodate higher IP protection, many developing countries reach agreements at the bilateral level in order to obtain benefits that seems to be more apparent. Compared with the multilateral approach, pursuing agreements through the less complicated regional and bilateral approaches, seems to be a more attractive route, especially for developed countries in their pursuit of a higher level of IP protection. Furthermore, due to the increasing use of regional

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[209] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) 362.
[210] ibid.

and bilateral agreements in pursuing TRIPs-Plus protection, there would be a possibility that the bilateral and regional standards can become the global standard.

2.2.5 The Role of Dispute Settlement Mechanism in IP Harmonisation

Ensuring effective compliance with and uniform interpretation of legal instruments can increase the degree of harmonisation. To this end, a strong compliance mechanism in the form of a dispute settlement body and court were established. A noteworthy example can be found in the development of IP harmonisation at international and regional levels.

To ensure that the WTO members adhere to their TRIPs obligations, international disputes relating to TRIPs are subject to the WTO dispute settlement body (DSB), which establishes a panel to deal with each case. It has proven to be an effective mechanism and has been used by various WTO members.[211] Non-compliance with TRIPs may lead to trade sanctions against WTO members that contravene TRIPs obligations. Prior to TRIPs, international disputes relating to IP were not regularly resolved through formal dispute settlement mechanism.[212] It was pointed out that the reasoning of implementing TRIPs in the WTO is to rely on the dispute settlement mechanism that could authorise trade sanctions.[213] In case of a dispute concerning compliance with TRIPs, the WTO panel will interpret the provisions of TRIPs and

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[211] Ginsburg and Treppoz (n 35) 93.
[212] Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011) 29.
[213] Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement: Applying Intellectual Property Standards in a Trade Law Framework* (Cambridge University Press 2016).

issue a report of its finding.[214] The panel's decision can be challenged in the Appellate Body.[215] After the DSB adopts the report by the Panel (and Appellate Body), conclusions and recommendations contained in the report have binding effect.[216] The successful party may be allowed to impose trade sanctions upon the unsuccessful party.[217] However, the WTO has never authorised sanctions on trade for non-compliance with TRIPs.[218] Notwithstanding, trade sanctions have been used by developed countries as a tool to induce compliance and deter non-compliance. An example can be found in South Africa and Thailand. Due to the fear of trade sanctions imposed by the US, South Africa passed the Medicines and Related Substances Act 1977, which is compliance with TRIPs.[219] Like South Africa, the US has threatened to impose trade sanctions on Thailand, and hence significant amendments to the Thai Patent Law were made in 1999 to become TRIPs compliant.[220]

The WTO dispute settlement system also plays a role in ensuring a uniform interpretation of TRIPs. TRIPs is considered 'one of the most substantive agreements of the WTO' and provides 'very precise provisions'.[221] However, some provisions are vague and can lead to divergent interpretations.[222] This leaves discretion to the member states for implementing TRIPs provisions in their national laws. Some WTO

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[214] Ping Xiong, *An International Law Perspective on the Protection of Human Rights in the TRIPS Agreement: An Interpretation of the TRIPS Agreement in Relation to the Right to Health* (Martinus Nijhoff Publishers 2012) 7.
[215] WTO, 'WTO Bodies involved in the dispute settlement process' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm> accessed 11 June 2016.
[216] WTO, 'Legal effect of panel and appellate body reports and DSB recommendations and rulings' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm> accessed 11 June 2016.
[217] Xiong (n 214) 7.
[218] Kennedy (n 213) 351.
[219] Srividhya Ragavan, *Patent and Trade Disparities in Developing Countries* (OUP 2012) 83.
[220] ibid 85.
[221] Oliver Cattaneo, 'The Interpretation of the TRIPs Agreement Considerations for the WTO Panels and Appellate Body' (2000) JWIP 627, 629.
[222] ibid.

members, particularly less developed countries seek to interpret TRIPs obligations narrowly and interpret TRIPs exceptions broadly in order to weaken the agreement.[223] On the contrary, some members, particularly developed countries tend to adopt narrow interpretation of the exceptions to limit the scope of exceptions.[224] For instance, developing and developed countries have adopted a different approach in interpreting TRIPs flexibility relating to patent and public health.[225] Developing countries tend to interpret the exceptions to patent rights broadly to address public health issue.[226] On the other hand, developed countries want to adopt a narrow interpretation of TRIPs flexibility to promote stronger patent protection.[227] It is thus the difficult task of the panel and appellate body to balance the divergent interests of the WTO members when interpreting the TRIPs provisions.[228] However, this would help develop guidelines for interpreting TRIPs obligations and exceptions, and thereby increase consistency in interpreting TRIPs among the members.

At a regional level, regional judicial institutions can play an important role in ensuring compliance and uniform interpretation of agreements and legislations. To promote regional economic integration, regional courts were established with authority to ensure compliance and interpret legally binding rules.[229] The role of the Court of Justice of the European Union (CJEU), the self-contained EU dispute

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[223] ibid.
[224] ibid.
[225] Mor Bakhoum 'TRIPS, Patent Rights and Right to Health: 'Price' or 'Prize' for Better Access to Medicine?' (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper No 10-07, 2009) 5.
[226] ibid.
[227] ibid.
[228] Cattaneo (n 221) 629.
[229] Erik Voeten, 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' (2010) ADB Working Paper Series on Regional Economic Integration 65, 2-5 <https://aric.adb.org/pdf/workingpaper/WP65_Voeten_Regional_Judicial_Institutions.pdf> accessed 12 June 2016.

settlement mechanism[230] is an example of how a regional court plays a crucial role in promoting the harmonisation of IP laws throughout the EU. EU legislation is the major source of European law making in IP.[231] If a member state fails to comply with the EU law, either the Commission or another member state may commence a judicial phase by bringing the matter before the CJEU to ensure compliance.[232] Furthermore, uniform interpretation and application of the EU law in all the member states can be achieved by the CJEU's interpretative authority.[233] A preliminary ruling issued by the CJEU could help enhance legal certainty,[234] and thereby facilitate the creation of an EU-wide IP system. Moreover, since IP harmonisation is linked to a well-functioning of an internal market[235], the CJEU has also been playing an important role in ensuring the free movement of goods and removing distortion to competition in the internal market created by disparities in national IP laws of the member states. A noteworthy example is the development of the doctrine of community exhaustion by the CJEU in the early 1970s in order to support the free movement of goods within the internal market.[236] This principle has had a significant influence on IP law at both national and EU levels.[237] Distribution of IP rights on harmonisation directives and regulations

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[230] Nicolette Butler, 'In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill – Nijhoff 2015) 375.
[231] Justine Pila, 'Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 9.
[232] Andrew Le Sueur, Maurice Sunkin, and Jo Murkens, *Public Law: Text, Cases, and Materials* (2nd edn, OUP 2013) 578.
[233] Europa, 'The reference for a preliminary ruling' <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14552> accessed 12 June 2016.
[234] ibid.
[235] See Commission, 'Completing the Internal Market – White Paper from the Commission to the European Council' COM (85) 310.
[236] Ulrich Loewenheim, 'Harmonization and Intellectual Property in Europe' (1995-1996) 2 CJEL 481 483; WIPO, 'Interface between Exhaustion of Intellectual Property Rights and Competition Law' (2011) CDIP/4/4 REV./STUDY/INF/2, 17-18.
[237] Loewenheim (n 236).

were developed based on the community exhaustion principle established by the CJEU.[238] This clearly demonstrates the crucial role of the CJEU in the development of IP harmonisation. Consequently, it would not be an overstatement to say that the considerable level of IP harmonisation in the EU which can help remove obstacles to the establishment and functioning of the internal market, cannot be achieved without negative integration through the CJEU's case law, as will be further discussed in Chapter 3.

Not only legislation, but also mechanisms for enforcement and interpretation are significant for the IP harmonisation. In addition to having harmonised rules governing IP protection, establishing a strong and effective compliance mechanism that has power to punish non-complaint parties and interpret rules would be necessary. This would be one of the key factors that facilitates a higher degree of IP harmonisation at international and regional levels.

2.3 The Effect of IP Harmonisation

When examining an overview of IP harmonisation and its development at the multilateral, regional and bilateral levels, it is undeniable that the harmonisation of IP laws is desirable and significant to cross-border trade. The disparity of IP laws can be considered to be a barrier to trade as it can obstruct the free flow of goods between countries and inhibit the establishment of free trade. Therefore, various methods have been attempted to harmonise IP standards at all levels. The process of IP harmonisation can have a substantial effect on countries in both the developed and

[238] ibid; WIPO, 'Interface between Exhaustion of Intellectual Property Rights and Competition Law' (n 236); Enrico Bonadio, 'Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?' (2011) 33 EIPR 153, 155.

developing worlds in various aspects, particularly legally and economically, at both the international and the individual country levels. However, due to differences in levels of development between countries, such effect would be different from one country to another.

2.3.1 Legal Aspect

2.3.1.1 The Perspective of Developed Countries

Developed countries are usually involved in the process of IP harmonisation at all levels. Developed countries, especially the US and the members of the EU, play a significant role in attempting to establish global harmonisation of IP protection. The movement in setting international IP standards has flown in one direction, from developed countries, which have strong IP protection and enforcement, to developing countries, which have quite weak IP standards.[239] This can be clearly seen from analysing the TRIPs Agreement which is viewed as the product of developed countries such as the US, the members of the EU, Japan, and Canada and not a product of the developing or least developed countries.[240] Furthermore, by connecting IP rights to international trade through the adoption of the TRIPs Agreement, developed countries, especially the US, have 'achieved their objective of incorporating internationally enforceable IPR norms into the world trading system'.[241] In other words, it can be considered a success of developed countries that they can firmly introduce IP protection to the international trade arena.

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[239] Drahos, 'Developing Countries and International Intellectual Property Standard-setting' (n 208) 766.
[240] ibid 772.
[241] Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamic of International Intellectual Property Lawmaking' (2004) 29 Yale J Int'l L 1, 23.

Apart from initiating the process of harmonisation at the international level, developed countries are also enthusiastic about seeking further improvement in the protection of IP rights beyond TRIPs through the pursuit of regional and bilateral trade agreements. These types of agreements usually impose a greater burden on the less developed contracting parties to improve their IP protection and enforcement. By entering into agreements with TRIPs-Plus obligations, prospective contracting parties that have less bargaining economic power are usually obliged to reform their IP regimes to accommodate a higher level of IP protection. Due to the lack of IP administrative capacity and infrastructure to standardise their IP standards to conform to those of developed countries, the cost of law reformation might outweigh the economic benefits that could be derived from a strengthening of IP protections. Hence, it has been opined that developing countries are pressured by developed countries to reform their IP laws to conform to the standards of developed countries.[242]

However, the IP harmonisation process is not an easy task that can be achieved in a short period of time. Even in developed countries, the harmonisation of law could adversely affect and bring a greater burden on some countries in amending their laws and increasing their standard of protection to be consistent with those of the leading countries that have a strong interest in holding IP rights. For instance, although the EU is perceived to be the leading successful region having made significant progress

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[242] Michael Blakeney, 'TRIPs After the Doha Ministrial Declaration' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 13.

in the harmonisation of national IP laws over the last two decades,[243] it has faced numerous challenges during this process. Generally, it is undeniable that the EU reaps a lot of benefits from harmonisation. Nevertheless, harmonisation may have a negative impact on some individual countries in the community, especially countries with less bargaining power. It has been stated that 'harmonisation is not unquestionably 'a good thing', even within the EU, and certainly not for all those affected by IP rights'. [244] This could be because each country has different backgrounds and circumstances. As a result, rather than having a 'one size fits all' system, having flexibility to develop its own national IP system might better satisfy and suit the particular interests of the individual countries. Therefore, a country that might have to incur a lot of expense in strengthening its IP standards might oppose harmonisation, whereas a country that has significant interest in IP rights usually seeks strong and wide protections.[245] Additionally, differences in the legal cultures of the member countries can also lead to controversy and obstruct harmonisation. For instance, since the concept of copyright has developed differently among the member countries, [246] the EU has faced difficulty in standardising copyright laws in its community. The different aspects of copyright between France, where the focus is on 'author centred copyright concept', and other continental European countries has led to an ongoing legal debate during the development of copyright harmonisation in the

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[243] Christoph Antons 'Legal Culture and Its Impact on Regional Harmonisation' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 31.
[244] Catherine Seville, *EU Intellectual Property Law and Policy* **(**Edward Elgar Publishing 2009) 2.
[245] ibid.
[246] NEN – The Education Network, 'The History of Copyright starts with books and then expanded to cover painting, photographs, film, audio, film, broadcasting and now the digital world' <http://www.copyrightsandwrongs.nen.gov.uk/ipr-and-copyright/history-of-copyright> accessed 30 September 2013.

EU.[247] Furthermore, differences in IP traditions between civil jurisdictions, where IP rights can be found in codes or statutes, and common law jurisdictions, where legal principles are established from precedents could make the harmonisation more complicated.[248] Legal diversity between individual countries could delay and make it more difficult to achieve a complete IP harmonisation. However, despite these obstacles, a considerable level of IP harmonisation is still perceived to be essential to enjoying regional economic benefits, particularly benefits from establishing a genuine internal market.

From an overall perspective, efforts to harmonise IP standards by increasing the level of IP protection have long existed and have developed in industrialised countries. Increasing the level of IP protection is viewed as an important way to promote cross-border trade and eliminate barriers to international trade. Developed countries, particularly the US and the members of the EU, play a major role in setting up a global IP standard and encouraging other countries, especially countries in the developing world, to comply with their standards. In other words, developed countries are the policy makers that introduce a uniform set of high level IP protections. However, to assure that IP harmonisation can benefit all parties involved, their divergent interests and backgrounds should be takin into account.

2.3.1.2 The Perspective of Developing and Least Developed Countries

Since IP standards always flow outward from developed countries, the IP harmonisation process tends to place a much greater burden on countries in the

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[247] Blakeney (n 242) 31.
[248] ibid 31-32.

developing world to reform their IP laws and conform their IP protection levels to the new international standards. Harmonising IP laws, which usually results in an enhancement of IP protection can decrease opportunities for less developed countries to develop IP policies which serve their own particular needs and interests better.[249] Countries that have little bargaining power are forced to comply with the standards imposed by developed countries in order to protect IP rights which are primarily owned by nationals of developed countries.[250] As a result, it has been suggested that the pressure from industrialised countries can be considered a new form of colonialism.[251] Contracting states with less bargaining power would have to constrain their sovereignty in initiating policies and regulations that may otherwise serve their particular needs and be suitable for their country. When sovereign nations have to limit their sovereignty, in particular legislative powers, this shows the dominance of developed countries over developing and least-developed countries. Thus, an agreement with TRIPs-Plus standard obligations could be considered as a new form of colonialism.

Most countries in the developing world have either voluntarily accepted or have been forced to accept a strengthening of their IP protections in return for economic benefits, especially an increase of FDI and technology transfer. For instance, ASEAN, a regional economic integration of which the majority of its members are developing and least-developed countries, has established IP harmonisation as one of their

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[249] Peter K. Yu, 'Five Disharmonizing Trends in the International Intellectual Property Regime.' (2007) MSU Legal Studies Research Paper No. 03-28, *7* <http://ssrn.com/abstract=923177> accessed 6 January 2013.
[250] Morgan (n 10) 9.
[251] Richard H. Stern, 'Intellectual Property' in Michael Finger and J. Olechowski (eds), *The Uruguay Round: A Handbook on the Multilateral Trade Negotiations* (Washington, DC: The World Bank 1987) (as cited in Wolfgang E. Siebeck and others, *Strengthening protection of Intellectual Property in developing countries : a survey of the literature* (World Bank 1990) 54).

primary focuses in order to transform ASEAN into a highly competitive region through the establishment of the AEC.[252] Nevertheless, this process is still lagging behind the previously established timeframe. Disparities in the level of development between the member states can be considered as a major obstruction for ASEAN to pursue its goal in this area. Less developed members often do not have enough IP administrative capacity and infrastructure to implement higher IP standards. They could be adversely affected by the harmonisation process due to the significant burden placed on them to reform and administer their IP laws in conformity with the international standard. However, to reap greater benefits of regional economic integration, strengthening IP rights is indispensable.

The harmonisation of IP law tends to have a positive impact on regional groupings as a whole. That said, IP harmonisation is linked to the steps towards deeper regional economic integration with potential economic benefits. Notwithstanding, when focusing on the perspective of an individual country, harmonisation can have a negative impact. The scope of which can vary depending on that country's legal and economic background and its existing IP laws. In addition, countries in the developing world can be considered to be policy followers rather than policy makers in the harmonisation process. Due to the lack of IP administrative capacity and infrastructure to standardise their IP standards to conform to those of developed countries, the cost of law reformation might outweigh the economic benefits that could be derived from a strengthening of IP protections. Additionally, international agreements with IP clauses, particularly the TRIPs-Plus standard, have significant impact on the sovereignty of developing and least developed countries parties due to

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[252] ASEAN, 'Intellectual Property' <http://www.asean.org/communities/asean-economic-community/category/intellectual-property> accessed 30 September 2013.

the unequal bargaining power of the contracting parties. The power of developed countries can be extended and indirectly maintained in developing and least developed countries. Countries that have less bargaining power have to constrain their sovereignty and reform their laws in accordance with developed countries' policy in order to obtain benefits from international trade.

Although being involved in the process of IP harmonisation would allow developing and least developed countries to update their IP laws in accordance with the international standard, and thereby further their own goals related to international trade. Implementing too strict IP protection can have a negative effect on them. Less developed countries may not be ready for harmonisation because adopting more strict IP standards may be too costly and burdensome. This is consistent with the view that a 'one size fits all' IP approach may not be the best solution for all countries.[253] Consequently, to ensure that less developed countries can reap benefits from strengthening IP rights, a harmonised IP laws should be incrementally developed taking into account less developed countries' interests and capacity.

2.3.2 Economic Aspect

2.3.2.1 The Perspective of Developed Countries

IP rights are considered to be a major factor in international trade law and policy in developed countries.[254] Countries with strong economic performance have developed a knowledge-based economy. The IP system is being used to add value to ideas and

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[253] ibid; John F. Duffy, 'Harmony and Diversity in Global Patent Law' (2002) 17 Berkeley Tech. L.J. 685, 703-06.
[254] Shi (n 96) 44.

knowledge and transform these intangibles to concrete economic assets. Additionally, innovativeness is acknowledged to be a key element that can stimulate economic growth.[255] It can be said that in an era of globalisation, IP rights are seen as a major driving force of economic development in developed countries.

It is evident that sectors that rely on IP rights make a substantial contribution to the economy.[256] IP rights are integrated as part of the institutional infrastructure in developed countries. These countries rely on IP rights to foster their economic development. By having strong and effective IP protection and enforcement, a countries' economy can enjoy various benefits such as contributions to its GDP (Gross Domestic Product), increased employment[257] and FDI. For instance, copyright protection industries in the G7 countries, which consist of the seven main industrialised countries, namely Canada, France, Germany, Italy, Japan, the United Kingdom and the United States[246] have contributed to an increase of 4-11% in the GDP of those countries.[259] Apart from copyright-based industries, sectors that rely on other IP rights such as patent and trademark also make a significant contribution to the growth of the GDP.[260] In addition, these sectors also increased the employment rate within the countries.[261]

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[255] Ville Oksanen and Mikko Valimaki, 'Some Economic Aspects of the European Harmonization of Intellectual Property Rights in Software and its Impact to Eastern EU' (Helsinki Institute for Information Technology (HIIT) 2004) 5 <http://www.dklevine.com/archive/refs4122247000000000448.pdf > accessed 27 May 2015.
[256] ibid 3.
[257] ICC, 'Intellectual Property: Powerhouse for Innovation and Economic Growth' (2011), 3.
[246] European Commission, 'G7/G8, G20' <http://ec.europa.eu/economy_finance/international/forums/g7_g8_g20/index_en.htm> accessed 24 July 2016.
[259] ICC (n 257) 3.
[260] ibid 4.
[261] ibid 3.

According to research conducted by the Organisation for Economic Co-operation and Development (OECD), strong IP rights protection, especially in patent, can increase FDI of a country.[262] For instance, in the OECD countries like Japan and Korea, strengthening patent protection has resulted in higher inward FDI in biopharmaceuticals for the period 1980-2010.[263] This demonstrates that a strong IP standard has a positive correlation to the volume of FDI. FDI is an essential element of economic development since it is considered to be 'an important engine for economic growth'.[264] FDI can increase employment, foreign capital, technological transfer and development, and economic growth in the host state.[265] It has also been pointed out that FDI is an important factor in modernising a national economy and fostering economic development.[266] There is a positive relationship between FDI and GDP of the host states.[267] Additionally, FDI can also promote competition in the domestic market. Increase of FDI inflow can bring new inputs into the host state's economy, and thereby promoting competition in the domestic input market.[268] Higher

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[262] Walter G. Park and Douglas C. Lippoldt 'Technology Transfer and the Economic Implications of the Strengthening of IP Rights in Developing Countries' (2008) OECD Trade Policy Working Paper No. 62, OECD Publishing, doi:10.1787/244764462745, 5, 20, 28.
[263] Meir Perez Pugatch, David Torstensson and Rachel Chu, 'Taking Stock: How Global Biotechnology Benefits from Intellectual Property Rights' (Pugatch Consilium2012) 43-46 <https://www.bio.org/sites/default/files/Pugatch%20Consilium%20-%20Taking%20Stock%20Final%20Report%20%282%29.pdf> accessed 30 December 2015.
[264] Hudson and others (n 94) 3.
[265] Joshua Boone, 'How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies' (2010) 1 GBLR 187, 191.
[266] Laura Alfaro and others, 'How Does Foreign Direct Investment Promote Economic Growth? Exploring the Effects of Financial Markets on Linkages' (2010) 91 J. Dev. Econ. 242, 242.
[267] For a more detailed analysis, see Ali Riza Sandalcilar and Ali Altiner, 'Foreign Direct Investment and Gross Domestic Product: An Application on ECO Region (1995-2011)' (2012) 3 International Journal of Business and Social Science 189, 189.
[268] Assaf Razin and Efraim Sadka, *Labor, Capital, and Finance: International Flows* (Cambridge University Press 2001) 119.

competition in the host state can therefore lead to lower prices, increasing productivity, and more efficient resource allocation.[269]

Patent is also regarded as an important determinant of innovation.[270] It is acknowledged that patents plays an important role in stimulating innovation, which directly affects economic performance of a country.[271] In industrialised countries, patents have been widely used to foster investments and the development of dissemination of knowledge and technology.[272] For example, in the US patent law was reformed by making patent protection easier to enforce, expand its scope to cover new subject matter and by granting patents for longer period in order to promote innovation and economic growth.[273] Due to the reform of the US patent system, the number of patent application has substantially increased since 1990s.[274] Similar to the US, the number of patent filed in other developed countries, particularly those in the EU and Japan, have been continuously increasing.[275] This reflects that patents play a significant role in those countries' economy. Therefore, in addition to contributions to the GDP and employment, and increased FDI, the increasing number of patent application filed in each country can lead to more innovation, and thereby have a positive effect on economic development.

Furthermore, according to the Global Competitiveness Index (GCI), there is a strong correlation between a country's IP ranking and its overall economic competitiveness

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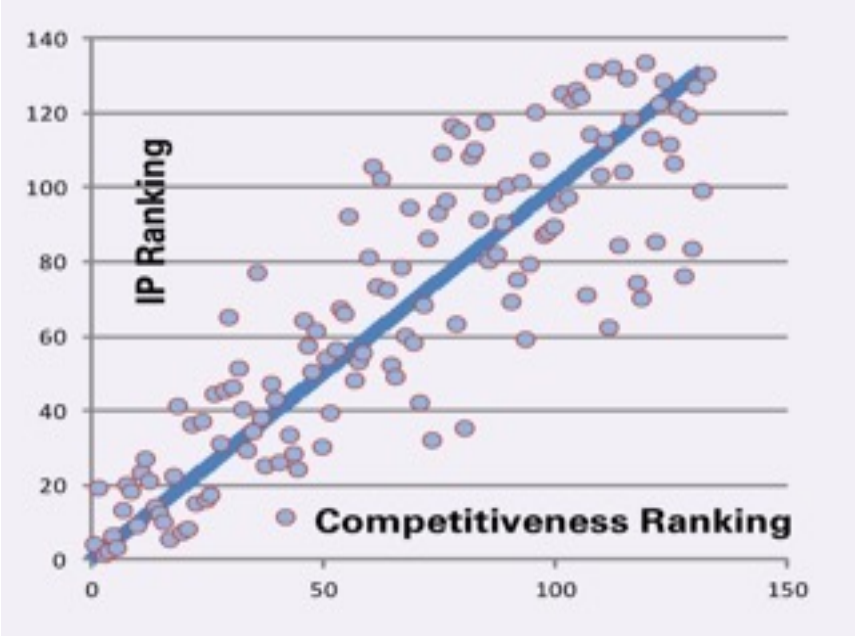
[269] OECD, *Staying Competitive in the Global Economy Moving Up the Value Chain: Moving Up the Value Chain* (OECD Publishing 2007) 8-9.
[270] Yee Kyoung Kim, Keun Lee and Walter G. Park, 'Appropriate Intellectual Property Protection and Economic Growth in Countries at Different Levels of Development' (2012) 41 Research Policy 358, 358.
[271] OECD, *Patents and Innovation: Trends and Policy Challenges* (OECD Publishing 2004) 5.
[272] ibid.
[273] Nancy T. Gallini, 'The Economics of Patents: Lessons from Recent U.S. Patent Reform' (2002) 16 JEP 131, 131.
[274] ibid.
[275] OECD, *Patents and Innovation: Trends and Policy Challenges* (n 271) 5.

ranking.[276] Countries having strong IP protection are likely to be countries with high levels of competitiveness. Meanwhile, countries with weaker IP regimes tend to rank lower in the competitiveness ranking. (See figure 1)

Figure 1: WEF Competitiveness and IP Rankings



Source: International Chamber of Commerce (ICC)[277]

Thus, it can be seen that harmonising IP laws by increasing the level of IP protection and enforcement in developed countries tends to have a positive effect on overall economic development. This also indicates that a strong and effective IP regime can help promote economic growth and development in developed countries.

Moreover, standardising national IP law between the member states in a regional grouping can help them advance towards deeper regional economic integration and establish a genuine internal market. This could provide various positive economic

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[276] Klaus Schwab, *The Global Competitiveness Report 2009-2010* (World Economic Forum 2009).
[277] ICC (n 257) 10.

benefits to the member countries. The EU is a good example of regional economic integration that successfully established a well-functioning internal market. Both business owner and consumers reap the benefits of this kind of internal market. From a business perspective, when economic resources, namely goods, services, capital and workers can move freely around the community, the market becomes more competitive and thus the existence of a monopoly is reduced.[278]Additionally, from a consumer's perspective, increased market competitiveness brings down the prices of products.[279] Consequently, consumers would have a variety of goods with cheap and affordable prices from which to choose.

It would therefore appear that harmonisation of IP laws in developed countries can provide various economic benefits at both the national and regional levels, and thus promote economic growth and expand the market of the country and positively influence larger scale economic development.

2.3.2.2 The Perspective of Developing and Least Developed Countries

From the perspective of developing and least developed countries, there are two different points of view. On the one hand, since strengthening IP laws is always initiated by developed countries, it does not provide any economic benefits to these countries when compared to the cost of standardising IP laws to conform with the standards of developed countries. Harmonisation may be a disadvantage to these countries due to the significant differences between more and less developed countries, particularly the economic differences. Obliging less developed countries to

[278] East African Community towards a Common Market, 'Benefits of a Common Market', <http://www.eac.int/commonmarket/benefits.html> accessed 5 August 2013.
[279] ibid.

adopt high IP standards may entail them having a level of IP protection that is not suitable for their economies, and thereby could be harmful to their interests and economic development.[280]

It has been suggested that stronger IP protection tends to provide benefits to developing countries that have high investment in research and development (R&D).[281] For instance, patents can help enhance innovation in developing countries that have sufficient capacity to conduct innovative research.[282] That said, increasing the level of patent protection in developing countries might not result in an increase in FDI, expenditure on R&D or technology transfer. On the contrary, these countries might suffer from public health problems since more stringent patent protection can severely restrict access to affordable medicines for their people.[283] The ratification of an FTA between the US and Jordan can be considered to be a significant example. By entering into the FTA with the US, Jordan is obliged to implement the TRIPs-Plus standard in its national legislation.[284] Rather than obtaining economic benefits from that, it was evident that Jordan faced serious public health problems. There has been no FDI from multinational pharmaceutical companies to manufacture drugs in association with local companies as the US promised after Jordan entered into the FTA.[285] As a result, there was no technological transfer from multinational expertise

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[280] Yee Kyoung Kim, Keun Lee and Walter G. Park, 'Appropriate Intellectual Property Protection and Economic Growth in Countries at Different Levels of Development' (2012) 41 Research Policy 358. 366-367.
[281] Rod Falvey and Neil Foster, 'The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence' (Working Paper 2006) viii.
[282] Kim, Lee and Park (n 280) 358.
[283] Rohit Malpani, 'All costs, no benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines' (Oxfam Briefing Paper 2007) 2-3 <http://donttradeourlivesaway.files.wordpress.com/2011/01/all-costs-no-benefits.pdf> accessed 30 September 2013.
[284] Charles T. Collins-Chase, 'The Case Against TRIPs-Plus Protection in Developing Countries Facing Aids Epidemics' 29 U Pa J Int'l L 763, 796.
[285] ibid 797.

to local companies.[286] Furthermore, the price of medicine was high and unaffordable for many patients since most medicine was imported rather than produced by local manufacturers.[287] It was also suggested that due to the stronger level of IP protection, new pharmaceutical products had been developed and sold at high prices by industrialised countries, especially the US.[288] In other words, R&D in pharmaceuticals by local companies did not increase as a result of the stricter IP regulations. This demonstrates that strengthening IP standards in accordance with developed countries' standards might not always provide significant economic benefits to developing countries. On the other hand, it can adversely impact access to medicine and potentially harm public health in these countries. This may be because there is no balance between IP rights holders and the public interest. Additionally, when compared to developed countries, particularly the US and the countries in the EU, developing countries might not receive as much from their patent systems as in developed countries. That said, due significantly to the disparity in legal and economic development, the cost of reforming a patent system might outweigh the potential economic benefits.[289]

On the other hand, it has been claimed that strengthening IP rights could generate many economic benefits such as increased FDI, technological transfer and more R&D, which could all stimulate the economic growth of a country.[290] Countries in the developing world with stronger IP protection and enforcement can attract more

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[286] Malpani (n 283) 15.
[287] ibid 3.
[288] ibid 15.
[289] Carlos M. Correa & Sisule F. Musungu, 'The WIPO Patent Agenda: The Risks for Developing Countries' (S. Ctr., Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Papers, Paper No. 12, Nov. 2002) 26.
[290] Hudson and others (n 94) 13.

foreign investors, particularly multinational companies.[291] Adequate IP protection in developing countries can stimulate foreign investors to trade and invest, thereby increasing technology transfer embodied in the inflow of FDI.[292] However, in order to obtain benefits of technology transfer, sufficient human capital in developing countries is required.[293] On the contrary, countries with weak IP laws are less attractive to foreign companies.[294] Therefore, the level of IP protection and enforcement can affect the decision of foreign investors in locating their investments.

In addition, the volume of FDI can be affected by strengthening IP rights. It was proved that developing countries with stronger IP laws can increase FDI into their countries, especially in high technology sectors.[295] Moreover, research conducted by the OECD showed that the strength of IP rights has a positive correlation with the volume of FDI in countries with all degrees of development, namely developed, developing and least developed countries.[296] For instance, at least 25 percent of investors in developed countries such as the US, Japan and Germany refuse to invest in developing countries that have weak IP protections.[297] Reforming IP laws by increasing the level of protection and enforcement could lead to an increase in FDI from developed countries to developing and least-developed countries.

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[291] ibid 4.
[292] Asid, R. Yusof, Y. S. and Saiman, S. (2004). Impact of intellectual property protection, domestic market condition and R & D expenditure on foreign direct investment Inflow. *Preliminary Evidence in Elected Cross-Countries Data*. Munich Personal RePEc Archive Paper No. 1008 (as cited in Samuel Adams, 'Intellectual Property Rights, Investment Climate and FDI in Developing Countries' (2010) 3 International Business Research 201, 201.
[293] UN, *Survey of Economic and Social Developments in the ESCWA Region 2001-2002: Reform of economic institutions in ESCWA member countries with Egypt and the Syrian Arab Republic as case studies* (United Nations Publications 2003) 8.
[294] ibid.
[295] ibid.
[296] ICC (n 257) 8-9.
[297] ibid 9.

Increasing FDI would have a positive impact on the economic development of a country since FDI is a major factor in promoting economic growth. According to the ASEAN Economic Community (AEC) Blueprint 2025, to firmly establish the AEC, most of the members of which are developing and least-developed countries, it is clearly stated that having a strong and effective IP regime would help attract an increased flow of FDI, and thereby enhance the global competitiveness ranking.[298] Additionally, it was found that industries related to IP rights, particularly copyright, in countries in the developing world can increase those countries' GDPs by two to six percent and their employment rate by three to eleven percent of total employment, similar to in developed countries.[299] For instance, in Thailand, the contributions to GDP and employment of copyright-based industries have been considered as enabling factors that can promote a country's economic growth and development.[300]

Stronger IP protection could increase incentive to invent by domestic firms. Stronger IP laws could attract greater spending on R&D by domestic firms in developing countries.[301] This could lead to the improved indigenous technology capacity of these countries.[302] A noteworthy example can be found in India. There was strong evidence that bringing the law into compliance with TRIPs led to increased expenditure in R&D by Indian Firms and thereby promoting innovation.[303] It is inevitable that patent

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[298] ASEAN, *ASEAN Economic Community Blueprint 2025* (n 134) 14.
[299] ICC (n 257) 5-6.
[300] Watcharas Leelawath, Danupon Ariyasajjakorn, and Poonsri Sakhornrad, 'The Economic Contribution of Copyright-Based Industries in Thailand' (2012), 1 <http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_th.pdf> accessed 14 March 2016.
[301] Antara Dutta and Siddharth Sharma, 'Intellectual Property Rights and Innovation in Developing Countries: Evidence from India' (Enterprise Surveys, World Bank 2008) 3.
[302] ibid.
[303] ibid 28-29.

protection is 'a main pillar of modern economic policy'[304] which can stimulate economic development of a country. Having stronger patent protection tends to attract a greater volume of FDI.[305] As a result, countries in the developing world are concerned with reforming their patent protections with the purpose of encouraging economic growth and innovation.[306] Moreover, it has been suggested that there is a positive correlation between FDI and resident patenting.[307] FDI can induce growth in the number of patents granted to residents in developing countries such as Indonesia, Malaysia, Philippines, Vietnam and Thailand.[308] That said, FDI contributed to enhancement of innovation and technological capacity, and stimulated domestic inventors and companies to protect their inventions by patents.[309] This is consistent with the OECD's view that an effective IP system does not only attract FDI, but also promotes R&D and technological transfer in developing countries.[310] This would positively affect economic growth in these countries.

It could be said that both views may be correct. Strengthening IP protection can have both positive and negative effects on less developed countries. However, developing and least-developed countries can also derive benefits from IP protection similar to the benefits enjoyed by developed countries. This would depend directly on the adequacy of IP protection and enforcement, administrative capacity, and the background and level of economic development of each individual country. That said,

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[304] Ali Imam, 'How Patent Protection Helps Developing Countries', <http://www.bskb.com/news_and_events/lectures_and_articles/documents/Ali_Imam_s_AIPLA_Quarterly_journal1.pdf> accessed 7 August 2013.
[305] ICC (n 257) 8.
[306] ibid 9.
[307] Tuan Anh Vu, 'An insight into the patent systems of fast developing ASEAN countries' (2012) 34 World Patent Information 134, 141; Timothy C. Ford and Jonathan C. Rork, 'Why buy what you can get for free? The effect of foreign direct investment on state patent rates' (2010) 68 JUE 72–81.
[308] See Vu (n 307) 136.
[309] ibid.
[310] ICC (n 257) 8-9.

countries with less legal and economic capacity might not derive much economic benefit from implementing overly strict IP regulations and could experience resulting public health problems, as was the case in Jordan. Therefore, before enhancing their level of IP protection and signing an agreement that includes TRIPs-Plus obligations, developing and least-developed countries should fully comprehend all of the potential advantages and disadvantages to doing so.

2.4 Concluding Remarks

This chapter clearly demonstrates the need and importance of IP harmonisation to international trade, as well as available methods of IP harmonisation in the international trade arena. In summary, IP harmonisation has been widely used as an important tool to promote international trade. The harmonisation process, which usually results in an enhanced, stronger IP standard can be found at various levels namely, a multilateral, regional and bilateral levels. This clearly demonstrates that IP rights are not only a national mater, but also a regional and international concern. The standardisation of IP laws has been pursued to reduce barriers to trade, and thereby ensuring and encouraging free trade.

All in all, the IP harmonisation process at all levels has had significant legal and economic impact on the countries involved. Developed countries play a major role in setting the IP standard at the international level. On the contrary, developing and least developed countries tend to be the followers rather than the policy makers. The IP harmonisation process results in significant economic benefits to developed countries, but it is still controversial whether or not developing and least-developed countries derive much benefits from increased levels of IP standards which is the usual result of

IP harmonisation. In order to ensure that developing and least developed countries benefit from the harmonisation, the standardisation of IP rights in those countries should be developed incrementally while balancing the interests of the IP right holders, the member countries' readiness and capacity and the public interest in general. Additionally, in order to better address their country's particular needs and interests, developing and least-developed countries should play an active role in introducing and initiating their own IP standards and policies that are appropriate to their levels of development.

CHAPTER 3 THE DEVELOPMENT OF IP HARMONISATION IN THE EU

The purpose of this chapter is to investigates the development of IP harmonisation in the EU, which is perceived to be the one and only regional grouping that has successfully achieved a considerable level of IP harmonisation. It will first explore historical backgrounds and objectives of harmonising IP laws in the EU. Subsequently, EU IP systems in six major areas, namely copyright, patents, trademarks, designs, plant variety rights (PVRs), and geographical indications (GIs) will be investigated. Finally, the impact of IP harmonisation in both legal and economic aspects in the EU will be analysed. This chapter will attempt to highlight the link between a high degree of IP harmonisation and a well-functioning internal market. It will propose that without IP harmonisation, the free movement of goods in the internal market cannot be guaranteed. Since ASEAN shares similar interests with the EU in establishing an internal market, where goods can freely move around the community, EU can be considered as a point of reference for ASEAN in harmonising IP laws between the member states. Lessons can be drawn from the EU's success in approximating and unifying IP rights, and tackling difficulties arising in the harmonisation process.

3.1 Historical Background and Objectives of IP Harmonisation in the EU

3.1.1 The Development of the EU

Integration of the EU begun after World War II in response to the devastation left by the war. In order to rebuild, bring peace and economic growth to their societies, the European Coal and Steel Community (ECSC) Treaty established the first European

community, 'The European Coal and Steel Community' in 1951. There were six founding members namely, France, Germany, Italy, Belgium, the Netherlands, and Luxemburg.[1] This was considered to be 'the first step towards a supranational Europe'.[2] Following the success of the ECSC Treaty, the member states extended their cooperation on economic integration. The European Economic Community (EEC) Treaty was signed in Rome in 1957 thereby establishing the European Economic Common Market (EEC), which allowed goods, services, capital and persons to freely move around the community.[3] This constituted closer cooperation and deeper regional integration in Europe. The first enlargement of the EEC was in 1973 when Denmark, Ireland and the United Kingdom joined the community.[4] After that, in 1981 Greece joined the EEC as the 10th member, followed by Spain and Portugal in 1986.[5]

The EEC was transformed into the European Union (EU) in 1993 when the Treaty on European Union (TEU) was signed in Maastricht. A significant component of the TEU was the introduction of the European Monetary Union (EMU), which represented a high level of economic integration.[6] However, not all the EU members are part of the EMU. The euro (€) is the official currency shared by 19 out of 28 EU

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[1] Europa, 'The history of the European Union' <http://europa.eu/about-eu/eu-history/index_en.htm> accessed 19 May 2015.
[2] Europa, 'Treaty establishing the European Economic Community, EEC Treaty' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm> accessed 19 May 2015.
[3] ibid.
[4] Europa, 'A growing community' <http://europa.eu/about-eu/eu-history/1970-1979/index_en.htm> accessed 19 May 2015.
[5] Europa, 'The changing face of Europe – the fall of the Berlin Wall' <http://europa.eu/about-eu/eu-history/1980-1989/index_en.htm> accessed 19 May 2015.
[6] Europa, 'Treaty of Maastricht on European Union' <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm> 19 May 2015.

countries.[7] In 1995, the membership in the EU increased when Austria, Finland and Sweden joined, thereby including nearly all countries in western Europe.[8] In 2004, 10 new countries namely Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia joined the EU.[9] This was the EU's biggest enlargement ever. In 2007, Romania and Bulgaria become the EU members, bringing the number of member states to 27. In 2013, Croatia became the 28th EU member country.[10]

Presently, the EU is comprised of 28 member countries.[11] Following the ratification of the TEU in 1993, the EU has adopted various other treaties such as the Treaty of Amsterdam (1997), the Nice Treaty (2000) and the Lisbon Treaty (2007) in order to foster membership growth and extend the areas of cooperation. The Lisbon Treaty amends the Treaty on European Union (TEU) and renames the Treaty establishing the European Community (TEC) to the Treaty on the Functioning of the European Union (TFEU). The TEU and the TFEU are the primary source of EU law.[12] By virtue of these treaties, the EU institutions are given the power to enact secondary legislation. Although numerous treaties have been ratified to adapt the structure and function of the EU in light of surrounding circumstances, the fundamental structure and concept of the EU are still largely based on the original concept which was established over 60

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[7] Europa, 'The euro' <http://europa.eu/about-eu/basic-information/money/euro/index_en.htm> accessed 12 June 2016.
[8] Europa, 'Europe without frontiers' <http://europa.eu/about-eu/eu-history/1990-1999/index_en.htm> accessed 19 May 2015.
[9] Europa, 'Further expansion' <http://europa.eu/about-eu/eu-history/2000-2009/index_en.htm> accessed 19 May 2015.
[10] Europa, 'The history of the European Union: 2010 – today' <http://europa.eu/about-eu/eu-history/2010-today/index_en.htm> accessed 12 June 2016.
[11] Once Article 50 of the Lisbon Treaty has been triggered, the UK will have two years to negotiate its withdrawal from the EU.
[12] Elspeth Berry, Matthew J. Homewood and Barbara Bogusz, *Complete EU Law: Text, Cases, and Materials* (2nd edn, OUP 2015) 71.

years ago of development and to create an internal market .[13] At present, by achieving a relatively high level of economic integration through the creation of the internal market and a single currency, the EU is arguably a model for regional economic integration efforts in other regions.

3.1.2 EU and IP Harmonisation

The creation of an internal market, 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured',[14] is one of the core objectives of the EU in accordance with Article 3(3) of the TEU. To approximate national laws of the member states through European legislative intervention, Article 114 of the TFEU permits the adoption of measures for both minimum and exhaustive harmonisation necessary for the establishment and functioning of the internal market.[15] Only directives, regulations, or administrative action in member states that lead to harmonisation of laws can be adopted under Article 114 TFEU.[16] This article is considered as 'the key vehicle for the advancement of positive integration' of the internal market.[17]

One of the major factors ensuring free movement of goods within the EU, a core principle of an internal market, is success in harmonising IP laws within the community. IP rights had been included on the EU's agenda from the start in

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[13] Nigel Foster, *Foster on EU-law* (2nd edn, OUP 2009) 254.
[14] Article 26(2) of the TFEU.
[15] See Isidora Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar Publishing 2013).
[16] See Catherine Barnard, *The Substantive Law of the EU* (5th edn, OUP 2016) 558-559.
[17] Maletić (n 15) 1.

completing the internal market.[18] According to the 1985 White Paper for the completion of the internal market, it was clearly stated that 'differences in intellectual property laws have a direct and negative impact on inter-Community and on the ability of enterprise to treat the Common Market as a single environment for their economic activities'.[19] The commission stated that the decision on the proposal of creating community trademark and on the proposal of approximating national trademark laws needed to be made.[20] Moreover, the Community Patent Convention was intended to be brought into operation.[21] This clearly demonstrates that disparities in national IP laws between the member states are incompatible with the existence of internal market,[22] and should therefore, be replaced by harmonised legislation. Additionally, the level of IP harmonisation that would be required in order to establish the internal market is a certain level of approximation of national IP laws and a complete harmonisation through a community-wide IP system.

The EU has spent a significant effort to harmonise IP laws and provide a uniform set of IP systems legislatively by enacting directives[23] and regulations[24], and ratifying international agreements in major areas of IP rights. By using these harmonising measures, the level harmonisation of IP laws in the EU ranges from minimum harmonisation to complete harmonisation. That said, the adoption of harmonising

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[18] Peter Groves, 'Editorial' (1993) 4 European Business Law Review 54, 54.
[19] Commission, 'Completing the Internal Market – White Paper from the Commission to the European Council' COM (85) 310, 37.
[20] ibid.
[21] ibid.
[22] Peter Groves, *Sourcebook on Intellectual Property Law* (Cavendish Publishing 1997) 99.
[23] 'Directives' require all the EU member states to amend their national laws to be compliant with the directives within the certain timeframe. See Europa, 'Regulations, Directives and other acts' <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> accessed 5 April 2016.
[24] 'Regulations' do not impose any action on the EU member states to make the regulations part of their national laws. All the member countries are bound by the Regulations and must comply with. See Europa, 'Regulations, Directives and other acts' <http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm> accessed 5 April 2016.

directives and international IP treaties can help approximate national IP laws of the member states. Nevertheless, some aspects of IP rights still remain unharmonised and are subject to member states' discretion. These measures allow the member states to have some degree of flexibility to tailor their IP systems to fit their particular needs and interests. Whereas the harmonisation of IP laws through the adoption of regulations, which no derogation is allowed, can help unify IP laws between member states. Further discussion of these issues can be found in Section 3.2.

Prior to the commencement of IP harmonisation in the late 1980s, IP laws of the member states were affected by EC law to a limited extent.[25] This was mainly through the provisions relating to competition and free movement of goods under the EC Treaty (Treaty establishing the European Community (TEC)).[26] The free movement of goods is a core objective of an internal market. This fundamental principle can be found in Articles 28-30 of the EC Treaty. Article 28-29 of the EC Treaty states that in order to ensure the free movement of goods in an internal market, quantitative restrictions on imports and exports, including other means with equivalent effect are prohibited. However, Article 30 of the EC Treaty provides a list of exceptions, which includes the protection of IP rights. Moreover, Article 295 of the EC treaty also stipulates that the rules governing the system of property ownership of the member states were not to be prejudiced by the EC. Therefore, in the beginning, member states used this article to support their own efforts to regulate IP in their countries while

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[25] Mireille van Eechoud and others, 'Harmonizing European Copyright Law: The Challenges of Better Lawmaking' (May 2, 2012) Information Law Series 19, Alphen aan den Rijn: Kluwer Law International 2009. (Chapters 1 and 9); Amsterdam Law School Research Paper No. 2012-07; Institute for Information Law Research Paper No. 2012-07, 2.
[26] ibid.

there was no community IP system in place.[27] Nevertheless, it was clearly ruled by the CJEU that Articles 28, 29, 30 and 295 of the EC Treaty could not be interpreted to allow member states to exclusively regulate their own IP laws in a way that could adversely affect the principle of free movement of goods within the internal market.[28]

When the Lisbon Treaty came into effect in December 2009, it brought expansive competence of the EU into the field of IP.[29] According to Article 118 of the TFEU, the EU is explicitly allowed to create EU-wide IP rights in order to establish a functioning internal market. However, although a specific legal basis on IP harmonisation was firstly introduced under the Lisbon Treaty, the EU had long before adopted secondary legislation on IP matters.[30] Since the 1980s, the community relied on a general law-making power to enact IP-related legislation to remove impediments to the free movement of goods and support the creation of an internal market.[31] Several harmonisation directives focusing mainly on substantive IP law in major areas have been approved.[32] All directives have been passed based on article 95 of the EC Treaty.[33] Regulations creating EU-wide IP rights have also been enacted. For instance, legislation on EU-wide trademarks and design rights was created under Article 308 of the EC Treaty.[34] Consequently, it was opined that Article 118 of the

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[27] Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing 2009) 320.
[28] *Commission v United Kingdom* [1992] ECR1-829, para 18.
[29] Justine Pila, 'Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 11.
[30] ibid 11-12.
[31] P. B Hugenholtz and others, 'The Recasting of Copyright & Related Rights for the Knowledge Economy' (January 11, 2006) 9 <http://ssrn.com/abstract=1096673> accessed 28 April 2016.
[32] ibid 11-12.
[33] ibid 9.
[34] Abel Moreira Mateus and Teresa Coelho Moreira (eds) *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* (Edward Elgar Publishing 2010) 184-185.

TFEU is 'simply restating the existing situation'.[35] On the other hand, it was argued that Article 118 enables the EU to create a unitary IP rights for better functioning of the internal market by means of ordinary legislative procedure on the basis of qualified majority voting (QMV),[36] whereas Article 308 of the EC Treaty required unanimity.[37] Presently, IP rights with a unitary effect exist in the areas of trademarks, designs, plant variety rights (PVRs) and geographical indications (GIs). A new patent system with a unitary effect is planned to take effect by 2017. Meanwhile, copyright is still a long way from achieving the same level of development as the other areas.

IP harmonisation usually means an increase in the level of IP protection. It has been claimed that increasing or adding extra protection is easier than taking away already acquired rights.[38] A core measure used to standardise the IP laws of the member states is the issuance of harmonisation directives. A substantial number of directives, which member states are required to implement into their national laws within a set deadline, was approved in order to approximate substantive IP law of the member states. The directives mostly focused on the harmonisation of the delineation of protected subject-matter, the scope of protection, and the duration of protection. This helps to decrease the disparity between the national IP systems of the EU countries. However, although the standardisation of a national IP system through the adoption of harmonisation directives encompasses various areas of IP rights, the EU has not yet achieved a complete harmonisation. The EU has successfully achieved a certain degree in the areas of GIs, copyright and trademarks. Disparities in the fields of

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[35] House of Lords, European Union Committee, *The Treaty of Lisbon: An Impact Assessment* (The Stationery Office 2008) 219.
[36] Mateus and Moreira (n 34) 184-185.
[37] House of Lords, European Union Committee (n 35) 220.
[38] Trevor Cook, 'European Intellectual Property Developments' (2011) 16 JIPR 426, 427.

patents and designs still exist due to the difference in legal culture and administrative procedures of each member country.[39] As a result, an attempt toward EU-level harmonisation through the enactment of regulations governing IP at the community level and the ratification of international IP agreements was pursued to address this issue.[40] This could enable the EU to achieve a higher degree of IP harmonisation within its community.

According to Article 3(c) of the EC Treaty, one of the major objectives of the EU is to eliminate obstacles to cross-border trade between member countries in order to ensure the free movement of goods, services, capital and persons. The driving force behind the harmonisation of IP laws in the EU was to ensure that trade barriers, which can obstruct the free flow of goods are eliminated.[41] Since IP rights are territorial in nature, IP protection is limited to national jurisdiction.[42] IP rights protection can be enforced only in the territory of the state granting it and administered exclusively by that state's national courts.[43] In other words, the principle of territoriality restricts the protection of IP rights to individual countries. This could potentially create a conflict between the enforcement of IP rights and the principle of free movement of goods, and thereby partition the internal market. Furthermore, according to the principle of exhaustion, which is regarded as 'one of the limits of IP rights',[44] after the first sale of a product by the individual seller or others with his consent, the product can then be

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[39] Billy A. Melo Araujo, 'IP and the EU's Deep Trade Agenda' (2013) 16 JIEL 439, 444.
[40] ibid.
[41] Ulrich Loewenheim, 'Harmonization and Intellectual Property in Europe' (1995-1996) 2 CJEL 481, 481.
[42] ibid.
[43] Pila (n 29) 6.
[44] WIPO, 'International Exhaustion and Parallel Importation' http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm> accessed 19 December 2013.

freely resold without the IP rights owner's permission.[45] In other words, after the first sale, the right of an IP owner is exhausted. The right to control the further distribution of a protected product is limited by this principle. Generally, the principle of exhaustion applies at the national and the international level. Some EU member countries have adopted the principle of 'national exhaustion', which means that the IP rights of the owner are exhausted once a protected good is placed in the market inside the country by the owner or others with his consent. However, 'national exhaustion' would allow the IP rights owner to oppose the importation of products into the domestic territory.[46] On the other hand, some countries have adopted the principle of 'international exhaustion' in which the IP rights of the owner would be exhausted once the goods are sold in any part of the world.[47] This means that the rights owner cannot assert his right to control further movement of such goods after the products are first sold by him or other authorised sellers.

If the principle of national exhaustion is applied, the extent of its application would be subject to a particular jurisdiction. This means that the first sale doctrine can exhaust IP rights in a particular territory in accordance with national law. As a result, the IP rights owner can still enjoy the sales of the products in other countries where IP rights have not been exhausted.[48] This also allows the rights owner to set up trade barriers against importation in order to control further distribution of the goods.[49] This would create barriers to trade and obstruct free movement of goods within the EU. This clearly demonstrates that the interaction between the principle of territoriality and the

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[45] Loewenheim (n 41) 482.
[46] WIPO, 'International Exhaustion and Parallel Importation' (n 44).
[47] ibid.
[48] Loewenheim (n 41) 481.
[49] ibid.

principle of national exhaustion could be regarded as a major obstacle to the establishment of a complete internal market.[50] Consequently, relying on Article 28 and 30 of the EC Treaty, the CJEU established the principle of 'community exhaustion' to have the principle of free movement of goods prevail.[51] This principle was established for the first time in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH.*[52] In this case, Grammophon, as a proprietor asserted his exclusive right under German copyright law to oppose importation of records manufactured and sold by its subsidiary in France, into Germany by Metro. The Court held that the owner's right was exhausted once the copyrighted product was put on the community market for the first time. Therefore, the copyright owner cannot prevent the parallel importation of such records conducted by a third party.[53]

The creation of a unified internal market is considered as the main goal of developing the community exhaustion principle.[54] This demonstrates that the principle of community exhaustion is closely linked to the principle of free movement of goods and competition law.[55] This development is considered to be 'a regional compromise between national and international exhaustion'.[56] By virtue of the doctrine of community exhaustion, the territoriality and resulting exhaustion of IP right was

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[50] Loewenheim (n 41) 481.
[51] Valentine Korah and Denis O'Sullivan, *Distribution Agreements Under the EC Competition Rules* (Bloomsbury Publishing 2002) 63. See also Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing 2009) 2.
[52] C-78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* [1971] ECR I-00487.
[53] ibid.
[54] Irene Calboli, 'Trademark Exhaustion in the European Union: Community-Wide Or International? The Saga Continues' (2002) 6 IPLV 47, 52 <http://scholarship.law.marquette.edu/iplr/vol6/iss1/3> accessed 24 April 2016.
[55] WIPO, 'Interface between Exhaustion of Intellectual Property Rights and Competition Law' (2011) CDIP/4/4 REV./STUDY/INF/2, 17.
[56] Calboli (n 54) 49.

extended in scope from a single country to cover a larger area.[57] As a result, once goods are traded anywhere in the EU by the IP rights owner or with his consent, the further movement of those goods within the community could no longer be opposed. Parallel imports between the EU countries are allowed.[58] It can therefore claimed that the principle of community exhaustion was justified in order to prevent owners of IP rights from being allowed to partition the internal market.[59] Therefore, the interplay between the territoriality of IP rights and the principle of exhaustion would no loner oppose the free movement of goods and distort competition within the internal market. After the principle of community exhaustion was established by the CJEU, this principle was codified in several harmonising directives and regulations relating to IP rights.[60] It was claimed that the development of IP laws in both national and EU levels has been to a significant extent influenced by the principle developed by the CJEU.[61] This demonstrates a crucial role of the CJEU in the process of IP harmonisation, which can help ensure the free movement of goods and remove distortion to competition in the internal market.

The disparity of national IP laws of the member countries is also considered to be a major barrier to free trade within the community.[62] It could obstruct the free movement of goods and distort competition in the internal market.[63] A noteworthy

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[57] Tuomas Mylly, 'A Silhouette of Fortress Europe? International Exhaustion of Trade Mark Rights in the EU' (2010) 7 MJ 1, 4.
[58] Enrico Bonadio, 'Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?' (2011) 33 EIPR 153, 155-156.
[59] Trevor Cook, *EU Intellectual Property Law* (OUP 2010) 18.
[60] Bonadio (n 58) 155.
[61] Loewenheim (n 41) 483.
[62] ibid 482.
[63] See Evangelia Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Martinus Nijhoff Publishers, 2008) 179.

example can be found in *EMI Electrola GmbH v Patricia Im-und Export*[64]. This case dealt with sound recordings imported from Denmark to Germany. At that time, the sound recordings were protected in Germany, whereas the copyright protection had already expired and the recordings had become part of the public domain in Denmark. Patricia wanted to import the sound recordings from Denmark to Germany. Due to the absence of IP harmonisation between the EU members in the area of copyright, the court ruled that the conditions of copyright protection were subject to national legislation of the member states. EMI could assert its copyright in the sound recordings to prevent importation by Patricia since its IP rights had not been exhausted.[65] The court held that the fact that the sound recordings were lawfully marketed in Denmark due to the expiration of the national copyright protection was not an act of copyright owner. Therefore, the community exhaustion principle did not apply.[66] The exercise of the right of the copyright owner against the importation did not violate European law.[67] However, this clearly demonstrates that in the absence of harmonisation of IP laws, differences in IP protection between member countries could create different conditions as to the production and distribution of goods, and thereby obstruct intra-community trade.[68] This would be contrary to the major purpose of the EU in establishing an internal market. Nevertheless, this case led to the harmonisation of the term of copyright protection and related rights through the harmonisation Directive in 1993.[69]

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[64] *EMI Electrola GmbH v* Firme *Patricia Im-und Export* Verwaltungsgesellschaft mbH [1989] ECR 79.
[65] ibid.
[66] ibid.
[67] Loewenheim (n 41) 482.
[68] ibid.
[69] David Vaver and Lionel Bently, *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge Univeristy Press 2004) 281.

The main driving force behind the harmonisation of IP rights in the EU is to abolish barriers to trade within the internal market. Disparities in national IP laws of the member states could obstruct the EU in unifying national markets into a single market. Thus, in order to successfully establish a genuine internal market, the EU has progressively pursued its goal in harmonising IP laws through both positive and negative integration.

3.1.3 The Role of Institutions in the IP Harmonisation Development

The development of IP harmonisation in the EU has been primarily realised through the adoption of EU secondary legislation, directives and regulations. There are three main institutions involved in proposing and approving EU legislation, namely the European Parliament, the Council of the European Union and the European Commission. The European Parliament is the EU's law-making body. Members of the European Parliament (MEPs) are directly elected by EU citizens to represent their interests.[70] The number of MEPs granted to each member state is allocated based on the country's population.[71] It, along with the Council of the European Union, has the role of passing laws of the EU. The Parliament and the Council have equal weight in the ordinary legislative procedure of the EU.[72] Most EU laws are jointly adopted by these two institutions.[73] The Council can be regarded as the main decision-making

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[70] Article 10(2) TEU; See also Robert Schütze, *European Constitutional law* (2nd edn, Cambridge University Press 2016) 154-169. Europa, 'European Parliament' <http://europa.eu/about-eu/institutions-bodies/european-parliament/index_en.htm> accessed 8 January 2016.
[71] European Commission, *The European Union Explained - How the European Union Works* (Publications Office of the European Union 2013) 9.
[72] Schütze, *European Constitutional law* (n 70) 165; European parliament, 'Legislative Powers' <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers> accessed 8 January 2016.
[73] Emily Finch and Stefan Fafinski, *Legal Skills* (5th edn, OUP 2015) 19.

body of the EU.[74] It is the most powerful EU institution in terms of day-to-day decision making of the EU.[75] The Council consists of the government ministers of each EU country and has a role in passing EU laws and coordinating EU policies.[76] The European Commission has the exclusive right to propose EU legislation to the Parliament and the Council.[77] The members of the Commission have to act in the interest of the Union as a whole.[78] It is therefore considered as 'motor' of the European integration.[79] The Commission is also commonly described as the 'guardian of the European treaties' due to its role in ensuring that the provisions of the treaties are applied by the member states and other institutions.[80] To harmonise IP laws of the EU member states, a substantial number of directives and regulations were proposed by the Commission and approved by the Parliament and the Council, thereby leading to a greater level of IP harmonisation at the EU level.

In addition to the adoption of EU law to harmonise IP law between the member states, Europeanisation of IP law has been achieved through negative integration, which largely relies on the case law of the CJEU.[81] The CJEU is regarded as another institution that plays an important role in the development of IP harmonisation. It was

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[74] Andrew Le Sueur, Maurice Sunkin and Jo Murkens, *Public Law: Text, Cases, and Materials* (OUP 2013) 349

[75] Daniel Naurin and Helen Wallece, 'Introduction: from rags to riches' in Daniel Naurin and Helen Wallece, *Unveiling the Council of the European Union: Games Governments Play in Brussel* (Palgrave Macmillian 2008) 1-2; Alex Warleigh-Lack, *European Union: the Basics* (2nd edn, Routledge 2009).

[76] Schütze, *European Constitutional law* (n 70) 165, 173-175; Finch and Fafinski (n 73) 18; Europa, 'Council of the European Union' <http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm> accessed 8 January 2016.

[77] Schütze, *European Constitutional law* (n 70) 193; European Commission, *The European Union Explained - How the European Union Works* (n 71) 20.

[78] Schütze, *European Constitutional law* (n 70) 193; Andrew Le Sueur, Maurice Sunkin and Jo Murkens, *Public Law: Text, Cases, and Materials* (3nd, OUP 2016) 332.

[79] Schütze, *European Constitutional law* (n 70) 193

[80] Andrew Le Sueur, Maurice Sunkin and Jo Murkens, *Public Law: Text, Cases, and Materials* (n 78); Anne Bonnie, 'The Evolving Role of the European. Commission in the Enforcement of. Community Law: From Negotiating Compliance to Prosecuting Member States?' (2006) 1 JCER 39, 40.

[81] Susanne K. Schmidt, 'Beyond Compliance: the Europeanization of Member States through Negative Integration and Legal Uncertainty' (2008) 10 Journal of Comparative Policy Analysis 299, 301.

claimed that 'the first step in the creation of European IP law has been a Community delimitation of national laws made by the European Court of Justice (ECJ) and the Court of First Instance of the EC'.[82] Prior to the commencement of IP harmonisation in the late 1980s through secondary legislation, there is no IP provision included in the European law except for Article 30 of the EC Treaty.[83] During that time, IP law rights were mainly managed in national laws of the member states, which may vary from country to country. To ensure that disparity in IP laws would not obstruct the free flow of goods and distort competition in the internal market, questions relating to the scope of national IP laws and community law, particularly those relating to free movement of goods and competition policies were sent to the CJEU for judgments.[84] The interpretation and application of the general EU law in IP field by the CJEU can help shape IP law in the EU.[85] This also highlights the need to maintain a proper balance between IP rights and other interests such as the maintenance of a competitive internal market.[86] However, the harmonisation effect of negative integration through the CJEU case laws in IP is different in accordance with the types of IP rights involved.[87] The majority of the CJEU cases on IP were trademarks, which concerned both EU trademark system and approximation of national trademark laws of the member states.[88] Whereas there were few cases in other areas, particular patents.

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[82] Jean-Luc Piotraut, 'European National IP Laws under the EU Umbrella: From National to European Community IP Law' (2004) 2 Loy U Chi Int'l L Rev 61, 63-64.
[83] ibid 64.
[84] ibid; see Case 24/67, *Parke, Davis & Co. v. Prabel, Reese, Beintema-Interpharm and Centrafarm* [1968] ECR 55, [1968] CMLR 47 [1968]; Case 40/70, *Sirena S.r.l. v. Eda S.r.l* [1971] ECR 69, [1971] CMLR 260 [1971]; Joined cases 55/80 and 57/80, *Musik-Vertrieb Membran GmbH and K-tel International v. GEMA und Mechanische Vervielfa ̈ltigungsrechte* [1981] ECR 147.
[85] Alain Strowel and Hee-Eun Kim, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 122.
[86] ibid.
[87] ibid 124.
[88] ibid 123.

Nevertheless, despite the small number of cases, these case laws were claimed to play a crucial role in 'advancing the substance of European jurisprudence for IP'.[89]

Higher degree of legal certainty can also be achieved through negative integration. One of important functions of the CJEU is to ensure that EU laws are consistently interpreted and applied in every member state.[90] National courts can submit questions regarding the interpretation or validity of EU laws to the CJEU for a preliminary ruling. Consequently, the CJEU has rendered decisions on major problematic issues arising from interpretation of harmonisation directives and regulations in various areas of IP rights. The decision rendered by the CJEU is a binding interpretation of the applicable EU law provisions.[91] When the same issue arises, other member states are also bound by the CJEU's decision.[92] In addition to preliminary reference, cases can reach the CJEU through direct actions, which can take various forms. The most obvious direct action involving compliance is the action for member state's failure to comply with the EU law.[93] Such action can be initiated by the European Commission or another EU country.[94] By having the CJEU to ensure uniform interpretation and compliance of EU law, it would help enhance legal certainty and thereby facilitate IP harmonisation.

Moreover, IP rights which are granted at the EU level are supranational rights.

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[89] ibid.
[90] See Morten Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment' (2014) 12 Int J Constitutional Law 136-163; Europa, 'Court of Justice of the European Union' <http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm> accessed 19 May 2015.
[91] Nicolette Butler, 'In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill – Nijhoff 2015) 375.
[92] ibid.
[93] Michelle Cini and Nieves Pérez-Solórzano Borragán, *European Union Politics* (5th edn, OUP 2016) 172.
[94] ibid.

Supranational rights cannot be granted without supranational institutions.[95] Apart from the EU institutions which are involved in promulgating EU legislation, supranational bodies charged with the administration of IP rights have necessarily been established. The two institutions that have played a crucial role in harmonising IP rights within the EU are the European Patent Office (EPO) and the Office for Harmonization in the Internal Market (OHIM). By virtue of Regulation 2015/2424 of the European Parliament and the Council amending the Community trade mark regulation, which entered into force on 23 March 2016, OHIM is now named the EU Intellectual Property Office (EUIPO).[96] The EPO was established in 1978 in order to examine patent applications and grant European patents for up to 38 EU countries under the European Patent Convention (EPC).[97] Although the EPO is not an EU institution, the EU decided to give authority to the EPO to grant future unitary patents.[98] This clearly shows the importance of the EPO in the IP harmonisation process in the EU. The EUIPO was established in 1994 as a decentralised agency of the EU to grant trademark and design rights that are valid in all 28 EU member states.[99] Since its establishment in 2006, more than half a million applications were received and over 350,000 applications were registered.[100] The role of EUIPO and its importance in IP has continuously increased and is being extended to other areas apart

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[95] Christopher Heath, 'Methods of Industrial Harmonization – the Example of Europe' in in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 53.
[96] EUIPO, 'EU trademark regulation' <https://euipo.europa.eu/ohimportal/en/eu-trade-mark-regulation> accessed 23 March 2016.
[97] EPO, 'Activities' <https://www.epo.org/about-us/office/activities.html> accessed 8 january 2016.
[98] Gov.uk, 'The Unitary Patent and Unified Patent Court' <https://www.gov.uk/guidance/the-unitary-patent-and-unified-patent-court> accessed 8 January 2016.
[99] OHIM, 'The Office' <https://oami.europa.eu/ohimportal/en/the-office> accessed 9 January 2016.
[100] Seville (n 27) 221.

from trademarks and designs.[101]

It can be clearly seen that both EU and non-EU institutions have been playing a crucial role in the IP harmonisation process. These institutions can be regarded as important cogs for the EU in seeking a higher level of IP harmonisation. Without these institutions, the EU's success in this area could not be realised.

3.2 IP System in the EU

The EU has continuously made an effort to standardise IP protection within its community in order to deal with the conflict between IP rights and the free movement of goods. Major sources of harmonising IP laws in the EU have been EU legislation and international conventions.[102] In order to investigate the development of this process, the major areas of IP rights, namely copyright, patents, trademarks, designs, geographical indications (GIs) and plant variety rights (PVRs) will be addressed.

3.2.1 Copyright

In the field of copyright, harmonisation within the EU has developed through the enactment of EU legislation and the adoption of international treaties. Copyright was seen as an economic factor. This is because copyrighted subject matter was considered to be a tradable commodity.[103] Moreover, due to the growing problem of

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[101] Paul Maier, 'OHIM and its role in the past, today and where it is going' (2012) 26 <http://fordhamipconference.com/wp-content/uploads/2010/08/Maier_OHIM-Paper.pdf> accessed 9 January 2016.
[102] Pila (n 29) 9.
[103] Harald von Hielmcrone, 'The Efforts of the European Union to Harmonie Copyright and the Impact on Freedom of Information' (2000) 50 Libri 29, 30.

copyright infringement and efforts to establish a well-functioning internal market, the need for harmonisation in this area has become more relevant since the early nineties.[104] The disparities in national copyright and related rights laws within the EU could obstruct the free movement of goods in the community. Consequently, a genuine internal market could not be established. Hence, a number of directives were passed to bring national laws of the member states in line with each other.

The Europeanisation in the area of copyright was firstly addressed by the EU Commission in the Green Paper on Copyright and the Challenge of Technology (The Green Paper)[105], which provided a harmonisation framework to eliminate disparities in national law in the areas of copyright and neighboring rights that might adversely affect the internal market.[106] The first generation of copyright directives have their roots in The Green Paper.[107] Seven directives have been passed to specifically deal with various areas of copyright protection made necessary by the development of new technology. Moreover, other aspects of copyright and related rights are covered by the Enforcement Directive[108] in order to prevent copyright infringement.

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[104] Marcella Favale and Maurizio Borghi, 'Harmonization of Intellectual Property Rights within and beyond the European Union: The Acquis Communautaire in the Framework of the European Neighbourhood Policy' (WP5/25 Search Working Paper, September 2013) 10 <http://www.ub.edu/searchproject/wp-content/uploads/2013/09/WP05.25.pdf> accessed 11 September 2015.

[105] Commission, 'Green Paper on Copyright and the Challenge of Technology –copyright issues requiring immediate action' COM (88) 172 final.

[106] Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (OUP, USA 2012) 67.

[107] P. Bernt Hugenholtz, 'Copyright without frontiers: the problem of territoriality in European copyright law' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009) 13-14.

[108] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157.

Originally, the area of copyright law was not included in the EC Treaty, which is regarded as having provided the major framework of European law harmonisation. [109] The harmonisation of copyright in the EU began in 1991, when EC Directive 91/250 on the Protection of Computer Programs, which is the first directive in the area of copyright, was adopted.[110] As a response to the growth of the software industry, the directive provided a harmonised framework to standardise the national laws of the member states regarding the protection of computer programs in an effort to prevent unauthorised reproduction of such programs.[111] This has led to 'fairly uniform legal rules' and thus increased 'legal certainty, transparency and predictability' in obtaining protection in this area.[112] Since then, significant directives have been approved to protect various areas of copyright and related rights, such as the Rental and Lending Rights Directive, which provided exclusive rights to the copyright owner to authorise or prohibit the rental and lending of copyrighted work,[113] the Cable and Satellite Directive, which aimed to facilitate the transmission of audio-visual programs, especially those broadcast via satellite, between countries,[114] the Term of Protection Directive, which aimed to harmonise the terms of protection for each type of copyright work in the member states,[115] the Database Directive, which established an

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[109] Silke von Lewinski, 'Harmonisation of Copyright in Europe – Backgrounds, principles and Problems' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 93.
[110] ibid.
[111] European Commission, 'Protection of computer programs' <http://ec.europa.eu/internal_market/copyright/prot-comp-progs/index_en.htm> accessed 30 October 2013.
[112] P. Bernt Hugenholtz, 'Harmonisation or unification of European union copyright law' (2012) 38 Mon LR 4, 5.
[113] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L 346.
[114] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248.
[115] Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights [1993] OJ L 290.

exclusive right for database producers and harmonised legislation governing copyright in databases,[116] the Electronic Commerce Directive, which provided regulations aimed at harmonising the governing of information society services,[117] the Resale Right Directive, which aimed to harmonise an artist's resale rights within the EU for the benefit of the author of an original work ,[118] and the Information Society Directive, which provided harmonised rules governing copyright and related rights in response to technological developments.[119]

A major step towards the harmonisation of copyright law was taken in 1993 when the duration of copyright protection was standardised by directive to be 70 years after the death of the author or creator.[120] Before this directive harmonised the term of copyright protection, a longer term existed in Germany, Spain and France, whereas other EU countries provided a general term of protection of 50 years from the death of the author.[121] Nevertheless, the EU chose to adopt the longest term of 70 years after the death of the author. This demonstrated a trend of upwards harmonisation. The primary reason behind this adoption was not to protect the author's rights, but to establish an internal market.[122] Additionally, this directive had a retroactive effect and restored protected status to copyrighted work that had previously become part of the

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[116] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 077.
[117] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178.
[118] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272.
[119] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167.
[120] Dietmar Harhoff, 'Intellectual Property Rights in Europe – Where Do We Stand and Where Should We Go?' (2006), 13 Contribution to the Project: Globalisation Challenges for Europe and Finland <http://www.ip.mpg.de/files/pdf2/Harhoff_06-09-20.pdf> accessed 29 September 2013.
[121] Lewinski (n 109) 96.
[122] ibid.

public domain.[123] Since this term of protection exceeded the duration provided in the Berne Convention, this could be considered to have established a new standard of copyright protection introduced and enforced in the EU member countries.

Apart from the objective of unifying national markets, the EU wanted to stimulate European information industries. A strong copyright protection would be required and essential to achieving this goal.[124] A directive that made a significant contribution to the harmonisation of copyright law is Directive 2001/29/EC, commonly known as 'The EU Copyright Directive'. This directive harmonised certain aspects of copyright and related rights in the information society. [125] The major objectives of this directive were to provide regulations on copyright and related rights in response to technological developments, and to implement international obligations of the WIPO Copyright Treaty.[126] This directive provided a strong copyright protection standard and introduced legal protection for Digital Rights Management (DRM) to control the use of copyrighted work in digital form.[127] In other words, the EU Copyright Directive was passed to approximate copyright and related rights to meet the challenges of the digital era. Nevertheless, it was suggested that by providing a system to protect copyright of electronic media, The EU Copyright Directive 'introduces severe impediments to the usability of digital works'.[128] That said, DRM

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[123] ibid.
[124] ibid.
[125] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167.
[126] Lucie Guibault, 'Evaluating Directive 2001/29/EC in the Light of the Digital Public Domain' in Dulong de Rosnay and others (eds), *The Digital Public Domain: Foundations for an Open Culture* (Open Book Publishers 2012) 61 <http://dare.uva.nl/cgi/arno/show.cgi?fid=451211> accessed 29 September 2013.
[127] Harhoff (n 120) 13.
[128] Joe McNamee, Marie Humeau, and Kirsten Fiedler, 'Copyright: Challenges in the Digital Era, (The EDRI Paper Issue 07) 13 <http://www.edri.org/files/paper07_copyright.pdf> accessed 30 October 2013.

could prevent a user from copying or sharing copyrighted work. This might not suitable for people's way of life in the digital era. For instance, when a person buys an e-book, which usually contains DRM, it could prohibit the buyer from copying or transferring such e-book to other devices, sharing with friends, or printing.[129] Therefore, it comes into question whether the effect of the copyright directive is suitable and practical for the users in the digital era.

However, this directive was regarded as 'one of the centrepieces of the original Lisbon Agenda of 2000'.[130] According to the original Lisbon Strategy, the major objective of the EU is 'to become the most dynamic and competitive knowledge-based economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment'.[131] Since the directive provides a legislative framework that could encourage the growth of knowledge-based economy, this could help the EU achieve its goal in accordance with the Lisbon Agenda.[132]

Additionally, since the Internet is an important channel for doing business on which information can be quickly spread, a relevant directive that should be considered is the Electronic Commerce Directive. This directive was approved to ensure the free flow of information society services within the community. 'Information society services' are defined as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of

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[129] ibid 12.
[130] Guibault (n 126) 61.
[131] See Commission, 'Lisbon Strategy evaluation document' SEC (2010) 114 Final, 2 <http://ec.europa.eu/europe2020/pdf/lisbon_strategy_evaluation_en.pdf> 30 September 2013.
[132] Guibault (n 126) 62.

services'.[133] In other words, this directive is not only limited to selling and buying online, but also covers online services that are not provided for remunerated by the recipient such as providing search engine usage or online information.[134] In general, this directive provided harmonised provisions governing information society services, particularly various aspects of electronic commerce. Concerning IP rights, in order to deal with online copyright infringement, this directive introduced the liability of internet services providers (ISPs) who provide access to the internet and related services. [135] Therefore, by adopting this directive, a legal framework for electronic commerce within a community could be established, which could provide more certainty to both business owners and consumers. In addition, it could also address new forms of copyright infringement that usually occur in the digital era. This can help increase efficiency of IP protection and enforcement in the EU member states.

In addition to the implementation of harmonisation directives, there are various international treaties relating to copyright and related rights, namely the Berne Convention, the WIPO Copyright Treaty, the Rome Convention, the WIPO Performances and Phonograms Treaty, and the TRIPs agreement that were all acceded to by all the EU countries. By adopting these international agreements, certain areas of national copyright and related rights law of the EU member countries have been more closely approximated to each other. In the follow up to The Green Paper, the Commission's action plan clearly stated that all member states are required to accede to the international IP treaties administered by WIPO and adopt the 1971

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[133] See Article 1 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 217.
[134] Directive on Electronic Commerce.
[135] Seville (n 27) 47.

Paris Act of the Berne Convention of 1961 in order to strengthen copyright protection.[136] The level of protection in some areas addressed in directives is beyond the minimum standards provided under the Berne and Rome Conventions and TRIPs.[137] Nevertheless, it has been suggested that the Berne Convention can be considered as 'foundational instruments of the European IP system'.[138] This clearly demonstrates that both directives and multilateral treaties are two major tools that help the EU develop a harmonised copyright regime.

The CJEU has also played an important role in the process of harmonisation. In order to ensure harmonised applications of copyright directives in the member states, questions arising from an interpretation of the directives were to be referred to the CJEU by a national court. For instance, in *Butterfly Music v Carosello Edizioni Musicali e Discografiche Sr,*[139] an Italian court referred a question to the CJEU on the interpretation of the harmonising term of copyright protection in Directive 93/98/EEC which extended the term of copyright protection for rights of performers and of producers of phonograms to be 50 years. It was ruled that by virtue of the directive, it was possible for the copyright and related rights that had expired before the date of the implementation of the directive to be revived, without prejudice to the exploitation that occurred before such date.[140] Also, in *Egeda v Hoasa,*[141] a question regarding the interpretation of Article 1 of the 93/83EEC Cable and Satellite Directive was referred to the CJEU for a preliminary ruling.

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[136] Commission, 'Follow-up to the Green Paper' (1991) COM (90) 584 final.
[137] Goldstein and Hugenholtz (n 106) 70.
[138] Pila (n 29) 7.
[139] C-60/98 *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl* [1999] ECR I-3939.
[140] ibid.
[141] C-293/98 *Egeda v Hoasa* [2000] ECR I-629.

In *Infopaq International A/S v Danske Dagblades Forening,*[142] the Danish Supreme Court referred a list of questions to the CJEU for a preliminary ruling. The CJEU found that the extraction of 11 words from a newspaper article amounted to 'reproduction' under Article 2 of the Copyright Directive if they were the expression of the intellectual creation of the author. Per the court's ruling, an 11-word extract from a newspaper could be works protected by copyright. The decision of the CJEU in this case became a standard and has been followed by national courts. For instance, in *The Newspaper Licensing Agency v Meltwater,*[143] it was ruled that in order to avoid infringing the publisher's copyright, users of Meltwater News, an electronic press-monitoring service that provided headlines and extracts of words from online newspaper to clients, needed a license from the Newspaper Licensing Agency (NLA). It should be noted that prior to the *Infopaq* decision, the UK courts adopted different approach in determining what considers as infringement. The shift from the approach that was formerly adopted in the UK has led to an expansion in the scope of copyright protection.[144] This clearly shows that the decision of the CJEU had influence on the decision of the UK Courts. The CJEU's ruling helps increase consistency in the interpretation of EU copyright law, and thus lead to a higher degree of harmonisation. This is example of how negative integration can be achieved through the CJEU's case law.

There are also other cases relating to the harmonisation of copyright law which addressed the failure of a member state to implement directives within the prescribed period of time. For instance, Ireland's failure to implement Database Directive

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[142] C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.
[143] C-360/13 *Newspaper Licensing Agency Ltd v Meltwater Holdings BV* [2014] AC 1438.
[144] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP 2014) 205.

96/9/EC was brought before the CJEU.[145] In addition, the CJEU had to rule in an action where member states failed to comply with obligations under international treaties relating to copyright. For instance, an action against Ireland, which failed to adhere to the Berne Convention before 1 January 1995, was brought before the CJEU.[146]

Moreover, since it is recognised that the territorial nature of copyright can obstruct the free movement of goods, the principle of community exhaustion was also developed by the CJEU. The right to control the distribution of copyright protected goods is exhausted once the goods are lawfully placed in the market by the rights holder or with his consent in one member state. This notion can be found in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG*[147], in which the concept of European exhaustion was created to ensure the free movement of goods.

These examples show that the CJEU has played an active role in shaping the development of EU copyright law. The CJEU has had a crucial role in filling the gaps of harmonisation directives.[148] In addition to standardising copyright protection within the EU through the enactment of directives and the adoption of international IP treaties to deal with the era of digital information and pursue the establishment of an internal market, the CJEU has also played a relevant role in ensuring that harmonisation directives are applied and interpreted consistently while ensuring compliance with the obligations imposed by international treaties. As a result of the

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[145] C-370/99 *Commission v Ireland* [2001] ECR I-297.
[146] C-13/00 *Commission v Ireland* [2002] ECR I-2943.
[147] *Deutsche Grammophon Gesellschaft* mbH (n 52*)*.
[148] Strowel and Kim (n 85) 126.

EU's continuous efforts, the harmonisation of copyright law through use of these instruments can strengthen and standardise copyright protection in various areas.

Nevertheless, it has been opined that the copyright harmonisation in the EU is 'fragmentary harmonisation'.[149] The reason is that the legislature tended to focus on the issues that clearly obstructed free movement of goods and services.[150] Although various directives have been approved, there are still remaining areas that further harmonisation at EU-level is needed.[151] Current directives do not address all essential areas, and thus disparities in national copyright laws of the member states still remain. This can be seen in the area of moral rights. Since there were no initiatives to harmonise legislation governing moral rights between the member states, there are disparities in this area between civil and common law countries.[152] For instance, protection of moral rights has been recognised more under French law than in the UK.[153] The French legal system provides 'the most generous protection of moral rights in the world'.[154]

In addition, the territorial characteristic of copyright obstructs the establishment of a complete internal market.[155] Despite various directives, copyright is considered to be the least harmonised IP right in the EU.[156] Compared to other areas, particularly

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[149] Lewinski (n 109) 97.
[150] ibid.
[151] Trevor Cook, 'The Future of Copyright protection in the EU' (2013) 18 JIPR 181, 183.
[152] Irma Sirvinskaite, 'Toward Copyright "Europeanification": European Union Moral Rights' (2011) 3 J Int'l Media & Ent L 263, 271.
[153] ibid 275.
[154] ibid.
[155] Hugenholtz, 'Copyright without frontiers: the problem of territoriality in European copyright law' (n 107) 25.
[156] Estelle Derclaye and Matthias Leistner, *Intellectual Property Overlaps: A European Perspective* (Bloomsbury Publishing 2011) 31.

trademarks and designs, EU copyright law was harmonised, but is not yet unified.[157] Consequently, it has been suggested that the EU should introduce a community copyright system with EU-wide effect in order to create a single market for copyright and related rights.[158] This would help eliminate the current disparity in copyright law at the national level, enhance legal certainty and substantially reduce transaction costs.[159] In the Commission's paper 'Creative Content in a European Digital Single Market: Challenges for the Future', it was suggested that rather than pursuing a greater level of harmonisation of national copyright regimes through directives, a unitary copyright system should be established.[160] However, creating a unitary system such as in the area of trademark and design rights might not effectively address the problems related to a fragmentation of the internal market caused by national copyright.[161] A community system cannot effectively harmonise copyright law in a community if the rights governed by national law still existed.[162] It was pointed out that unlike other areas of IP rights (with the exception of unregistered designs), copyright automatically comes into existence as soon as a work is created.[163] Moreover, in other unitary regimes, these systems operate in conjunction with existing national systems, and thereby offer an applicant further choices that might better suit his interest. Establishing a unitary copyright system that would exist alongside a national regime, would result in having two copyrights granted

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[157] Trevor Cook and Estelle Derclaye, 'An EU Copyright Code: what and how, if ever?' (2011) 3 IPQ 259, 259.
[158] Derclaye and Leistner (n 156) 31.
[159] ibid 25-26.
[160] Commission Paper, 'Creative Content in a European Digital Single Market: Challenges for the Future -- A Reflection Document of DG InfSo and DG Markt' (October 22, 2009) <http://ec.europa.eu/archives/information_society/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf> accessed 19 September 2015.
[161] Cook 'The Future of Copyright protection in the EU' (n 151) 183.
[162] ibid.
[163] Cook and Derclaye (n 157) 262.

simultaneously the national and community levels each time an original work is created.[164] This would be problematic. Consequently, it was realised that the best way to cope with copyright harmonisation in the EU was to develop 'a single, unitary, EU wide copyright law' in place of national laws.[165] However, it is still questionable whether this concept would be feasible since EU IP rights have never been introduced as a replacement for national rights. Moreover, replacing existing national copyright regimes that offer protection 70 years after the death of the author with a new copyright system with a unitary effect would not be an easy task.[166] A transition period to implement a unitary copyright system needs to be provided since it is necessary for national regimes to remain in existence until subsisting national copyrights expire.[167]

It is highly likely that unification of the copyright regime in the EU remains very challenging. However, in response to the EU's initiative in creating a single digital market, which would help the EU move towards a knowledge based economy, the Commission pointed out that it is necessary for the EU to develop a more harmonised copyright system in order to reduce disparities in copyright regimes, and thus ensure a wider cross-border access to online services.[168] To achieve this goal, an amendment of the copyright law to eliminate online barriers is necessary. Recently, a proposal for a regulation to ensure cross-border portability of online content services in the internal market was released in order to ensure that consumers can access purchased

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[164] ibid.
[165] ibid. See also Trevor Cook and Estelle Derclaye, 'An EU Copyright Code: what and how, if ever?' (2011) IPQ, 7 <http://eprints.nottingham.ac.uk/1739/1/cook_derclaye_2011.pdf> accessed 22 December 2013.
[166] Cook and Derclaye (n 157) 262.
[167] ibid.
[168] Chole Smith, 'Europe to harmonise copyright laws' <http://www.lawgazette.co.uk/law/europe-to-harmonise-copyright-laws/5048673.fullarticle> accessed 12 September 2015.

or rented online content while travelling in other EU countries.[169] This reformation aims to help reduce the differences in national copyright laws of the EU members and thereby allows wider access and represents further harmonisation.[170] This clearly demonstrates a continual effort by the EU to seek a higher degree of copyright harmonisation. Thus, it can be seen that harmonisation of copyright in the EU is still an ongoing process. Solely relying on the enactment of the harmonisation directives cannot change the exclusive nature of national copyright law, which remains territorial. As a result, a fragmented copyright system that can partition the single market would still exist thereby obstructing free movement of goods.

3.2.2 Patents

The standardisation of patent law in the EU has been accomplished through the ratification of international agreements and the enactment of a directive. Multilateral treaties are major instruments used to approximate legislation in this area. The only EU legislative measure providing substantive harmonising provisions in the area of patent is Directive 98/44/EC on the Legal Protection of Biological Inventions, which provides provisions governing patent protection of biological materials.[171] The international IP treaties that play a significant role in harmonising patent law in the EU are the European Patent Convention (EPC) and the Patent Cooperation Treaty (PCT). Before these treaties entered into force, national patent laws of the EU members were only harmonised by the Paris Convention, which does not contain a

[169] European Commission, 'Copyright' <https://ec.europa.eu/digital-agenda/en/copyright> accessed 2 January 2016.
[170] European Commission, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' <http://europa.eu/rapid/press-release_IP-15-4919_en.htm> accessed 2 January 2016.
[171] Council Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions [1993] OJ L 213.

significant degree of minimum standards of patent protection.[172] Consequently, there were significant disparities in both substantive and procedural patent laws among EU members.[173]

The EPC was the 'first and foremost' system to provide uniform procedures for filing and granting a European patent.[174] The European Patent Office (EPO) was borne out of this convention. As of now, 38 countries have joined the EPC, including 28 member states of the EU.[175] The EPC provides harmonised rules governing both substantive and procedural aspects of granting and obtaining patent protection.[176] This means that the EPC not only provides a common procedure, but also standardises substantive laws of the member states. This helps decrease the disparity in national patent laws among the contracting states. The EPC enables an applicant to file a single patent application designating one or more of the member states of the EPC.[177] The applications can be filed at an EPO, which provides a centralised procedure for the examination and grant of European patents.[178] In other words, a European patent application is analysed and granted by the EPO pursuant to the single procedure, uniform requirements and conditions of the EPC. This helps increase the certainty in the process of granting patents because the same standard is applied to all applications.

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[172] Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar Publishing 2013) 90.
[173] ibid.
[174] Christopher Heath, 'Intellectual Property Harmonisation in Europe' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 47.
[175] European Patent Office (EPO), 'Member States of the European Patent Organisation' <http://www.epo.org/about-us/organisation/member-states.html> accessed 29 October 2013
[176] Stefan Luginbuehl, *European Patent Law: Towards a Uniform Interpretation* (Edward Elgar Publishing 2011) 1.
[177] Elizabeta Zirnstein, 'Harmonization and Unification of Intellectual Property in the EU' (2005) Intellectual Capital and Knowledge Management 293, 298.
[178] Nikolaus Thumm, 'Developments towards a unitary European patent system' (3rd Workshop, The Output of R&D Activities: Harnessing the Power of Patents data 2011) 3.

However, the rights granted under the EPC are a bundle of national patent rights, dissimilar to the single patent right that is valid throughout the European territory.[179] This requires European patents granted by the EPO to still rely on the national patent laws of the contracting states,[180] and thereby be enforced separately in the national court of the designated contracting states. Interpretation of the EPC may vary depending on the national courts of the contracting states, thereby leading different outcomes.[181] Therefore, it was opined that such an outcome might be contrary to the prime goal of the EU of establishing a unitary community patent system.[182]

Since national courts are free to use their own interpretations, it could lead to legal uncertainty, and thus adversely affect the operation of the internal market. For instance, in *Improver v Remington,*[183] a three-step test was provided by Lord Hoffmann to assess whether a variant infringes on the claim of a patent. Subsequently, UK courts generally applied this test to determine whether a variant fell within the outlined scope. Examples of the use of this three-step test can be found in *Daily v Berchet*[184] and *American Home Products Corp v Novartis Pharmaceuticals UK Ltd*[185]. However, in *PLG Research Ltd. v Ardon,*[186] the Court followed the approach applied by a German court, which it claimed was a modified version of the three-step test in *Improver*.[187] It has been noted that the interpretations of the UK

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[179] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection' COM (2011) 215/3 Brussels, 3.
[180] ibid.
[181] Heath (n 174) 47.
[182] Zirnstein (n 177) 298.
[183] *Improver Corp v Remington Consumer Prods Ltd* [1990] FSR 181.
[184] *Daily v Berchet* [1992] FSR 533.
[185] *American Home Products Corp v Novartis Pharmaceuticals UK Ltd* [2001] RPC 8.
[186] *PLG Research Ltd v Ardon International Ltd* [1993] FSR 197.
[187] Helen Norman, *Intellectual Property Law Direction* (OUP 2011) 160.

courts and the German courts are different.[188] UK courts regard a patent as an incentive to invent, whereas German courts consider a patent to be a reward to the patentee rather than an incentive.[189] This can decrease the degree of conformity among the EPC contracting parties.

The European patent system has been called the most expensive patent system in the world.[190] The EU was concerned about this; therefore in 1975 the Community Patent Convention was signed to create a unitary system of patent in the community. However, the agreement has yet to come into effect due to a disagreement about some proposed language and the litigation process of a European patent.[191] In 2000, the European Commission proposed the creation of a community patent and revised the proposal in 2004.[192] Nevertheless, the proposal was defeated due to the continual disagreement about language and wording. [193]

Recently, in 2011, a proposal for a unitary patent was introduced.[194] The regulations providing the unitary patent protections consisted of two EU regulations and one agreement between participating EU member states regarding the creation of a

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[188] Matthew Fisher, 'New Protocol, Same Old Story? - Patent Claim Construction in 2007; Looking Back with a View to the Future' (2008) 2 IPQ 133.
[189] ibid.
[190] Bruno van Pottelsberghe de la Potterie and Malwina Mejer, 'The London Agreement and the Cost of Patenting in Europe' (2008) ECARES working paper 2008_032 <http://www.ecares.org/index2.php?option=com_docman&task=doc_view&gid=46&Itemid=204> accessed 26 December 2013.
[191] Hector L Macqueen and others, Contemporary Intellectual Property: Law and Policy (OUP 2010) 383; Susana Borrás, The Innovation Policy of the European Union: From Government to Governance (Edward Elgar Publishing 2003) 87.
[192] European Parliament, 'The new EU unitary patent - Q&A' <http://www.europarl.europa.eu/news/en/pressroom/content/20121205BKG57397/html/The-new-EU-unitary-patent-QA> accessed 29 October 2013.
[193] ibid.
[194] ibid.

Unified Patent Court (UPC).[195] According to Regulations (EU) No. 1257/2012 EU and 1260/2012, which came into force on 20 January 2013, the system will give unitary effect in all participating EU member states to European patents granted by the EPO under the provisions of the EPC. A single court, the UPC of the participating member states, was established. The UPC would have jurisdiction over new unitary patents and European bundle patents granted by the EPO.[196] It was expected that the creation of this common court could help avoid duplicate litigations in multiple countries.[197] As of now, 26 of the 28 EU member states participate in the new patent system.[198] Spain and Croatia are the only EU countries that are still not part of the enhanced cooperation for the creation of the Unitary Patent.[199] The unitary patent package will come into effect when 13 countries, including France, Germany and the UK[200] have ratified the Agreement on the UPC.[201] As of June 2016, 10 countries,

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[195] European Commission, 'Patents' <http://ec.europa.eu/internal_market/indprop/patent/index_en.htm> accessed 29 October 2013.

[196] Intellectual Property Office, 'Intellectual property – guidance: The Unitary Patent and Unified Patent Court' <https://www.gov.uk/guidance/the-unitary-patent-and-unified-patent-court> accessed 12 September 2015.

[197] Richard Arnold, 'An Overview of European Harmonization Measures in Intellectual Property Law' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 29.

[198] European Commission, 'Unitary Patent' <http://ec.europa.eu/growth/industry/intellectual-property/patents/unitary-patent/index_en.htm> accessed 22 April 2016; Adam Jolly, *The Handbook of European Intellectual Property Management: Developing, Managing and Protecting Your Company's Intellectual Property* (4th edn, Kogan Page Publishers 2015) 25.

[199] The enhanced cooperation on unitary patent protection was established according to Article 20 TFEU, which stipulates that enhanced cooperation can be established in the areas of the Union's non-exclusive competence. The creation of the EU IP protection is considered an internal market measure, which is not an exclusive competence of the Union. For a more detailed analysis, see Tihana Balagovic, 'Enhanced Cooperation: Is there hope for the Unitary Patent' (2012) 8 Croatian YB Eur L & Pol'y 299; Alfredo Ilardi, *The New European Patent* (Hart Publishing 2015).

[200] It is still debatable whether the UK can still ratify the UPC Agreement after a Brexit. It was opined that Brexit will not have immediate effect on UK's participation in the European Patent package. After Article 50 of the Lisbon Treaty is triggered, it will take at least two years to exit the EU. As long as the UK remains a member of the EU, it can ratify the UPC Agreement. For further knowledge, see DLA Piper LLP, 'Is the UPC Brexit-proof?' <http://www.lexology.com/library/detail.aspx?g=3ab54d25-35c6-44d7-a51e-843bca5f267a> accessed 13 August 2016.

[201] European Commission, 'Unitary Patent' (n 198).

including France, had ratified the UPC Agreement.[202] A firmly established unitary patent system would allow an applicant to obtain a European patent with unitary effect throughout the territories of participating EU countries taking part in the enhanced cooperation scheme and having ratified the Agreement on a UPC.[203] In other words, a single European patent would be enforceable throughout the contracting states and would not be subjected to disparities in the national patent laws of the member states. Decisions of the UPC would help ensure uniform application and interpretation in all the EU contracting states. As a court common to the member states, the UPC is obliged to refer questions for preliminary ruling to the CJEU as with other national courts of the EU members.[204] This would increase the role of CJEU in the patent harmonisation process. Prior to the introduction of the unitary patent and the UPC, the CJEU had not yet dealt with the core issue of patent because the directive was approved to deal with specific areas.[205]

Agreeing on a language, or languages is often a major obstacle to establishing a community patent system. It was proposed that the official languages of the community patent be English, French and German,[206] which are the official languages of the EPO. Nevertheless, some EU countries, particularly Spain and Italy disagreed and argued that this would undermine the internal market and adversely affect small

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[202] European Council, 'Agreement' <https://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013001> accessed 22 April 2016.
[203] Stefan Luginbuehl, 'An Institutional Prespective I: The Role of the EPO in the Unitary (EU) Patent System' in Justine Pila and Christopher Wadlow (eds), *The Unitary EU Patent System* **(**Bloomsbury Publishing 2015) 47.
[204] The Select Committee: www.unified-paent-court.org, 'An Enhanced European Patent System' 15 <http://www.unified-patent-court.org/images/documents/enhanced-european-patent-system.pdf> accessed 16 November 2015.
[205] Strowel and Kim (n 85) 125.
[206] Michael J. Crowley, 'Reintroduction of the Substantive Patent Provisions of the Unitary Patent Package into EU Law' (2015) 4 J Intell Prop & Ent L 197, 218-222; Chris Ingram, 'European patent system hangs in the balance with ECJ challenge to unified litigation (IP/IT newsletter, April 2011)' <http://www.ashurst.com/publication-item.aspx?id_Content=5883> accessed 25 November 2013.

and medium businesses.[207] Local businesses might have to bear excessive costs in translating applications into one of the official language.[208] However, compared to the current system of a European patent, this will substantially reduce patent transaction costs, particularly the translation cost.[209] When the unitary patent is granted, a machine translation will be available for the purpose of informing on the content of patents.[210] No human translation will be required.[211] However, during a transitional period, until the machine translation system is fully operational, applicants will need to provide a translation into English (if the language of proceedings is French or German) or a translation into one other EU official language (if the language of proceeding is English).[212] Meanwhile, under the current system, it was shown that in order to obtain valid patents in all the EU member states by utilising the traditional European patent system, an average application validation would cost approximately 32,000 euros.[213] Validating a European patent in 13 countries was ten times more expensive than a patent in the US or Japan.[214] Therefore, one of the core objectives of the unitary patent system is to reduce costs of obtaining and maintain patent

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[207] Brian Cordery, 'Staying UK Proceedings Pending EPO Oppositions – Commercial Common Sense Prevails' <http://kluwerpatentblog.com/2011/01/12/an-eu-patent-proposal-for-enhanced-cooperation/> accessed 25 November 2013.
[208] Ingram (n 206).
[209] OECD, *OECD Economic Surveys: European Union 2014* (OECD Publishing 2014) 61; Florence Hartmann-Vareilles, 'Intellectual property law and the Single Market: the way ahead' (2014) 15 ERA Forum 159, 161.
[210] EPO, 'Unitary Patent' <https://www.epo.org/law-practice/unitary/unitary-patent.html> accessed 22 April 2016.
[211] ibid.
[212] Justin Pila and Paul Torremans, *European Intellectual Property Law* (OUP 2016) 153.
[213] Commission, 'Proposal for a Regulation of the European Parliament and of the Council: Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent' COM (2011) 215 final, 1 <http://ec.europa.eu/internal_market/indprop/docs/patent/com2011-215-final_en.pdf> accessed 27 December 2013.
[214] European Commission, 'a proposal for a Council Regulation on the translation arrangements for the European Union patent' COM (2010) 350 final 2 <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2010/sec_2010_0797_en.pdf> accessed 22 April 2016.

protection in the EU countries.[215] It is expected that full implementation of the unitary patent system will lower costs for patent owners about 5,000 euros.[216] Moreover, it should be noted that the community patent is designated to operate in parallel with the European patent system under the EPC.[217] That said, an applicant would have a choice whether to file an application for the European patent with unitary effect under the community patent system or apply for a bundle of national patents under the EPC. This would help increase effectiveness and attractiveness of the European patent system. Although there are still some controversies surrounding the creation of the community patent system, a new unitary patent right and UPC could be considered a significant development toward European patent unification, since it could combat fragmentation experienced in the current European patent system.

In addition to developing patent protection within the region by ratifying the EPC and issuing the directive and regulation, the EU was involved in patent harmonisation at the international level. The EU can be also regarded as an active player in the global IP community since EU members are signatory to various international treaties relating to patent protection, particularly the PCT. The PCT, which is a treaty administered by the WIPO, was adopted in order to streamline the procedures for filing, searching and examining patent applications. The PCT system enables an applicant to file a single application by designating any one or more of the contracting states to the treaty. However, the granting of the patent remains within the control of each contracting state. An applicant can obtain a European patent by designating the

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[215] James Tumbridge, 'Unified Patent Court: Harmonising Patent Law Throughout Europe?' (2014) 15 Nus L Int'l 55, 66.
[216] European Commission, 'Patent reform package - Frequently Asked Questions' European Commission Memo/12/970 (11 December 2012) <http://europa.eu/rapid/press-release_MEMO-12-970_en.htm?locale=en> accessed 22 April 2016.
[217] Favale and Borghi (n 104) 28-29.

EPO in a PCT application.[218] In other words, an applicant can designate all the contracting parties to the EPC as a single entity. This is known as the 'Euro-PCT route'.[219] In order to obtain a patent, an application would be processed through the international phase, the granting procedure of which is subject to the PCT, and through the regional phase, which is governed by the EPC.[220] This means that the decision whether or not to grant a patent is left to the EPO which would be controlled by the terms of the EPC. Similar to the EPC, the outcome would be the granting of a bundle of national patents. Nevertheless, compared to the EPC, the PCT is likely to provide a lesser degree of harmonisation. The PCT merely provides harmonised procedural rules governing searching and conducting preliminary examination in the patent granting process. While the EPC provides harmonised procedural and substantive rules. It has been suggested that the EPC goes much further than the PCT 'in centralising the remainder of the substantive examination process right through to grant'.[221]

Presently, the harmonisation of patent law in the EU is still in progress and requires further harmonisation. The existing European patent system through the EPC or PCT routes cannot be considered to be complete harmonisation since the enforcement of patent rights is still a matter of the national patent law of the member states. However, it can provide an applicant with an alternative route by offering a centralised procedure, which could help an applicant save both time and money that would otherwise be incurred in filing separate patent applications in each country when a larger number of countries is required to ensure patent protection. This can facilitate

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[218] OECD, *OECD Patent Statistics Manual* (OECD Publishing 2009) 152.
[219] ibid.
[220] ibid.
[221] Trevor Cook, *A User's Guide to Patents* (Bloomsbury Professional Limited 2011) 70.

the European patent granting procedure, which could help provide an incentive in the community to invent. Furthermore, successfully implementing the unitary patent system and UPC would help the EU move towards a complete harmonisation in the area of patent.

3.2.3 Trademarks

The harmonisation of trademark has been developing for over 20 years. It was regarded as a 'pioneer of harmonisation at the European level'.[222] It is not an overstatement to say that the EU trademark system has proved to be a great success.[223] Before harmonisation took place, the disparity in trademark protections between member states could have led to use or misuse of trademarks in a way that could have threatened the operation of the internal market.[224] It was noted that the disparity in national trademark laws allowed trademark owners to partition the internal market into national markets where they could charge different prices for their products.[225] As a result, trademark harmonisation directives were approved to standardise the substantive laws of member states, help eliminate barriers to trade between the member countries and ensure that goods could flow freely around the community.

Council Directive 89/104 was the first legislative instrument utilised. It was passed in 1989 in order to bring consistency to the national trademark laws of the member

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[222] Favale and Borghi (n 104) 39.
[223] Hartmann-Vareilles, (n 209) 167.
[224] Oreste Montalto, 'Patent and Trademark Developments in the European Community' (1993) 4 Fordham Intell Prop Media & Ent LJ 299, 308.
[225] Ramses Trogh, 'The International Exhaustion of Trade Mark Rights after Silhouette: the End of Parallel Imports?' (Master, University of Lund 2002) 13.

states.[226] The directive sets out requirement for obtaining trademark protection, the scope and term of protection, possible grounds for refusal of a trademark, and exhaustion of rights provisions. The enactment of the directive led to amendments to the laws of member states since the directive included provisions that were different from the then current law. For instance, under the Council Directive, trademark subject matter was extended to cover marks or services marks based on shape or packages.[227] Primarily, the directive was passed to provide more consistency in the then existing trademark laws of the member states. Nonetheless, it was considered as a partial harmonisation since it only addressed sections that directly affected the operation of the internal market.[228] That said, the directive provided harmonised rules governing the conditions in obtaining a trademark, whereas procedural provisions regarding trademark registration remained up to national discretion.[229] Therefore, this resulted in a limited trademark harmonisation effect in the EU because trademarks remained a matter of national law that would be enforced in each particular national jurisdiction.

In 2008, the first harmonisation directive was replaced by Directive 2008/95 that contained no substantive legislative change.[230] The directive was passed in order to standardise trademark laws between the member countries so that member states

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[226] Alexander von Mühlendahl, 'The Max-Plank-Study "Study on the Overall Functioning of the European Trade Mark System': Background, Findings, Proposals" European Communities Trademark Association, 1 <http://www.ecta.org/IMG/pdf/519b-_von_muhlendal_2_.pdf> accessed 29 October 2013.
[227] Eric Sedwick, 'Trademarks and the European Economic Community' (2001-2002) 12 J Contemp Legal Issues 437, 438.
[228] Seville (n 27) 220.
[229] ibid 221.
[230] OHIM, 'Regulations and related texts' <http://oami.europa.eu/ows/rw/pages/CTM/legalReferences/regulations.en.do> accessed 30 October 2013.

could enjoy the same standard of protection.[231] However, it cannot not be considered to be full harmonisation since the directive did not change the territorial nature of trademarks. [232] Trademarks that were registered at the industrial property office of the member states would still be subject to national trademark law of each country. As a result, conflict resulting from similar trademarks protected in different member countries could arise. [233] Additionally, some areas, especially national trademark procedures, were not addressed by the current directive.[234] Therefore, differences in trademark procedures in the member states still remained.[235]

Solely relying on the promulgation of harmonisation directives is not sufficient for the EU to achieve its goal of having a fully harmonised national trademark system. Uniform EU IP system cannot be firmly established by merely standardising national IP laws.[236] Apart from standardising trademark law at the national level through use of directives, Council Regulation 40/94 on community trademarks was adopted in 1993 in order to create a unitary system of trademark.[237] This regulation was later replaced by regulation 207/2009. The community trademark system (CTM), which is now the European Trademark (EUTM) was established to operate parallel with the national trademark system.[238] In other words, the EUTM was set up as an alternative to national trademark filing. As a result, the same sign could be registered at both the

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[231] European Commission, 'Modernisation of the European Trade Mark System – Frequently Asked Questions' <http://europa.eu/rapid/press-release_MEMO-13-291_en.htm> accessed 30 October 2013.
[232] ibid.
[233] Sedwick (n 227) 439.
[234] Trevor Cook, 'European Union Trademark Law and its Proposal Revision' (2013) 18 JIPR 283, 284.
[235] Annette Kur, 'The EU Trademark Reform Package - (Too) Bold a Step Ahead or Back to Status Quo?' (2015) 19 Marq Intell Prop L Rev 19, 23.
[236] Zirnstein (n 177) 299.
[237] ibid.
[238] ibid.

national and the community level.[239] It should be noted that the substantive provisions of this regulation are nearly identical as the provisions in trademark harmonisation directives.[240] The provisions regarding the requirements and scope of protection under the regulation are substantially the same as in the directive.[241] However, the regulation governing the EUTM was passed to address a slightly different issue than those focused on by the directives.[242] The directives were enacted to approximate national trademark laws of member states to reduce impediments to the free movement of goods within the internal market.[243] Whereas the regulation was approved to reduce impediments to trade resulting from natural territorial IP rights, which could not be changed by approximation of laws.[244] This demonstrates that the regulation creating the EU-wide trademark system could render a higher degree of harmonisation. It has been suggested that the objective of the regulation was different from that of the directive because it aimed to unify rights rather than harmonise laws.[245] However, some have argued that these instruments shared the same goal of helping the EU pursue a genuine internal market.[246]

Under the EUTM, an applicant is permitted to file a single application through the EUIPO for an EU trademark, which would be valid throughout the EU.[247] It has been claimed that establishing a system wherein the national and community systems

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[239] European Commission, 'Modernisation of the European Trade Mark System – Frequently Asked Questions' (n 231).
[240] Zirnstein (n 177) 300.
[241] Kur (n 235) 21.
[242] Graeme Dinwoodie, 'The Europeanization of Trade Mark Law' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 87.
[243] ibid.
[244] ibid.
[245] ibid.
[246] ibid.
[247] Zirnstein (n 177) 300.

coexisted was to satisfy the needs of different sized companies.[248] A national trademark system may be more suitable and fit the interests of local companies and small and medium enterprises (SMEs). Contrarily, the EUTM might better satisfy the business interests of large companies that operate business on a much broader scale throughout the EU.[249] Additionally, the EUTM would be automatically extended to new EU members without any formalities and fees.[250] Hence, the expansion of the EU did not obstruct the function of the system. This is regarded as a benefit of the EUTM system.

By providing a uniform trademark registration, an applicant can save time and money that would otherwise be expended in filing separate applications in each EU member country.[251] The EUTM registration process of a simple application with no objections could take only 6 to 9 months from the date of filing to finalise.[252] Additionally, the EUTM is 'very easy to be administered' since it offers trademark rights that can be enforced in all the EU countries.[253] The unitary effect of the EUTM can also help trademark owners to plan their market strategies since their trademarks are afforded the same standard of protection in all EU member countries.[254] Using the EUTM system could have various advantages to applicants. Nevertheless, this system still has

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[248] European Commission, 'Modernisation of the European Trade Mark System – Frequently Asked Questions' (n 231).
[249] ibid.
[250] OHIM, 'What is a Community trade mark (CTM)?' <http://oami.europa.eu/ows/rw/pages/CTM/communityTradeMark/communityTradeMark.en.do> accessed 30 October 2013.
[251] Community Trademark, 'CTM Advantages' <http://www.communitytrademark.nl/communitytrademarkadvantages.html> accessed 29 October 2013.
[252] INTA, 'Community Trade Mark' <http://www.inta.org/TrademarkBasics/FactSheets/Pages/CommunityTradeMarkFactSheet.aspx> accessed 29 October 2013.
[253] Community Trademark (n 251).
[254] Cornel Grigorut and Calin Marinescu, 'The Community Trademark and the Office for Harmonization on the Internal Market (OHIM)' (EIRP Proceedings 2012) 347.

some limitations. The system does not permit an applicant to exclude any country in which the applicant does not want his mark registered.[255] Furthermore, it was pointed out that if an application faces objection, an applicant might have to incur significant extra expense in order to deal with such opposition.[256]

However, from an overall perspective the advantages of the EUTM system outweigh the drawbacks. This system is a good alternative for business owners, who operate throughout the EU. Its unitary effect can allow mark owners to register a trademark with minimal cost and time expenditure while allowing enforcement of exclusive trademark rights throughout the EU. Furthermore, the EUTM is an example of significant community harmonisatation of IP rights since it is the result of harmonisation at the national level through the implementation of the directive and passage of regulations governing community trademarks with a unitary effect.[257]

However, in 2016, there are a number of important reforms to the EU trademark law. In order to modernise and provide a more effective trademark system within the EU at both the national and community levels, the EU trademark reform package has been adopted. It aimed to make the EU trademark system more accessible, to reduce cost and complexity and to provide a faster process.[258] This has led to an amendment of harmonisation Directive 2008/95/EC and Community Trademark Regulation 207/2009/EC. It has been noted that there is a need to modernise the trademark regime in the EU due to a significantly change in the business environment over the

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[255] INTA (n 252).
[256] ibid.
[257] Seville (n 27) 3.
[258] European Commission, 'Trade marks: Commission proposes easier access and more effective protection' <http://europa.eu/rapid/press-release_IP-13-287_en.htm?locale=en> accessed 14 October 2015.

previous two decades.[259] There had been no major changes in the national and community trademark systems, which were standardised through EU legislation for more than 15 years prior to 2015.[260] The reformation consists of two legislative components, which are the new Trademarks Directive (Directive (EU) 2015/2436) and the amended Community Trademark Regulation (Regulation (EU) 2015/2424). Presently, the new trademark Directive 2015/2436 (The new Trademark Directive) has come into force since January 2016. It aims to further harmonise the national trademark systems of EU members. The member states are obliged to transpose the majority of the provisions into their national law by 14 January 2019.[261] The Regulation (EU) 2015/2424 has just come into effect on 23 March 2016. It was adopted to amend the existing EU Trademark Regulation (Regulation 207/2009/EC). There are various key changes of EU trademark reform. For instance, the Community Trademark (CTM) is re-named to European Union Trademark (EUTM), and the European trademarks registry, OHIM, has become the European Union Intellectual Property Office (EUIPO). New fees system is also introduced. Average costs of registering and renewing EUTM will be reduced.[262] Furthermore, the scope of sign that can be registered as a trademark is also expanded. The previous trademark directive and community trademark regulation explicitly laid down the need for a mark to be graphically represented.[263] However, under the new trademark reform package, the requirement of graphic representation has been removed.[264] This means

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[259] European Commission, 'European Commission - Fact Sheet: Package to modernise the European Trade Mark System – Frequently Asked Questions' <http://europa.eu/rapid/press-release_MEMO-15-4824_en.htm> accessed 14 October 2015.
[260] ibid.
[261] Article 54 of Directive (EU) 2015/2436.
[262] EUIPO, 'Fees' <https://euipo.europa.eu/ohimportal/en/eu-trade-mark-regulation-fees> accessed 4 April 2016.
[263] Article 2 of Directive 2008/95/EC; Article 4 of Regulation 207/2009/EC
[264] Article 3 of Directive (EU) 2015/2436; Article 4 of Regulation (EU) 2015/2424.

that the new definition of a trademark may be extended to cover non-traditional marks such as a sounds and smells.[265] Consequently, these non-traditional marks can be registered more easily. Moreover, to effectively prevent the flow of counterfeit goods, provisions on detaining goods in transit have been integrated in the new trademark directive and regulation. The owner of a trademark is entitled to prohibit third parties from importing counterfeit goods into the EU, regardless of whether they are intended to release goods for free circulation within the EU.[266] These provisions did not follow the guideline adopted by the CJEU in the joined cases of *Philips* and *Nokia,* where the court ruled that in-transit *g*oods can be detained if there is sufficient evidence to consider that the goods are likely to be marketed within the EU.[267] Moreover, in order to increase more certainty, some aspects of trademark procedures such as filing dates and standards for classification of goods/services are standardised.[268] These changes could help modernise trademark laws of member states and ensure greater harmonisation across the EU than presently exists, and thereby reducing obstacles to free movement of goods resulting from disparities in national laws. This demonstrates continual efforts by the EU in pursuing a higher degree of IP harmonisation in the field of trademarks, which is expected to help increase consistency and legal certainty of the trademark system at both the national and the EU level.

In regards to the enforcement of trademark rights, a claimed infringement of a trademark granted at the national level would be subject to the jurisdiction of the national court of each member state. Meanwhile, if there is an infringement of an EU

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[265] Kur (n 235) 25-26.
[266] Article 10(4) of Directive (EU) 2015/2436; Article 9(4) of Regulation (EU) 2015/2424.
[267] Joined Cases, *Koninklijke Philips Elecs NV v Lucheng Meijing Indus Co Ltd* [2011] ECR 1-12435.
[268] European Commission, 'Package to Modernise the European Trade Mark System – Frequently Asked Questions' <http://europa.eu/rapid/press-release_MEMO-15-4824_en.htm> accessed 4 April 2016.

trademark, it would fall within the jurisdiction of the national court that is designated as the EU trademark court.[269] According to the CJEU's ruling in *DHL v Chronopost,*[270] decisions from a community trademark court should apply throughout the EU since EUTM and its regulation provide unitary rights that cover all EU countries.[271] In addition, when a questions arise regarding the interpretation or validity of an EU trademark laws, those questions can be submitted to the CJEU for a preliminary ruling by the national and community courts.[272] Therefore, when a ruling is issued by the CJEU, that ruling would apply to the national and community courts. This would provide more legal certainty and ensure equal application of the EU laws in the member states. A noteworthy example is *Sabel BV v Puma AG*,[273] in which the court was asked whether there exists a 'likelihood of confusion' for the purpose where the public might make an association between two marks. The CJEU explained the meaning of likelihood of confusion for the purpose of infringement between two marks that are not identical, and thereby providing guidance in assessing the likelihood of confusion in other cases. It was held that in interpreting the criterion of likelihood of confusion which includes the likelihood of association with the earlier mark as provided under in Article 4(1)(b) of Directive 89/104/EEC, 'the mere association which the public might make between two trade marks as a result of their analogous semantic content is not in itself a sufficient ground for concluding that there is a likelihood of confusion within the meaning of that provision.'[274] The likelihood of confusion must therefore be appreciated globally, taking all relevant

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[269] See Article 95 and 96 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark.
[270] C-235/09 *DHL Express France SAS v Chronopost SA* [2011] ECR I–2801 (ECJ, Grand Chamber).
[271] ibid para 38-39.
[272] See Europa, 'The reference for a preliminary ruling' <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14552> accessed 12 May 2016.
[273] C-251/95 *Sabel BV v Puma AG* [1997] ECR I-6191.
[274] ibid.

factors to the circumstances of the case into account.[275] The determination of 'likelihood of confusion' can also be found in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*[276]. Both cases were claimed to provide important guidance on assessment whether there is a likelihood of confusion.[277] This clearly demonstrates a crucial role of the CJEU in the development of IP law within the EU.

However, in practice, it would take some time before the precedent set by the CJEU could be the precedent in the national courts. Examples can be found in *LTJ Diffusion SA v Sadas Vertbaudet SA*[278] and *Reed Executive v Reed Business Information Limited*[279], in which guidance on the identity of marks was provided by the CJEU and the UK courts. In the 2003 case of *LTJ Diffusion SA v Sadas Vertbaudet SA,* the claimant, LTJ Diffusion SA, was the manufacturer and distributor of clothing and footwear. The claimant registered a French trademark under the name 'ARTHUR'. Sadas, the defendant, operated a children's clothing and accessory mail-order business and had a registered French trademark, 'ARTHUR ET FÉLICIE'. In this case, the the assessment of the identity of these two marks was referred to the CJEU by the French Court. The CJEU responded by stating that the test of identity must be strictly interpreted. Hence, it was held that there was identity between the mark and the sign where 'the former reproduces, without any modification or addition, all the elements constituting the latter'.[280] However, in 2004, according to *Reed Executive v. Reed Business Information Limited*, the test of identity was applied

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[275] ibid.
[276] C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1998] ECR I-5507; See also C-342/97 *Lloyd Schufabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77.
[277] David I. Bainbridge, *Intellectual Property* (7th edn, Pearson Education Limited 2009) 715.
[278] C-291/00 *LTJ Diffusion v Sadas Vertbaudet SA* [2003] FSR 34.
[279] *Reed Executive Plc v Reed Business Information Ltd, Reed Elsevier (UK) Lt*d [2004] ETMR 56.
[280] *LTJ Diffusion* (n 278).

and interpreted by the UK court in order to answer whether the use of the word 'Reed' by Reed Business Information Limited was considered as trademark infringement of the registered trademark, 'Reed', owned by Reed Executive. The English Court of Appeal ruled that this did not amount to trademark infringement. The use of the term, 'Reed', that appeared in a search engine, did not cause the public to be confused or wrongly believe there to be a trade connection between these two businesses.[281] Hence, although various directives were approved to standardise the laws between the member states, there was still fragmentation in the enforcement of rights, particularly in the interpretation of laws by the courts. Nevertheless, in *Mag Instrument v OHIM,*[282] it was held by the CJEU that the interpretation of provisions that were identical in regulation and the directive had to be interpreted in the same way.[283] This clearly demonstrates the role of the CJEU in ensuring homogenous interpretation of EU trademark laws.

In addition to filing a trademark application separately in each EU member country and by filing through the EUTM system, trademark protection can be achieved internationally through the Madrid Protocol. Under the Madrid system, an applicant is permitted to file one trademark application in one language designating one or more contracting parties.[284] However, the trademark granted through this system is a bundle of national rights. This is different from trademark registration through the EUTM system, which provides trademark rights with a unitary effect in all participating EU

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[281] *Reed Executive Plc* (n 279).
[282] *Mag Instrument v OHIM* [2002] ECR II-467.
[283] ibid; Tobias Chen Jehoram, Constant van Nispen and Tony Huydecoper, *European Trademark Law: Community Trademark law and Harmonized National Trademark Law* (Kluwer Law International 2010) 27.
[284] INTA, 'Community Trade Mark and the Madrid Protocol Comparison' <http://www.inta.org/TrademarkBasics/FactSheets/Pages/CTMMadridComparisonFactSheet.aspx> accessed 29 October 2013.

member states. Nevertheless, the EU has been a contracting party of the Madrid Protocol since 2004.[285] As a result, by using the Madrid system an applicant can designate the EU in an international application. [286] This could have the same effect as the granting of a European trademark through the EUTM system.

Thus, it can be seen that the EU has made significant progress in harmonising the trademark regimes within the community. The establishment of the EUTM system with its unitary effect represents a high degree of IP harmonisation throughout the EU. The coexistence of the national and community systems, as well as the operation of the Madrid system, gives an applicant a wide variety of choices from which to choose to obtain trademark protection in the manner that best suits his individual interest. The standardisation of the trademark regime in the EU through EU legislation, as well as international treaties can increase consistency in trademark protection among the EU member states, which can have a positive effect on the internal market. Furthermore, the case law of the CJEU has also played an essential role in the harmonisation process. However, fragmentation in the enforcement of trademark rights still exists as a result of different interpretations of the law by the courts. This problem can be minimised when the precedents set by the CJEU become the precedents established and followed by the national courts. Moreover, the adoption of the new EU Trademark reform package will help modernise and enhance efficiency in the EU trademark system at both the national and the community levels.

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[285] WIPO, 'Members of the Madrid Union' <http://www.wipo.int/madrid/en/members/> accessed 31 October 2013.
[286] OHIM, 'Questions on the Registration of International Marks (Madrid Protocol)' <http://oami.europa.eu/ows/rw/pages/CTM/FAQ/CTM12.en.do#200> accessed 31 October 2013.

3.2.4 Designs

Passage of Directive 98/71/EC in 1998 on the legal protection of designs represents a significant effort to harmonise laws in that area.[287] Before the approximation of law, the disparity of national laws in the field of design rights obstructed the free movement of goods within the community.[288] Lack of a harmonised standard had a detrimental effect on legal certainty and thereby adversely affected investments.[289] Therefore, the directive was adopted in order to standardise substantive national registered design laws among its member states, especially in areas that could directly affect the function of the internal market.[290] Generally, the directive provided a definition of the concept of registered designs and set out the requirements for obtaining design protection, the scope and the terms of protection, grounds for refusal and terms of the exhaustion of protection.[291] Nevertheless, procedural laws governing remedies, sanctions and enforcement are still a matter of the national law of each member state.[292] In the absence of harmonised procedures, obtaining design protection is quite costly since an applicant would need to file a national application in each member state in order to obtain protection in the EU.[293] The directive also fails to address the areas of unregistered designs and unfair competition, which still has much disparity among the member states.[294] Therefore, similar to the area of trademarks, the adoption of the harmonisation directive could merely constitute

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[287] Zirnstein (n 177) 296.
[288] Seville (n 27) 182.
[289] Christopher M. Aide, 'The Community Design: European Union-Wide Protection for Your Design Portfolio' (2003) 1 Nw J Tech & Intell Prop 35, 35.
[290] Seville (n 27) 182.
[291] Aldo Fittante, 'The Acceptance of Directive 98/71/EC on the Legal Protection of Designs: Statutory Regulation No. 95 which was passed by the Italian Council of Ministers on 2 February 2001' (2000) The European Legal Forum (E) 8-2000/01, 532, 532.
[292] Seville (n 27) 183.
[293] Aide (n 289) 35.
[294] Arnold (n 197) 32.

partial harmonisation since the directive was not passed for the purpose of creating a community design system. Furthermore, the directive only aims to harmonise design rights in the particular areas that could clearly obstruct the free flow of goods in the internal market. The enforcement of design rights is left to the discretion of the national courts, which could lead to inconsistent decisions. As a result, diversity of design rights in the community still remains, and thus obstructs the establishment of a genuine internal market.

The community system of design protection, which coexists with national systems, was created in 2002 when Council Regulation 6/2002 was approved. This regulation contains nearly identical substantive provisions as the design harmonising directive.[295] The regulation provides a uniform set of rules that cover both unregistered and registered design rights.[296] This makes the process of obtaining community-wide design protection cheaper and easier.[297] Similar to the EU trademark system, an applicant can obtain a registered community design, which officially covers the EU member countries, by filing a single application through the EUIPO.[298] Harmonisation in this area was developed in a manner similar to trademark harmonisation.[299] A right holder is able to obtain an unregistered design right that can be enforced throughout the European territory.[300] However, unlike the registered community design and trademark where a right holder obtains the exclusive right to its use, the unregistered community design trademark only grants a holder a right to

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[295] Zirnstein (n 177) 300-301.
[296] WIPO, 'Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs' <http://www.wipo.int/wipolex/en/details.jsp?id=6414> accessed 28 October 2013.
[297] Aide (n 289) 35.
[298] OHIM, 'Designs' <http://oami.europa.eu/ows/rw/pages/RCD/index.en.do> accessed 30 October 2013.
[299] Arnold (n 197) 32.
[300] John Sykes, *Intellectual Property in Designs* (LexisNexis Butterworths 2005) 212-213.

prevent the commercial use and copying of a design.[301] There is no need to file an application to protect an unregistered community design trademark.

The CJEU also plays an important role in design harmonisation in the EU as it does in other areas of IP rights. Several cases have been brought before the CJEU in order to ensure a single coherent interpretation of EU legislation. For instance, the Community Design Regulation fails to define the term 'informed user'. In *PepsiCo v Grupo Promer Mon Graphic SA*[302] the CJEU's first decision on community design rights, the court provided a clear definition of that term. Recently, in *Karen Millen Fashions Ltd v Dunnes Stores*[303], questions regarding Article 6 and Article 85(2) of Regulation 6/2002 were submitted to the CJEU for a preliminary ruling and interpretation.[304] This clearly demonstrates the significant role played by the CJEU in the development of IP harmonisation through interpretation of legislation. Interpretation of the core issues in the EU design law by the CJEU has helped 'pave the way for more analysis by national judges'.[305] This can foster consistent interpretation of the EU law, and thereby increase harmonisation in this area.

In addition to filing an application and utilising the national and community systems, an applicant can obtain international design protection by availing himself of the Hague Agreement Concerning the International Registration of Industrial Designs, to which the EU acceded in 2007.[306] The Hague Agreement permits an applicant to file a

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[301] OHIM, 'Unregistered Community Designs' <http://oami.europa.eu/ows/rw/pages/RCD/protection/UCD.en.do> accessed 25 October 2013.
[302] C-281/10 P *PepsiCo Inc v Grupo Promer Mon Graphic SA* [2012] FSR 5.
[303] C‑345/13 *Karen Millen Fashions Ltd v Dunnes Stores (Limerick) Ltd* [2014] All ER (D) 156 (Jun).
[304] ibid.
[305] Strowel and Kim (n 85) 124-125.
[306] WIPO, 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=9> accessed 29 October 2013.

single application in a single language and pay one set of fees while being able to designate several countries.[307] An applicant can obtain design protection not only throughout the EU but also in other countries which are contracting parties to the Hague Agreement. By designating the EU in an application, the scope of the design protection that is received would be the same effects in the EU as the protection received from utilising a community design system. Compared to the community design system, processing an application through the Hague system, which allows an applicant to choose fewer EU countries, could help an applicant save up to £109 per application. [308] However, the rights granted are a bundle of national rights that will depend on the national law of each country rather than unitary rights that are equally effective throughout the EU. It should be noted that the UK is not yet a member of the Hague Agreement.[309] Therefore, the UK cannot be included in a country-specific application.[310] In other words, if an applicant would like to obtain design protection in the UK through the Hague system, he would have to apply for protection by selecting the entire EU when designating countries in the application. Instead of being able to choose the UK as a specific country when applying for protection, an applicant is forced to select and pay for EU-wide protection. This has led to the controversy of whether or not the UK should become a member of the Hague Agreement.[311]

The EU has made significant progress towards design right harmonisation at the national, regional and international levels through the enactment of legislation, adoption of treaties and the development of CJEU case law, similar to the progress it

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[307] Seville (n 27) 183.
[308] IPO, 'Joining the Hague Agreement on Designs' <http://www.ipo.gov.uk/consult-ia-bis0351.pdf> accessed 29 October 2013.
[309] WIPO, 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=9> accessed 8 April 2016.
[310] IPO (n 308).
[311] ibid.

has made in trademark law. Applicants have various options to consider when filing an application for design protection through the national, community or international route. They could choose the method that best suits their particular business interests.

3.2.5 Plant Variety Rights (PVRs)

There are two options available for an applicant wishing to obtain protection of PVRs, protection at the national or the community level. At the national level, protection is not available in all countries in the EU. For instance, there is no national protection for plant varieties in Luxembourg, Greece and Malta.[312] Furthermore, unlike in the areas of trademark and design rights, there has been no harmonisation directive approved on PVRs. Consequently, the national laws of EU members in this area are quite different. However, in 1994, there was a significant development in the harmonisation of PVRs at the community level when the European Council adopted EC Regulation 2100/94, the Regulations on Community Plant Variety Rights.[313] The regulation was approved in order to streamline the method of obtaining PVRs protection then available throughout the EU. By virtue of this regulation, the Community Plant Variety Rights (CPVR) is established. An application for a community PVR can be submitted directly to the Community Plant Variety Office (CPVO), which is responsible for managing the EU plant variety rights system.[314]

According to the CPVR system, the standard of protection complied with the terms of the major international agreements related to PVRs protection, such as TRIPs and the

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[312] Jolly (n 198) 115.
[313] Guy Tritton, *Intellectual Property in Europe* (Sweet and Maxwell 2008) 6-029.
[314] Europa, 'Community Plant Variety Office (CPVO)' <http://europa.eu/about-eu/agencies/regulatory_agencies_bodies/policy_agencies/cpvo/index_en.htm> accessed 19 March 2016.

International Convention for the Protection of New Varieties of Plants (the UPOV Convention).[315] It was claimed that EC Regulation 2100/94 is modelled on the 1991 UPOV Act.[316] The CPVR system is regarded as an appropriate system since it could meet international obligations and standards.[317] Moreover, since this system authorises granting PVRs that are valid throughout the EU by filing a single application through the CPVO, it is possible for an applicant to obtain protection in the EU countries where national protection is not available.[318] The centralised procedure in granting the protection throughout the EU countries could save both time and money in filing an application. Additionally, the system was set up in order to provide incentives for the breeder industry to develop new plant varieties. This is exemplified in an important exemption clause known as the 'breeders' exemption' in accordance with Article 15 of EC Regulation 2100/94. This clause stimulates innovation in plant varieties since it allows access to protected plant varieties for the purpose of further development.[319] It has been evaluated that the CPVR system can provide an appropriate balance among stakeholders, and is thereby considered as 'an appropriate EU regime'.[320] However, under the CPVR system, the cumulation of national rights and patents with community PVRs is prohibited by Article 92(1). This means that a PVR, which is registered under the CPVR system cannot be registered as

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[315] INNOVACCESS network of National Intellectual Property Offices, 'Plant Variety' <http://www.innovaccess.eu/national_information.php?ct=LU&ip=other_rights&sb=plant_variety> accessed 30 October 2013.
[316] Margaret Llewelyn and Mike Adcock, *European Plant Intellectual Property* (Hart Publishing, 2006) 201
[317] ibid 519.
[318] Jolly (n 198) 115.
[319] CPVO, 'Protection of New Plant Varieties in Europe' <http://www.cpvo.europa.eu/documents/brochures/Brochure_EN.pdf> accessed 12 May 2016.
[320] GHK in association with ADAS UK, 'Evaluation of the Community Plant Variety Right Acquis- Final Report' (2011), iii <http://ec.europa.eu/food/plant/propertyrights/docs/cpvr_evaluation_final_report.pdf> accessd 29 October 2013.

a national PVR and a patent at the same time. In other words, a right holder is prohibited from holding a PVR granted at the national and the community level simultaneously. Nevertheless, member states are authorised to offer national protection in parallel with the community system as an option for an applicant.[321]

To ensure uniform application and interpretation of the Regulation on Community Plant Variety Right, some cases were brought before the CJEU for a preliminary ruling. For instance, 'exhaustion of community plant variety rights' is broadly described in Article 27(2) of the Regulation 2100/94. In *Greenstar-Kanzi Europe NV v Jean Hustin, Jo Goossens,*[322] the interpretation of this principle was referred to the CJEU for interpretation. The CJEU ruled that this article was to be restrictively interpreted in order to limit the right to control of the right holder.[323] Similar to other areas, this is evidence of the CJEU's role in IP harmonisation through the interpretation of EU secondary legislation.

It can be said that the EU has generally achieved considerable harmonisation in the area of PVRs. All in all, the establishment of the CPVR system can increase PVRs harmonisation at EU level. Nevertheless, there are still inconsistencies in PVRs protection at the national level. According to the Preamble to the regulation, it is recognised that the level of protection in PVRs among EU member states may be different.[324] The regulation was passed to address discrepancies at community level rather than national level.[325] Unlike the directive, member states are not obliged to

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[321] Seville (n 27) 174.
[322] *Greenstar-Kanzi Europe NV v Jean Hustin* and *Jo Goossens* [2011] OJ C362/10.
[323] Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (Edward Elgar 2013) 456.
[324] Llewelyn and Adcock (n 316) 206.
[325] ibid.

amend their domestic laws in accordance with the provisions under the regulation.[326] However, most of EU countries have already acceded to the UPOV Convention, which requires contracting states to adhere to minimum standards of protection such as criteria for the grant of the breeder's right. Therefore, some degree of harmonisation of national PVRs laws has been achieved. Nevertheless, differences in national plant variety laws can still exist among them. TRIPs and the UPOV Convention provide only minimum standards while allowing a degree of flexibility that member states can use to accommodate their own protection interests. However, by establishing the CPVR system alongside national systems, applicants can choose the method that best suits their interests.

3.2.6 Geographical Indications (GIs)

A community system of GIs protection coexists with national systems of the EU member states. At the national levels, some EU countries have established a *sui generis* system for GIs protection, while others provide protection through existing trademark legislation.[327] The EU has taken an important step to harmonise law relating to GIs by adopting EC Regulation 2081/1992 on the protection of GIs and designations of origin for agricultural products and foodstuffs.[328] This regulation was later replaced by Regulation 510/2006.[329] In 2012, the EU adopted Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs,[330] which

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[326] ibid.
[327] Favale and Borghi (n 104) 47.
[328] EC Regulation 2081/1992 on the protection of GIs and designations of origin for agricultural products and foodstuffs [1992] OJ L 208.
[329] Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L 93.
[330] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L 343.

repealed the 2006 GIs regulation. Furthermore, in 2014, various regulations namely, Regulation 664/2014,[331] Regulation 668/2014,[332] and Regulation 665/2014[333] were approved to supplement Regulation (EU) No 1151/2012 and made some procedural changes. These regulations cover all agricultural products with some exceptions for wines and spirits, which are regulated under other specific regulations. At present, a unitary GIs protection has been provided for wines, spirits, aromatised wines and other agricultural products and foodstuffs.[334]

This *sui generis* system functions in the same way as the EU trademark system,[335] wherein one registration can be enforced in all member states of the EU. By creating a separate system that deals specifically with GIs, stronger and more effective protection to local products in the region can be provided.[336] Furthermore, it could also encourage investment in local products, which can promote local economic growth.[337] To ensure that all EU members apply and interpret the regulation consistently with each other, questions related to community-wide GIs protection have been taken before the CJEU. Since the establishment of this community-wide system, various decisions of the CJEU, which outline and explain the legal

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[331] Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialities guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules [2014] OJ L 179.
[332] Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs [2014] OJ L 179.
[333] Commission Delegated Regulation (EU) No 665/2014 of 11 March 2014 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to conditions of use of the optional quality term 'mountain product' [2014] OJ L 179.
[334] Commission, 'Green Paper on the protection of geographical indications for non-agricultural products – Frequently Asked Questions' (2014) MEMO/14/486, 2.
[335] Matteo Gragnani, 'The Law of Geographical Indications in the EU' (2012) 7 J Intell Prop L & Pract 271, 273.
[336] ibid 272.
[337] Seville (n 27) 295.

ramifications of the regulation have been provided.[338] For instance, in *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods* Ltd,[339] the question on the interpretation of the community regulation on Protected Designation of Origin (PDO) was referred to the CJEU for a preliminary ruling.[340] Also, in *Bavaria NV and Bavaria Italia Srl v Bayerischer Brauerbund eV,*[341] the CJEU delivered the preliminary ruling on the issues concerning the validity of the regulation on Protected Geographical Indication (PGI) and the conflict between the PGI and the pre-exisitng trademark.[342] This affirms the CJEU's important role in the IP harmonisation process.

However, there are no harmonised regulations provided for non-agricultural products such as ceramics, cutlery, shoes, and musical instruments in this *sui generis* community system.[343] As a result, protection for these products is subject to the national law of each member country, which at least provides protection in accordance with the minimum standard of the TRIPs Agreement.[344] This demonstrates that the EU has achieved partial harmonisation in the area of GIs. The lack of harmonised rules governing non-agricultural GIs have an adverse effect on non-agricultural GIs protection since it leads to different levels of protection between

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[338] Ingrid Lidgard, 'Geographical Indications:
A result of European protectionism?' (Master, University of Lund 2009) 38
<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1559567&fileOId=1565027>
accessed 17 September 2015.
[339] *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Limited and Hygrade Foods Limited* [2003] ECR I-5121.
[340] ibid.
[341] *Bavaria NV and Bavaria Italia Srl v Bayerischer Brauerbund eV* [2009] ECRI-5491.
[342] ibid.
[343] Advisory Group International Aspect of Agriculture, 'DG AGRI Working Document on International Protection of EU Geographical Indications: Objectives, Outcome and Challenges' (Advisory Group International Aspects of Agriculture. Meeting of 25 June 2012) 1
<http://ec.europa.eu/agriculture/consultations/advisory-groups/international/2012-06-25/agri-working-doc_en.pdf> 20 March 2016.
[344] ibid.

the member states, which imposes a significant burden on producers and consumers of non-agricultural products.[345] This fragmentation may adversely affect a well-functioning internal market.[346] Therefore, the European Commission has launched a public consultation on a possible extension of GIs protection at the EU level on such products.[347] If GIs protection at the EU level could successfully be extended to non-agricultural products, a higher degree of harmonisation in the area of GIs would be realised.

At the international level, GIs are also protected in various international treaties such as the Paris Convention, the Madrid Agreement, the Madrid Protocol, the Lisbon Treaty and the TRIPs agreement. TRIPs is considered to be 'the most significant international treaty for geographical indications'.[348] All 28 EU member states, including the EU, are members of the WTO and are required to implement legislations that complies with TRIPs obligations. However, compared to other countries, the EU has quite strong GIs protection due to the crucial role of GIs in the EU's economy. Unitary GIs protection at the EU level is much greater than TRIPs. According to TRIPs, wines and spirits are given a higher protection than other agricultural products in accordance with Article 22 and 23. Meanwhile, the EU *sui generis* GIs system provides a high level of protection for all GI's products.[349] Furthermore, in order to promote a higher level of GIs protection in other countries,

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[345] European Commission, 'Making the most of Europe's traditional know-how: Commission launches public consultation on the protection of geographical indications for non-agricultural products' <http://europa.eu/rapid/press-release_IP-14-832_en.htm> accessed 22 May 2015.
[346] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe' COM (2011) 287 final.
[347] European Commission, 'Making the most of Europe's traditional know-how: Commission launches public consultation on the protection of geographical indications for non-agricultural products' (n 304).
[348] Seville (n 27) 292.
[349] Advisory Group International Aspect of Agriculture (n 343) 5.

the EU generally includes GIs provisions with TRIPs-Plus standard in trade negotiations, particularly FTAs. For instance, under the EU-South Korea FTA, additional protection for wines and spirits is extended to all agricultural products and foodstuffs.[350]

By establishing a *sui generis* system, the EU can achieve a considerable degree of GIs harmonisation, particularly in the area of agricultural products, foodstuffs, wines and spirits. By providing harmonised substantive and procedural provisions, the EU provides a harmonised framework governing GIs protection for agricultural products at the EU level. However, GIs protection for non-agricultural products remains unharmonised. Disparity in the law of EU members of non-agricultural products can obstruct the functioning of the internal market. Hence, to ensure that the disparity in national GIs law does not create a barrier to the free movement of goods, GIs protection at the EU level should be extended to non-agricultural products. This would help the EU move toward a higher degree of harmonisation in the area of GIs.

3.2.7 Remarks

The EU is acknowledged to be an example of regional economic integration that has achieved a high degree of harmonised IP standards. From an overall perspective, EU IP regimes in the areas of trademarks, designs, PVRs and GIs are almost fully harmonised, whereas copyright and patent are still fragmented. By establishing EU-wide trademarks, designs and PVRs systems, and a *sui generis* system of GIs with unitary effect, the conflict between the territorial nature of IP rights and the principle

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[350] See Article 10.21 of the EU-South Korea FTA.

of free movement of goods can be resolved, thereby ensuring proper functioning of the internal market. The creation of these unitary IP systems would allow an applicant to obtain trademarks, designs, PVRs and GIs protection that can be enforced in all EU countries through a relatively simple process. Under a unitary IP system, IP rights holders would be granted a uniform right that is valid in all EU contracting states and not subject to disparity in national laws of the member states. Therefore, certainty in the granting and the enforcement of these rights would be increased. Disparity of national IP laws and territorial nature of IP rights would no longer obstruct the free movement of goods and distort competition within the internal market.

On the other hand, copyright harmonisation, which relies solely on the promulgation of directives, and the traditional European patent under the EPC, are still fragmentary systems and need further harmonisation. In the area of copyright, harmonisation directives do not cover all aspects of copyright, and thus national law disparity and the territorial nature of copyright still remain. When focusing on patent, since the European patent granted under the EPC is a bundle of national rights, the enforcement of those right is still subject to the law of each chosen patent jurisdiction. Divergent laws and differing interpretations of those laws can obstruct the free movement of goods in the community, inhibiting the proper operation of the internal market. However, if a new unitary patent system can become operational, it would significantly increase the degree of harmonisation and thereby have a positive impact on the internal market.

3.3 The Impact of IP Harmonisation in the EU

Law and economics are two interconnected disciplines.[351] IP law is considered to be an element essential to enhancing a country's economy. Strengthening an IP system can have a significant impact on the economic growth of developed countries.[352] It is quite clear that IP harmonisation is linked to the establishment and operation of a internal market, which is regarded as a core objective of the EU. A considerable degree of harmonisation of IP laws is a factor crucial to the success of the EU internal market.[353] Therefore, it is undeniable that the harmonisation of IP law in the EU, can have substantial legal and economic effect, as detailed below.

3.3.1 Legal Aspect

3.3.1.1 Consistency in National IP Laws

Each country has a different IP law history and tradition based on its legal culture.[354] For example, before harmonisation, the legal concept of copyright in France was different than in other continental European countries.[355] Since IP rights are territorial in nature, those rights would be subject to the legislation of the particular state granting it. When the scope of IP rights protection is limited to individual jurisdictions, it can result in different levels of protection and enforcement depending on the idiosyncrasies of each jurisdiction.

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[351] Wei Shi, *Intellectual Property in the Global Trade System: EU-China Perspective* (Springer 2008) 25.
[352] ibid.
[353] Christina Schubert, 'Harmonization of Intellectual Property Rights on the European Level' (Seminar Paper 2010) 3.
[354] Christoph Antons 'Legal Culture and Its Impact on Regional Harmonisation' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 31.
[355] ibid.

The core measures that the EU employs to approximate IP laws among the member states are the promulgation of harmonisation directives and the ratification of international IP agreements. Since the establishment of the internal market is a primary component of the EU, it tends to pass directives that focus on the substantive areas that directly affect the operation of the internal market. Patent is the area that both substantive and procedural laws of the member states are harmonised through the adoption of the European Patent Convention (EPC). In addition, by entering into international IP agreements, such as the Berne and Paris Conventions, the EU member states were obliged to incorporate a minimum IP standard into their national laws. Both the Berne and Paris Convention are generally regarded as fundamental instruments of the EU IP system.[356] According to the national treatment principle under these conventions, each concreating states is obliged to treat nationals of other members as it treats its own nationals. When more consistency in the IP standards in the member states is provided, a distorting effect on the functioning of the internal market resulting from differences in national IP standards will be eliminated.

Generally, the harmonisation of IP laws, the enactment of directives and the adoption of international IP treaties can have a substantial impact on the national IP systems of the EU members. Successful and effective harmonisation of IP laws significantly decreases the disparity and inconsistencies in those protections among the jurisdictions of the member states. Nevertheless, neither the promulgation of directives nor the ratification of international IP treaties can ensure the EU's success in obtaining complete harmonisation of IP rights. This is because the directives and treaties do not provide provisions covering all aspects and areas of IP. Hence, there

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[356] Pila (n 29) 7.

are still areas that would still subject to the disparities of the various national laws of the member states. Moreover, the territorial nature of IP rights remains to some extent. A noteworthy example, copyright, is still far from achieving complete harmonisation. Without unification of copyright law at the EU level, copyright has remained a matter for national law. Divergences between the national copyright legislations may lead to EU market fragmentation. Similarly, although both substantive patent law and the rules governing the granting of patent procedures are harmonised under the EPC, the enforcement of a bundle of national patents is left to national courts. This may lead to different outcomes depending on the views of national courts.

Hence, although the issuance of the directives and the ratification of international IP agreements can enhance consistency in the IP laws of the member states, solely relying on these measures is not enough to eliminate all the disparities resulting from national IP rights and the territorial nature of IP rights. They do not provide an adequate basis for establishing a genuine internal market. This urged to EU to establish an IP system with unitary effect in which IP rights can be consistently enforced throughout the EU.

3.3.1.2 Providing IP Rights with Unitary Effect

Establishing a unitary IP system covering the whole of community territory is the EU's long term goal.[357] Since the issuance of harmonisation directives and the adoption of international IP treaties could not succeed in fully harmonising IP laws in

[357] Liguo Zhang, 'Recent IP legal reforms in China and the EU in light of implementing IPR strategies' in Nari Lee, Niklas Bruun and Mingde Li (eds), *Governance of Intellectual Property Rights in China and Europe* (Edward Elgar Publishing 2016) 206.

the EU, the EU also adopted regulations governing unitary IP rights with EU-wide effect in various areas of IP rights. By virtue of these regulations, which are directly binding on all member states without further validation by national parliaments, EU-wide IP systems in trademarks, designs, PVRs and GIs were established to operate parallel to the respective national IP systems. The IP rights granted through these systems have a unitary effect throughout the EU. This means that these rights are equally enforceable in all EU member countries, which, by definition, is increased harmonisation.

However, there are still fragmented areas that require further harmonisation and the establishment of an EU-wide system, such as patents. The Granting of a patent through the EPO under the EPC can increase consistency in patent protection because it is obtained by filing a single application and granted by following a consistent procedure. However, the existence of a patent still relies on the sovereignty of each member state in which it is granted.[358] When there is a patent infringement, different laws and interpretations from the distinct national courts would be employed.[359] Decisions from court in one country can differ from that of another country. This would decrease predictability and certainty in patent protection. More importantly, such diversity would adversely affect the function of the EU internal market and thereby obstructing the establishment the single market for patents. The current fragmented system is seen major impediment to innovation and competitiveness of

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[358] Kara M. Bonitatibus, 'The Community Patent System Proposal and Patent Infringement Proceedings: An Eye towards Greater Harmonization in European Intellectual Property Law' (2001-2002) 22 Pace L Rev 201, 203.
[359] ibid.

the EU.[360] This has led to the introduction of the Unitary Patent and the Unified Patent Court, which are expected to come into force in 2017.

A higher degree of harmonisation can be achieved by providing an IP system with a unitary effect. Under this system, both of the granting and the enforcement of rights are governed by a single consistent law controlling all members in the community. Rights would not be subject to the disparity in the national IP laws of individual member states. A unitary system enables a right holder to enjoy more extensive territorial protection.[361] In other words, the territorial nature of an IP right would be extended from one member country to all the EU territories. This can help eliminate barriers to cross-border trade within the community and ensure that goods can move freely between member states. Hence, it is true to say that regulations governing community IP systems, which provide the owner an exclusive right with a unitary effect that can be enforced throughout the EU, can significantly increase the degree of harmonisation. Unification of IP law in the EU can therefore ensure the proper functioning of the internal market.

3.3.1.3 Legal Certainty and Consistency in IP Rights

Disparity in IP protection and enforcement between countries can limit legal certainty. Differences in substantive and procedural provisions can generate unpredictable and inconsistent IP protection. For example, differences in protection offered by patent system at all levels can lead to 'inconsistencies and a notion of

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[360] Commission, 'Communication from the commission to the European Parliament and the Council: Enhancing the patent system in Europe' COM (2007) 165 final, 2 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0165:FIN:en:PDF> accessed 22 December 2013.

[361] *Leno Merken BV v Hagelkruis Beheer BV* [2013] ETMR 16, para 50.

unpredictability'.[362] In other words, the same right may be treated differently as a result of the difference in protection granted from country to country. This can inhibit and obstruct the establishment of a genuine EU internal market.

Legal certainty in IP rights is enhanced by standardising law through legislative adjustment that provides clear standards to be applied in granting and enforcing such rights.[363] Directives have had a significant impact on the IP systems in EU member states, especially in the areas of copyright, trademarks, and designs. By adopting these directives, the member states' IP laws became more in-line with each other and certain general rules in relation to IP protection were standardised. Nevertheless, the national courts are still left to interpret these provisions.[364] Therefore, a completed harmonisation of IP rights would not be established by this limited approximation of laws.[365] Additionally, the directives generally focus on substantive areas of IP rights that can directly affect the operation of the internal market. Yet other areas, particularly procedural laws, are still left to the discretion of the individual member states. Hence, although the directives can increase predictability in IP protection among the member states, there remain areas that need more consistency.

In pursuit of its goal of creating a unified IP protection, the EU has passed regulations governing IP systems with unitary effect in various substantive IP rights areas. The

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[362] Bonitatibus (n 358) 203.
[363] Graeme B. Dinwoodie, 'The Integration of International and Domestic Intellectual Property Lawmaking' (2000) 23 Colum-VLA JL & Arts 307, 308.
[364] Christopher Heath, 'Methods of Industrial Harmonization – the Example of Europe' in in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 46.
[365] ibid.

EU-wide IP system came into existence as a system independent of national IP law.[366] By establishing a centralised community system, which provides harmonised rules governing both the granting and enforcement of rights, it could provide more legal certainty and predictability to both applicants and right holders. An application would be examined and decided based on the centralised procedures and criteria, and the rights granted would be enforceable throughout the EU. In other words, the granting and the enforcement of such rights would be a matter of community law only.

In addition to the enactment of directives and regulations, it is undeniable that the CJEU plays a relevant role in the harmonisation of IP law. A number of issues arising out of the directives and regulations have been referred to the CJEU for its interpretation that can be consistently applied throughout the EU. Questions regarding the proper implementation and interpretation of the EU law can be brought to the CJEU, which is authorised to issue an interpretation in a preliminary ruling. Preliminary rulings by the CJEU are used as a measure to gain uniform application of EU law and significantly standardise IP rights. The harmonising effect of the CJEU's interpretation of EU law may vary depending on the IP right involved. However, the involvement of the CJEU can help increase consistency and legal certainty in the application of the EU law in all EU member states, and thereby provide a significant positive impact on IP harmonisation within the EU.

IP harmonisation generally achieved through legislative effort, promulgating directives and regulations governing a unitary IP system, and the CJEU case law can help the EU move closer to complete harmonisation. This, in turn, could ensure a

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[366] Hanns Ullrich, 'Harmony and Unity of European Intellectual Property Protection' in David Vaver and Lionel Bently (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge University Press 2004) 27-28.

well-functioning internal market. Having an EU IP regime that is more reliable and more predictable can therefore increase legal certainty for holders. This would make the investment climate more appealing and attract a greater investment in creativity and innovation to the region leading to economic growth and increased competitiveness of the EU.

3.3.1.4 A Point of Reference for other Regional Groupings

Various regional integrations, particularly ASEAN, which is perceived to be one of the most advanced regional grouping[367] can be inspired to follow the example set by the EU in developing a strong regional economic grouping. However, due to the substantially different backgrounds and experience of the member nations, ASEAN only recognises the EU as a reference and does not agree to use it as a model.[368] ASEAN has recognised that one of the crucial components of becoming the ASEAN Economic Community (AEC) with a viable single market is the harmonisation of IP laws between its member states. Having already accomplished this, the EU can be regarded as a good reference for ASEAN.[369]

However, complete harmonisation of IP laws is not easy to achieve. Attempts to standardise could face difficulties arising out of different levels in the social, legal and

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[367] Fraser Cameron, 'The European Union as a Model for Regional Integration' (Council on Foreign Relations Press, New York: Council on Foreign Relations 2010) <http://www.cfr.org/eu/european-union-model-regional-integration/p22935> accessed 5 March 2016.
[368] Reuben Wong, 'Model Power or Reference Point? The EU and the ASEAN Charter' (2012) 25 Camb Rev Int Aff 669.
[369] Saifulbahri Ismail, 'Harmonising legal standards important for ASEAN's integration: Shanmugam' (today online) <http://www.todayonline.com/singapore/harmonising-legal-standards-important-aseans-integration-shanmugam> accessed 24 November 2013.

economic background of the members.[370] The EU, however, has not yet reached its goal of having complete IP harmonisation. Although various directives were passed within a few years, the EU is still seeking further harmonisation of copyright laws.[371] Similarly, after decades of trying, the EU still has not established a community patent system either.[372] It is still debatable whether this unitary system would provide benefits to all the EU member countries.[373] This system might create controversies between countries that have differences in their national patent system structure.[374] Member countries have different backgrounds, income levels, innovation preferences, national interests that need to be protected and industrial development.[375] This diversity creates different factors that can contribute to successful national systems of innovation.[376] Consequently, the adoption of a 'one size fits all' system might impose more of a burden to reform their national patent structures on some member countries. Additionally, by adopting a unitary system, these countries would be obliged to reform their national laws and implement the policies that might not really be suitable for their particular circumstances. However, despite these controversies, it is expected that the new unitary patent system will enter into effect by 2017. Therefore, apart from being a model of successful regional economic integration, the EU is also an 'instructive example of the difficulties of the international harmonization of both

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[370] Evisa Kica and Nico Groenendijk 'The Governance of European Intellectual Property Rights: Toward a Differentiated Community Approach' (AIC 2009: Fourth GARNET Annual Conference, 11-13 November 2009, Rome, Italy) 2 <http://doc.utwente.nl/71951/1/Kica09governance.pdf> accessed 25 Novermber 2013.
[371] Ullrich (n 366) 21.
[372] ibid.
[373] Jane Hollywood and Robert Stephen, 'One size fits all? – some countries are still unsure of the benefits of an EU unitary patent system' <http://www.legalweek.com/legal-week/analysis/2270793/one-size-fits-all> accessed 25 November 2013.
[374] Kica and Groenendijk (n 370) 2.
[375] ibid 2.
[376] ibid 13.

standards and IP protection, and how these difficulties may be tackled'.[377] ASEAN can take lessons from the EU experience in establishing its own regional IP system.

3.3.2 Economic Aspect

3.3.2.1 Establishment of the Internal Market

Establishing an internal market, where goods, services, capital and workers can freely flow around the territory is a key task of the EU in its pursuit of market integration. However, this cannot be achieved without the harmonisation of IP rights. Standardising IP laws in all EU member states is an important tool to stimulate the free movement of goods.

Since regulating IP rights was left to individual jurisdictions, disparities in national IP laws and the resulting territorial nature of these IP rights could obstruct the free flow of goods in the community. IP rights can be used in a way that threaten the well-functioning internal market. The adverse effect of disparity of national IP laws on the free movement of goods is considered as one of the earliest driving forces behind the EU's efforts to harmonise IP law.[378] Consequently, the EU has intently focused on creating consistency in IP laws of its member states. Measures for the approximation of IP laws of the member states have been adopted in order to enhance the establishment and function of the internal market.[379] Various IP rights directives were adopted to standardise national IP laws of member states. Notwithstanding, directives

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[377] Sandro Sideri, 'The Harmonisation of the Protection of Intellectual Property: Impact on Third World Countries' (1994) UNU/INTECH Working Paper No. 14, 33.
[378] Cook, 'European Intellectual Property Developments' (n 38) 426-427.
[379] See Article 114(1) of TFEU.

tend to be used to approximate IP laws of among member states in the areas that most directly affect the functioning of the internal market.[380] This can help reduce disparity in national laws. Nevertheless, some areas, particularly procedural aspect remains unharmonised. Furthermore, these harmonising directives do not challenge the territorial nature of IP rights.[381] Approximation of laws by means of directives is therefore considered as 'limited approximation' rather than 'full-scale harmonisation'.[382] The territorial nature of rights and remaining differences between national IP laws can still partition the internal market. [383] Consequently, approximation of national laws cannot in and of itself establish the genuine internal market. An IP system with a unitary effect that harmonises both substantive and procedural law and offers EU-wide protection is required.[384] Because of a desire for an extension of national markets to an internal market and a need to address the incompatibility of the territorial nature of IP rights with cross-border trade, the IP systems with unitary effect were developed.[385] According to Article 118 TFEU, the creation of EU-wide IP rights is explicitly related to the establishment and functioning of the internal market. This demonstrates that there is a correlation between a high degree of harmonisation and a well-functioning internal market.

On the whole, although the establishment of the EU is still an unfinished project,[386] it is perceived as an example of successful regional economic integration. Clearly, IP

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[380] Helen Norman, *Intellectual Property Law* (OUP 2014) 23-24; Pedro A. De Miguel Asensio, 'Intellectual Property in European Private Law' in Elise Poillot and Isabelle Rueda, *Les frontières du droit privé européen / The Boundaries of European Private Law* (Primento 2012) 206.
[381] De Miguel Asensio (n 380) 210.
[382] Bently and Sherman (n 144) 688.
[383] Seville (n 27) 373.
[384] ibid.
[385] Ullrich (n 366) 28.
[386] Joaquín Roy and Roberto Domínguez, 'Introduction' in Joaquín Roy and Roberto Domínguez, *The European Union and Regional Integration: A Comparative Perspective and Lessons for the Americas* (Jean Monnet Chair University of Miami 2005) 7.

harmonisation can have a positive impact on the operation of an internal market. A higher level of IP harmonisation is considered as a key to success in establishing a genuine internal market. The merger of national markets into a single market can provide various economic benefits to the EU particularly, an increase of FDI, GDP growth and increased competitiveness in the global market,[387] which would positively affect the development of the EU economy.

3.3.2.2 The Inflow of Foreign Direct Investment (FDI)

FDI is regarded as a 'powerful instrument for growth and development', and a 'key to enhancing prosperity worldwide and boosting the global economy'.[388] Success from experiencing strong regional economic integration and the establishment of an internal market results in FDI among the EU member countries being more than other free trade areas.[389] It is inevitable that another factor that could affect the FDI inflows is the strength of an IP system.[390] There is a positive correlation between the strength of IP protection and the volume of FDI.[391] Some argue that merely having a strong IP system is not sufficient incentive to attract FDI.[392] Nevertheless, the

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[387] Stefan Vetter, 'The Single European Market 20 years on Achievements, Unfulfilled Expectations & Further Potential' (Deutsche Bank Research 2013) <https://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000322897/The+Single+European+Market+20+years+on%3A+Achievements,+unfulfilled+expectations+%26+further+potential.pdf> accessed 20 December 2013.

[388] Anabel González, 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (World Economic Forum 2013) 10 <http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf> accessed 20 December 2013.

[389] OECD, *OECD Economic Outlook* (OECD Publishing 2003).

[390] Stockholm Network, 'The strength of intellectual property environments and foreign direct investment' <http://www.stockholm-network.org/downloads/meetings/d41d8cd9-IP%20and%20FDI.pdf> accessed 20 December 2013.

[391] ICC, 'Intellectual Property: Powerhouse for Innovation and Economic Growth' (2011) 8.

[392] Keith E Maskus, 'Intellectual Property Rights and Foreign Direct Investment' (May 2000) Centre for International Economic Studies Working Paper No. 22, 2.

adoption of stronger IP protection can indicate that a more investment-friendly environment is provided.[393] For instance, it was evident that Ireland attracted a large amount of FDI in 2011[394], and continued to have a strong influx of FDI in 2012 and 2013[395], particularly in the pharmaceutical sector.[396] Ireland's strong IP regime was seen as important factor contributing to its success in attracting foreign investment.[397] On the other hand, it was found that before some eastern European countries and the former Soviet Union became full members of the EU and implemented the EU's IP standard, their weak IP protections deterred the influx of FDI, which is essential source of economic growth, particularly in technology-intensive industries.[398] Weak IP protection can increase the likelihood of imitation, thereby making a country less attractive for foreign investors.[399] Hence, this demonstrates that the correlation between the strength of IP and the volume of FDI exists. Weak IP regime is one of the key factors that can deter FDI inflow. On the other hand, strong IP protection is positively associated with inward FDI.

Moreover, factors that could affect the decision of foreign investors when they plan to invest or operate businesses in other countries are stability and predictability. Since

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[393]Keith E. Maskus, 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer' (Public-Private Initiatives After TRIPS: Designing a Global Agenda, Brussels, 16-19 July 1997) 19.
[394]Geoff Percival, 'Foreign Direct Investment Boost for Ireland' (*Irish Examiner* 18 April 2012) <http://www.irishexaminer.com/business/foreign-direct-investment-boost-for-ireland-190903.html> accessed 21 October 2015.
[395] IMF, 'Statement by Mr. Patrick Honohan, Alternate Governor of the Fund for Ireland' (Governor's Statement No. 30, 2013) 1 <http://www.imf.org/external/am/2013/speeches/pr30e.pdf> accessed 21 December 2013.
[396] Stockholm Network, 'The strength of intellectual property environments and foreign direct investment' <http://www.stockholm-network.org/downloads/meetings/d41d8cd9-IP%20and%20FDI.pdf> accessed 20 December 2013.
[397] Grant Thornton and Amárach Research, 'Foreign Direct Investment in Ireland: Sustaining the success' (2014) <http://www.grantthornton.ie/db/Attachments/Grant-Thornton-Foreign-Direct-Investment-in-Ireland_F.pdf> (As cited in Aidan Stennett, 'Foreign Direct Investment in the Republic of Ireland' (Research and Information Service Briefing Paper, NIAR 61-15 2015) 11.
[398] Beata K. Smarzynska. 'The Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies' (2004) 48 Eur Econ Rev 39, 39.
[399] ibid 40.

the outcome of IP harmonisation would result in a consistent IP standard and certainty and predictability of IP rights among the member states, investment certainty would also be enhanced while reducing potential investment risks. Hence, this would make the investment environment more desirable and attractive to foreign investors. Consequently, an increased inward flow of FDI would result in various economic benefits such as an increase in technological transfer, employment, and foreign capital which would all stimulate economic growth of the country.[400]

It could be said that the level of IP protection can significantly affect the volume of FDI in host states. Harmonisation in the EU and the resulting stronger IP standards among the member states and the creation of a community IP system with unitary effect all contribute to the creation of a more attractive investment environment. A more attractive investment environment naturally will result in more quantity and quality FDI. As discussed in the previous chapter, there is a positive relationship between FDI and GDP of the host states.[401] Moreover, FDI can also promote competition in the domestic input market.[402] Increase of FDI inflows would therefore make a positive contribution to the economic development of the countries and positively impact the operation of the internal market.

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[400] OECD, 'Growth, Technology Transfer and Foreign Direct Investment' (OECD Global Forum on International Investment, Mexico City, 2001), 2 <http://www.oecd.org/industry/inv/investmentstatisticsandanalysis/2422334.pdf> accessed 21 December 2013.

[401] For a more detailed analysis, see Ali Riza Sandalcilar and Ali Altiner, 'Foreign Direct Investment and Gross Domestic Product: An Application on ECO Region (1995-2011)' (2012) 3 International Journal of Business and Social Science 189, 189.

[402] Assaf Razin and Efraim Sadka, *Labor, Capital, and Finance: International Flows* (Cambridge University Press 2001) 119.

3.3.2.3 The Contribution through Employment, Gross Domestic Product (GDP) and Wages

The importance of IP rights to the EU's economy is reflected in its strong and continual effort to harmonise IP systems in the community. A large number of imports and exports in the EU rely on IP sectors.[403] According to the report of the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO), industries that intensively use IP rights (hereinafter referred to as 'IPR-intensive industries') make a significant economic contribution to the EU's economy, particularly the growth of employment, GDP and wages.[404] IPR-intensive industries are defined as industries that 'use a high number of IP rights per employee'.[405] That study showed that approximately 39% of the total economic activity in the EU comes from IPR-intensive industries.[406]

Over half of all industries in the EU are IPR-Intensive Industries.[407] From 2008-2010, 25.9% of all jobs in the EU came from IPR- intensive industries.[408] This means that approximately 56.5 million out of 218 million of Europeans worked in IP sectors.[409] At 20.8%, trademark-intensive industries contributed the highest percentage to the workforce.[410] Following the trademark, design-, patent-, copyright- and GI-intensive industries contributed 12.2%, 10.3%, 3.2% and 0.2% respectively to the overall

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[403] European Patent Office and the Office for Harmonization in the Internal Market, 'Intellectual Property Rights Intensive Industries: Contribution to Economic Performance and Employment in the European Union' (Industry-Level Analysis Report 2013) 63.
[404] ibid 6.
[405] OHIM, 'IPR-intensive industries: contribution to economic performance and employment in the European Union' (September 2013) <https://oami.europa.eu/ohimportal/documents/11370/80606/IP+Contribution+study+PPT> accessed 15 October 2015.
[406] European Commission, 'Intellectual property – Studies' <http://ec.europa.eu/internal_market/intellectual-property/studies/index_en.htm> accessed
[407] European Patent Office and the Office for Harmonization in the Internal Market (n 403) 6.
[408] ibid.
[409] ibid.
[410] ibid 7.

employment.[411] Additionally, non-IPR-intensive industries that are peripherally involved in IPR-intensive industries, such as suppliers, also contributed to the overall employment rate. An additional 9% of the work force was generated by non-IPR-intensive industries that were indirectly participating in IPR-intensive industries.[412] Therefore, in total, approximately 35% of all jobs in the EU are generated by IPR-intensive industries. This demonstrates the importance of IPR-related industries to employment in the EU.

The GDP[413] is regarded as the most important economic indicator.[414] From 2008-2010, 38.6% of the EU GDP was generated by IPR-intensive industries. As with its contribution to overall employment, trademark-intensive industries had the highest percentage of value added to the GDP at 33.9%, followed by patent, design, copyright and GI-intensive industries at 13.9%, 12.8%, 4.2% and 0.1% respectively.[415] This means that approximately 39% of the total economic output in the EU comes from IPR-intensive industries.[416] (See Table 1) Furthermore, employees in IPR-intensive industries were paid 40% higher than other industries.[417] Therefore, apart from creating more jobs and substantially contributing to the GDP, IPR-intensive industries also provide a higher salary incentive to workers.

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[411] ibid.
[412] Europa, 'Intellectual Property Rights: study indicates that roughly 35% of jobs in the EU rely on IPR-intensive industries' <http://europa.eu/rapid/press-release_IP-13-889_en.htm> accessed 21 December 2013.
[413] According to the Oxford English Dictionary, Gross Domestic Product (GDP) is defined as 'the total value of goods produced and services provided in a country during one year'.
[414] Investor Guide, 'Leading Economic Indicators Explained' <http://www.investorguide.com/article/11599/leading-economic-indicators-explained-igu/> accessed 21 December 2013.
[415] European Patent Office and the Office for Harmonization in the Internal Market (n 403) 8.
[416] ibid 62.
[417] ibid 6.

Table 1: Contribution of IPR-Intensive Industries to Employment and GDP to the EU Economy

IPR-Intensive Industries	Employment	Share of Total Employment	Value Added (GDP)(£ Million)	Share of Total EU GDP
Trademark-Intensive	45,508,046	20.8%	4,163,527	33.9%
Design-Intensive	26,657,617	12.2%	1,569,565	12.8%
Patent-Intensive	22,446,133	10.3%	1,704,485	13.9%
Copyright-Intensive	7,049,405	3.2%	509,859	4.2%
GI-Intensive	374,345	0.2%	16,134	0.1%
All IPR-Intensive	56,493,661	25.9%	4,735,262	38.6%
Total EU Economy	218,400,733		12,278,744	

Source: EUIPO/EPO Industry-Level Analysis Report 2013[418]

It could be said that the EU's economy relies significantly on IPR-intensive industries. These industries make a substantial contribution to the entire economy through employment, GDP contribution and higher wages. This can be viewed as a successful result of the EU's continual effort in setting up its modern and effective IP regime. This affirms that harmonising IP rights through the approximation of the IP laws of the member states and establishing a community IP system with a unitary effect is a step in the right direction. Moreover, it can be implied that a high level of IP harmonisation can enhance the growth of IPR-intensive industries and provide significant economic benefit.

[418] ibid 6-9.

3.3.2.4 Innovativeness

The EU aims to become a 'smart, sustainable and inclusive economy', which could provide 'high levels of employment, productivity and social cohesion' by 2020.[419] Consequently, fostering innovation is necessary in transforming ideas and creativities into goods and services.[420] IP protection is a crucial factor in stimulating innovation. There is a clear link between a high level of IP protection, especially patent, and a high level of innovation performance.[421] Patent has played an increasing role in innovation and economic performance.[422] It is considered to be 'a driving force for promoting innovation, growth and competitiveness'.[423] The member states of the EU can be regarded as leaders in supporting innovativeness by strengthening IP rights.[424] In the EU, European patents are considered as a key factor in the European knowledge economy.[425] In order to firmly establish the most competitive knowledge-based economy, it is necessary to have effective patent protection and enforcement.

At present, by virtue of the EPC, European patent application can be filed at the EPO. Centralised patent granting procedures facilitate patent transactions and save time and money that would otherwise be incurred when filing parallel applications. The number of European patent applications processed through use of this system has continuously increased. According to statistics, the total European patent filings in

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[419] European Commission, 'Europe 2020' <http://ec.europa.eu/europe2020/index_en.htm> accessed 21 December 2013.
[420] Commission, 'Europe 2020 Flagship Initiative: Innovation Union' COM (2010) 546 final.
[421] ibid.
[422] OECD, *Patents and Innovation: Trends and Policy Challenges* (OECD Publishing 2004) 5.
[423] Commission (n 360) 2.
[424] Harhoff (n 120) 7.
[425] EPO, 'Annual Report 2004: Foreword' <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2004.html> accessed 23March 2016.

2015 reached a then record high.[426] Five EU members, namely Germany, France, the Netherlands, UK and Italy, were included in the top ten countries of origin for European patent applications in 2015. An increase in patent applications could be considered as a sign of innovation. There is a link between the increasing use of patents to protect inventions and the recent development in innovation processes.[427] Furthermore, the growth of European patent applications indicate that Europe is 'a hub for innovators' and 'an attractive technology market'.[428] The number of resident patent applications can also be used to indicate the level of innovation capability of the country.[429] A country with higher innovation capability can be considered as 'IPR producer'.[430] Consequently, an increasing number of innovation can be expected.[431] Hence, this implies that harmonisation of the patent system through the ratification of the EPC could stimulate innovativeness within the EU.

However, despite the growth volume of European patent applications, the EU is still seeking further harmonisation in this area by proposing a community patent system with EU-wide effect, which could help improve transparency and reduce the cost of transactions.[432] By having a Unitary Patent system, including the UPC that would establish one jurisdiction for patent matters, it could reduce translation and litigation costs, and the legal uncertainty that may arise from differences in language, national

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[426] EPO, 'Demand for European patents continues to grow' <https://www.epo.org/news-issues/news/2016/20160303.html > accessed 5 April 2016.
[427] OECD, *Patents and Innovations: Trends and Policy Challenges* (n 422) 5.
[428] EPO, 'Demand for European patents continues to grow' (n 426).
[429] Sasatra Sudsawasd and Santi Chaisrisawatsuk, 'FDI Inflows and Outflows, Intellectual Property Rights, and Productivity Growth' (2014) IDE Discussion Paper No. 444, 3 <http://www.ide.go.jp/English/Publish/Download/Dp/pdf/444.pdf> accessed19 April 2016.
[430] ibid.
[431] ibid.
[432] Commission, 'Commission Staff Working Document: Towards enhanced patent valorisation for growth and jobs' SWD (2012) 458 final, 12 <http://ec.europa.eu/enterprise/policies/innovation/files/swd-2012-458_en.pdf> accessed 22 December 2013.

court's decisions, and interpretations. Moreover, the current European patent system cannot help the EU establish a complete internal market because it results in a bundle of national patent rights. The lack of a unitary effect can lead to a fragmented single market for patents.[433] Additionally, it could also reduce the EU's patent activity competitiveness when compared to other industrialised countries like USA and Japan.[434] Filing a European patent application designating 13 countries is up to 13 times more expensive than filing in US or Japan.[435] Consequently, the EU is enthusiastic in developing a community patent system with the unitary effect, which could provide more effective patent transactions with minimal cost in the community. This could contribute to free movement of goods and increase the EU's competitiveness in the global economy.

It is likely that an effective regional patent system is a great incentive to innovate which could have a significantly positive impact on the EU's economy. A higher level of patent harmonisation would be relevant to economic growth and competitiveness of the European community. Hence, in order for the EU to compete more strongly and successfully in the global economy, further unification of its patent system is essentially required.

3.4 Concluding Remarks

The EU has been moving closer towards complete IP harmonisation. As it is acknowledged to have had the most success in harmonising IP rights, the EU can be regarded as a point of reference for other regional groupings, especially ASEAN. It

[433] Commission (n 360) 2.
[434] ibid 2-3.
[435] ibid.

has been clearly shown that a higher level of IP harmonisation in the EU could have a positive legal and economic impact and thus result in deepening regional economic integration. The establishment of a well-functioning internal market cannot possibly be achieved without the Europeanisation of IP laws. Since ASEAN shares similar interest with the EU in unifying national markets into a single market, EU's success in harmonising IP laws, which positively affects the operation of the internal market, clearly demonstrates why ASEAN should develop a regional IP law system.

The IP harmonisation efforts, which have been processed through legislation and institutions, could help the EU provide a more efficient IP system at both the national and community level. Approximating the national IP laws of the member countries through the directives and ratification of international IP treaties could substantially decrease the disparities in the national law of the member states. Issuance of regulations establishing a unitary IP system in the areas of trademarks, designs, PVRs, and GIs could help resolve the conflict between the principle of free movement of goods and the territorial nature of IP rights, and thereby facilitate the proper function of an internal market. Increased consistency in IP standards can provide more predictability of IP protection and enforcement, and thus enhance the legal certainty in IP protection. Strong and effective IP regime makes a significant economic contribution to the EU's economy, particularly through GDP and stimulating innovation within the EU. This can also create a more investor-friendly environment, which could raise both the quantity and quality of FDI inflows.

However, IP harmonisation in the EU is still an ongoing process. Due to the unique characteristic of each member state, harmonisation, which always increases the level of IP protection, may impose a much greater burden on some countries by requiring

major changes in the national IP structures of those countries. To accommodate a different domestic culture and tradition, the EU provides some degree of flexibility in the national IP regimes of each member state. By allowing flexibility in the national IP systems to preserve diversity, member states would be able to set up their IP policies in order to protect their national interests. The remaining divergence at national level would not really matter and drastically affect the function of the internal market if a community IP system with a unitary effect exists.

CHAPTER 4 THE DEVELOPMENT OF IP HARMONISATION IN ASEAN

The main focus of this chapter is on the development of IP harmonisation in ASEAN. To investigate the current state of progress toward achieving the necessary level of IP harmonitation, the chapter will first explore the development of ASEAN. After that, the development of IP protection in ASEAN members, which are diversely categorised as developed, developing and least developed countries will be examined. The final part of chapter will investigate significant progress and achievements as a result of continuous collaboration between the ASEAN members themselves and collaboration between the ASEAN members and their external partners. The results from the analysis conducted in this chapter will demonstrate that due to the wide disparity of level of development, particularly in social, economic and legal aspects, establishing a regional IP system, the ideal level of IP harmonisation, is not realistic at the moment. Therefore, ASEAN chose to adopt more flexible approach to approximate national IP laws between the member states to be more inline with international IP standards. Although this can be considered as partial harmonisation, such progress and achievements can be considered as a stepping stone for ASEAN to pursue a greater level of harmonisation and further develop a regional IP system.

4.1 The Development of ASEAN

ASEAN was established on 8 August 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand. According to the founding document of ASEAN, the 'ASEAN Declaration', otherwise known as the 'Bangkok Declaration', ASEAN was created in order to advance mutual interests in the region, including encouraging economic growth, social and cultural progress, and regional peace and stability.

Among these core objectives, ASEAN is more concerned with the economic issues.[1] However, when compared to the EU, 'ASEAN is much more politically driven while the EU is much more economically driven'.[2]

Currently, ASEAN consists of ten member countries. It has expanded from the five founding countries to include Brunei Darussalam, Vietnam, Lao PDR, Myanmar, and Cambodia, which joined ASEAN in 1984, 1995, 1997 and 1999, respectively. Additionally, Timor-Leste, has filed an application to become the 11th member of the organisation in 2011. ASEAN is currently studying Timor-Leste's bid for member ship. The current members can be categorised as a country with an older and more developed economy or a country with a younger and less developed economy. The former includes Singapore, Thailand, Malaysia, Indonesia, Philippines, and Brunei Darussalam, while the latter includes Vietnam, Myanmar, Lao PDR and Cambodia.[3] By expanding the organisation to encompass all of Southeast Asia, ASEAN can obtain various political and economic benefits.[4] The expansion could enhance the region's economic and political bargaining power and result in an increase in ASEAN's market size.[5] This would help ASEAN compete more effectively in the world economy while remaining an important regional grouping. The most successful example of economic cooperation in ASEAN is the establishment of the ASEAN Free

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[1] Saisak Kanpachai, 'ASEAN and Thailand's regional security cooperation' (M.A. in National Security Affairs, Naval Postgraduate School 1997) 1.
[2] 'ASEAN told not to copy EU concept' *The Jakarta Post* (Jakarta, 19 April 2013) <http://www.thejakartapost.com/news/2013/04/19/asean-told-not-copy-eu-concept.html> accessed 21 January 2014.
[3] Jose L. Tongzon, 'Role of AFTA in an ASEAN Economic Community' in Denis Hew (ed), *Roadmap to an ASEAN Economic Community* (Institute of Southeast Asian Studies, 2005) 128.
[4] Carolyn L. Gates and Mya Than, 'Enlargement: An Introductory Overview' in Carolyn L. Gates and Mya Than (eds), *Asean Enlargement: Impacts and Implications* (Institute of Southeast Asian Studies, 2001) 2.
[5] ibid.

Trade Area (AFTA) in 1993. It was 'an important point in the history of the organisation'.[6] The main objectives of AFTA are to eliminate tariff and non-tariff barriers and attract a greater volume of foreign direct investment (FDI), which could enhance ASEAN's competitiveness at both the regional and global levels. The establishment of AFTA significantly contributed to continuous economic growth throughout the region.[7] This reflects the positive impact that having closer economic cooperation within the region can have despite the different economic backgrounds and levels of development of the member countries.

Although ASEAN is acknowledged to be 'one of the most successful regional grouping among developing countries',[8] it seems to have a lesser degree of economic integration than the EU, which has achieved an advanced stage of economic integration by successfully establishing a single market and introducing a common currency. ASEAN recognised that in order to remain as a relevant and competitive regional grouping in the global economy, a deeper level of regional integration would be required.[9] Consequently, ASEAN strongly committed itself to greater economic integration by establishing the ASEAN Economic Community '(AEC)' at the end of 2015 (with a longer timeline of 2018 for Cambodia, Lao PDR, Myanmar and Vietnam (CLMV)). The AEC is one of the three pillars of the ASEAN Community. In addition to the AEC, ASEAN aims to establish the ASEAN Political-Security Community and the ASEAN Socio-Cultural Community in order to fully establish the ASEAN

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[6] Paul Bowles, 'ASEAN, AFTA and the "New Regionalism"' (1997) 70 Pacific Affairs 219, 219.
[7] Tongzon (n 3) 128.
[8] Joseph L. H. Tan, 'Introductory Overview: AFTA in the Changing International Economy' in Joseph L. H. Tan (ed), *AFTA in the Changing International Economy* (Institute of Southeast Asian 1996) 22.
[9] Lay Hwee Yeo, 'Political Cooperation between the EU and ASEAN: Searching for a Long- Term Agenda and Joint Projects' in Paul J.J. Welfens, Suthiphand Chirathivat, and Franz Knipping (eds), *EU-ASEAN: Facing Economic Globalisation* (Springer 2008) 53.

community by 2020.[10] The establishment of the AEC seeks to transform ASEAN into a single market and production base. To achieve this goal, the free movement of goods, services, investment, capitals and skilled workers within the community are required. [11] According to ASEAN Vision 2020, deeper and broader economic integration would enable ASEAN to be 'a stable, prosperous, and highly competitive region with equitable economic development' [12] together with reducing social and economic disparities in member states.

4.2 The Development of IP Protection in ASEAN

Not unexpectedly, IP systems in the ASEAN countries vary significantly because of their diverse backgrounds and history. Recent legislative development in the major IP rights areas of copyright, patents, trademarks and geographical indications (GIs) will be explored. These are the areas most likely to have the largest impact on businesses in the member states. Due to different levels of development, ASEAN members can be categorised as a country that is developed, developing or a least developed country in the region as further detailed below.

4.2.1 ASEAN Members Classified as a Developed Country

Singapore is the only country that has been recognised as a developed country. According to the UN's Human Development Report 2015, in which life expectancy, educational attainment, wealth, and standard of living were used to measure

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[10] ASEAN, *ASEAN Economic Community Blueprint* (ASEAN Secretariat, 2008) 5 <http://www.asean.org/archive/5187-10.pdf> accessed 21 January 2014.
[11] ibid 6.
[12] ibid 5.

development progress, Singapore was ranked 11th in the group with very high human development, and thus maintained its developed country status.[13] Singapore is widely perceived to be a world leader in international trade and investment despite its lack of natural resources.[14] The country was classified as an 'advanced economy' by the International Monetary Fund (IMF).[15] According to a classification by the World Bank of the world's economies measured by the volume of gross national income (GNI) per capita, Singapore was categorised as a 'high income economy' with a GNI of $55,150 per capita.[16] By having well-regulated policies, its GDP per capita is relatively high and is expected to reach US$96,000 by 2040.[17]

Moreover, according to the Global Competitiveness Report 2013-2014 by the World Economic Forum, which includes IP protection as a measurement in the pillar of research and development (R&D) and innovation, Singapore was ranked second in the list of the most competitive economies in the world.[18] Singapore is the world's number two and Asia's number one for best IP systems.[19] Singapore recognised that in order to remain as a competitive and prosperous country in the global economy, IP

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[13] UNDP, *Human Development Report 2015: Work for Human Development* (UNDP 2015) 208.
[14] Aleksandra Iwulska, 'Golden Growth: Restoring the lustre of the European economic model – Country Benchmarks' (World Bank Flagship Report 2012) 39 <http://siteresources.worldbank.org/ECAEXT/Resources/258598-1284061150155/7383639-1323888814015/8319788-1324485944855/04_singapore.pdf> accessed 16 March 2014.
[15] IMF, 'World Economic Outlook Database' <https://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx> accessed 14 April 2014.
[16] The World Bank, 'Singapore' <http://data.worldbank.org/country/singapore> accessed 7 February 2016.
[17] Monetary Authority of Singapore (MAS), 'An Economic History of Singapore: 1965-2065*" - Keynote Address by Mr Ravi Menon, Managing Director, Monetary Authority of Singapore, at the Singapore Economic Review Conference 2015 on 5 August 2015' <http://www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-Policy-Statements/Speeches/2015/An-Economic-History-of-Singapore.aspx> accessed 13 May 2016.
[18] Klaus Schwab (ed), 'The Global Competitiveness Report 2013-2014' (World Economic Forum 2013) 12 <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf> accessed 16 March 2014.
[19] ibid 341.

is a key driving force of economic growth and wealth of the nation.[20] Therefore, IP protection in Singapore has been reformed homogenised with global IP standards established in international agreements.[21] Singapore is the only ASEAN member state that has acceded to all major international IP treaties such as the TRIPs agreement, the Paris Convention, the Berne Convention, the PCT, the Madrid Protocol and the Hague Agreement. Moreover, in order to maximise trade benefits and boost economic growth of the nation, Singapore has signed FTAs, which usually contain IP clauses imposing more stringent IP protection than that provided by the TRIPs agreement, which also known as the 'TRIPs-Plus standard'. Examples can be found in EFTA (Switzerland, Iceland, Liechtenstein and Norway) –Singapore FTA and US-Singapore FTA. Therefore, among ASEAN members, Singapore is viewed as the country with the best IP regime, and exemplifies that strong IP can promote economic growth.[22]

4.2.1.1 Copyright

Copyright has long been a recognised legal concept in Singapore. At first, copyright protection in Singapore relied on the UK Copyright Act 1911, which remained relevant until the modern Copyright Act (Cap. 63) of Singapore was passed in 1987.[23] The Copyright Act of 1987 followed Australian legislation, the Australian Copyright

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[20] Hang Chang Chieh and Marvin Ng, 'Intellectual Property and Innovation: Singapore's Experience' (International Symposium on Management of Technology and Innovation, Hangzhou, China, 24 Oct 2004) 13-17 <http://www.eng.nus.edu.sg/etm/research/publications/05.pdf> 1 accessed 17 March 2014.

[21] Infocomm Development Authority of Singapore (IDA), 'Intellectual Property Rights' <http://www.ida.gov.sg/Policies-and-Regulations/Acts-and-Regulations/Intellectual-Property-Rights> accessed 18 March 2014.

[22] Paul Goldstein and others, *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009) 233.

[23] Assafa Endeshaw, *Intellectual Property in Asian Emerging Economies* (Ashgate 2010) 30.

Act 1968,[24] which was rooted in the UK Copyright Act 1956.[25] Although the majority of the provisions were modeled after the law of developed countries, particularly Australia and the UK, Singapore also set up copyright standards that were more in-line with its particular interests, such as the provisions allowing parallel import.[26] Many countries, including Australia, had prevented parallel imports up to that point. Pursuant to the Australian Copyright Act 1968 and the 1991 Copyright Amendment Act, all parallel imports were prohibited except for the parallel importation of books under conditions provided in the 1991 statutory provisions.[27] Furthermore, according to the Explanatory Statement Copyright Bill 1986, the Copyright Act 1987 was passed in response to technological developments such as computer technology and advanced means of communication.[28]

The enactment of the Copyright Act 1987 could be considered as a significant development in copyright protection in Singapore. This Act provided the same copyright protection that could be found in the laws of developed countries and effectively dealt with new copyright matters as a result of technological advancements. When the UK Copyright Act 1911 was passed, only literary, dramatic, musical and artistic works could be copyrighted. Additionally, the absence of technological advancements at the time meant that copyright infringement was not a significant problem for copyright owners. For instance, without photocopying machines, reproduction of copyrighted work would have had to be done by hand.

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[24] Ng-Loy Wee Loon, 'The Imperial Copyright Act 1911 in Singapore: copyright creatures great and small, this act it made them all' in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire: 100 Years of the Copyright Act 1911* (Edward Elgar Publishing 2012) 156.
[25] Endeshaw (n 23) 32.
[26] Goldstein and others (n 22) 239.
[27] Louise Longdin, 'Cross Border Market Segmentation and Price Discrimination: Copyright and Competition at Odds'Fiona Macmillan (ed), *New Directions in Copyright Law, Volume 6* (Edward Elgar Publishing 2007) 148.
[28] See the Copyright Bill 1986, No. 8 of 1986.

However, the Copyright Act 1911 was inadequate to deal with copyright matters after the start of the information technology revolution, which introduced and resulted in the development of new types of expression and communication. Singapore recognised that in order to promote creativeness and the development of the software industry, there was a need to have stronger copyright protection.[29] Therefore, under the Copyright Act 1987, copyright protection was extended to cover sound recordings, cinematograph films, broadcasts, cable programmes and the typographical format of published editions of works.[30] Moreover, the development of computer technology led to a controversy of whether or not computer programmes should be protected under copyright law.[31] However, computer programmes were eventually granted copyright protection as 'literary work' in Section 7(1) under the Copyright Act 1987. Singapore has placed great emphasis on the software industry due to the growth of FDI in that industry. In order to stimulate development of computer programmes and to ensure that foreign companies would be accorded adequate and effective IP protection, Singapore realised that it was essential to provide a clear legal framework to the computer science industry.[32] This affirms that Singapore used strong IP rights as an incentive to enhance economic growth of the country.

To deal with copyright infringement, emphasis was placed on strengthening copyright enforcement. The existence of new, faster and cheaper copying technology made copyright infringement easier and more of a problem.[33] Copyright infringement, particularly that with a commercial purpose, dramatically increased as technology

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[29] Goldstein and others (n 22) 238.
[30] ibid.
[31] George Wei, 'Information Technology and the Law of Copyright in Singapore' in Eddie C. Y. Kuo, Chee Meng Loh and K. S. Raman (eds), *Information Technology and Singapore Society: Trends, Policies, and Applications: Symposium Proceedings* (NUS Press 1990) 67-68.
[32] ibid 68.
[33] ibid 67-68.

developed. Therefore, the Copyright Act 1987 made copyright infringement for a commercial purpose a criminal offence.[34] This is consistent with the minimum standard for IP protection outlined in Article 61 of the TRIPs Agreement, which obliges WTO member countries to provide criminal liability for 'copyright piracy on a commercial scale'.

Furthermore, when the Internet was introduced and became a significant tool for trading, communication, and entertainment, the Copyright Act 1987 was amended in 1999 in order to adjust the law to the digital environment. The widespread use of the Internet has not only introduced a new form of information providers, but also a new way to distribute, publish and reproduce the information. Consequently, the law was amended to extend a new type of copyright protection and provide enforcement measures in order to cope with copyright matters in the digital era.[35] A noteworthy example is the creation of Internet Service Provider's liability (ISP liability) for copyright infringement under Section 193C(1) of the Singapore Copyright (Amendment) Act 1999 amending Copyright Act 1987. This ISP liability can be considered to be a significant development in copyright protection. In addition to promoting the distribution of information, the Internet also facilitates online copying, which causes huge losses to copyright owners. Therefore, by being the first Asian country to enact a provisions relating to ISP liability for copyright infringement[36], Singapore is perceived to be a leading Asian country in adopting strong and modernised copyright protection.

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[34] Section 136-140 of the Copyright Act 1987.
[35] Infocomm Development Authority of Singapore (IDA) (n 21).
[36] V. K. Unni, 'Internet Service Provider's Liability for Copyright Infringement - How to Clear the Misty Indian Perspective' (2001) 8 Rich J L & Tech 13.

Furthermore, the level of copyright protection and enforcement in Singapore has increased beyond TRIPs as a result of the ratification of an FTA between Singapore and its trading partners. For instance, pursuant to FTA US-Singapore, Singapore is obliged to provide stronger copyright protection. Such enhanced protection became necessary, particularly in the area of digital and internet works, as a response to technological developments and the growth of copyright infringement in the digital era. For instance, in order to prevent piracy and the unauthorised distribution of copyrighted work on the internet, the FTA provides stringent legal protection and adequate remedies against the circumvention of any technological measures used by the copyright owners.[37] The contracting parties to the FTA were also obliged to ensure adequate anti-piracy enforcement measures.[38] For example, government agencies were prohibited from using computer software without authorisation.[39] Additionally, there were other FTAs signed by Singapore that contained TRIPs-Plus obligations. For example, according to EFTA-Singapore FTA, parties are required to accede to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[40]

The information technology revolution and the benefits of international trade were important factors that prompted Singapore to reform its copyright system. Doing so helped Singapore bring its national copyright law up to date and provided adequate methods to deal with new copyrightable works and infringement more effectively.

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[37] Reto M. Hilty, 'The Expansion of Copyright Law and its Social Justification' in Christopher Heath and Kung-Chung Liu (eds), Copyright Law and the Information Society in Asia (Hart Publishing 2007) 9-10.
[38] United States International Trade Commission, 'U.S.-Singapore Free Trade Agreement: Potential Economywide and Selected Sectoral Effects' (2013) Inv. TA2104-6, 97 <http://www.usitc.gov/publications/332/pub3603.pdf> accessed 20 March 2014.
[39] ibid.
[40] See EFTA –Singapore FTA Article 54.

Furthermore, in addition to developing its copyright law to conform with international standards, Singapore also devised its own standard of copyright protection that better aligned with its particular needs and interests. A strong emphasis on copyright matters and the promulgation a stringent copyright system could attract foreign investors to Singapore, which positively affected economic growth and development of the country.

4.2.1.2 Patents

Singapore is a former British colony. As such, its patent system was governed by the Registration of UK Patent Act 1937.[41] This Act required a re-registration in Singapore of patents previously granted in the UK. Patents registered in the UK, including patents designating the UK and granted by the EPO under the EPC, must be registered in Singapore within three years from the date that such patent was issued.[42] However, this system was deemed to be expensive, time-consuming and inconvenient.[43] The Registration of UK Patent Act 1937 was subsequently replaced by the Singapore 1994 Patents Act, which remains in force today. Singapore acceded to the WIPO in 1990. Thereafter, and guided by the WIPO, The Singapore Patent Act 1994 was developed based on the international IP standards contained therein.[44] The Patent Act 1994 was passed to specifically repeal the Registration of UK Patent Laws 1937 but was still

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[41] Goldstein and others (n 22) 240.
[42] ibid 240-241.
[43] Liew Woon Yin, 'Achieving TRIPS Level Protection for Industrial Property Rights - The Singapore Perspective' (APEC Industrial Property Rights Symposium, Tokyo, August 1996) <http://www.jpo.go.jp/shiryou_e/toushin_e/kenkyukai_e/singa.htm> accessed 21 March 2014.
[44] Ng-Loy Wee Loon, 'Singapore' in Paul Goldstein and Joseph Straus (eds), *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009) 240.

influenced by then existing UK law, specifically the UK Patent Act 1977.[45] Nevertheless, differences in the treatment of some legal issues remain, such as parallel imports and substantive patentable subject matters. There is no provision that expressly allows parallel import under the UK Patent Act 1977 whereas Section 66(2)(g) of the Singapore Patent Act 1994 clearly permits parallel import.[46] Furthermore, while animal and plant varieties and essential biological processes for the production of animals or plants are excluded from patentability under the UK Patent Act 1977[47]and the EPC in accordance with the morality and 'ordre public' exclusions,[48] Singapore adopted a different approach by allowing these matters to be patentable. This is because Singapore aims to use patent rights to provide a greater incentive to stimulate R&D in agricultural and biotechnological industries.[49]

By allowing these subject matters to be patentable, it seems that Singapore has followed the approach of the US on this issue to an extent. Under US law, the public order and morality exclusions do not exist in patent protection. According to Section 101 of the Patent Act 1952, 'any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof' can be granted

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[45] Goldstein and others (n 22) 241.
[46] Section 66(2)(g) of the Patent Act 1994
"An act which, apart from this subsection, would constitute an infringement of a patent for an invention shall not be so if —
Subject to subsections (3) and (5A), it consists of the import, use or disposal of, or the offer to dispose of, any patented product or any product obtained by means of a patented process or to which a patented process has been applied, which is produced by or with the consent (conditional or otherwise) of the proprietor of the patent or any person licensed by him, and for this purpose "patent" includes a patent granted in any country outside Singapore in respect of the same or substantially the same invention as that for which a patent is granted under this Act and "patented product", "patented process" and "licensed" shall be construed accordingly;".
[47] Goldstein and others (n 22) 241.
[48] EPO, 'Essentially biological processes for the production of plants or animals' <http://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_5_4_2.htm> accessed 22 March 2014.
[49] Goldstein and others (n 22) 241.

patent protection. The concept that lies behind these broad patentable subject matters is the principle that 'anything under the sun made by man is patentable'. However, compared to the US patent law, Singapore's approach is more limited and seems to be more concerned with ethics and morality. Section 13(2) of the Patent Act 1994 expressly excludes from patentability 'an invention the publication or exploitation of which would be generally expected to encourage offensive, immoral or anti-social behavior'. Moreover, Section 16(2) also raises ethical concerns in the granting of patents on animals and inventions related to human being. It is stated that, 'an invention of a method of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body shall not be taken to be capable of industrial application'. Therefore, although the Singapore Patents Act 1994 did not expressly exclude animals, plant varieties and essential biological processes for the production of animals or plants from being patentable, by virtue of these provisions, a patent might not be granted to an invention that the use of which would be contrary to public order and morality. In its discretion, the IP Office of Singapore (IPOS) would be required to balance ethical concerns and patent benefits. This could create uncertainty over the patent granting procedure.

Singapore has developed a strong patent system in conformity with international IP standards. Major international treaties relating to patents such as the Paris Convention, the PCT and the Budapest Treaty have been ratified. Additionally, compared to other ASEAN countries, Singapore provides a higher level of patent protection by having incorporated the TRIPs-Plus standard in its national law. By signing the FTA with the US, Singapore was required to implement a higher standard of patent protection contained in TRIPs. For instance, patent terms can be extended beyond 20 years to compensate for unreasonable delays that occur during the issuance

of a patent.[50] Thus, in general, Singapore has significantly developed its patent law to be consistent with international standards and to keep it up to date. A strong and effective patent regime can be an incentive to attract a large amount of FDI and lead to the development of advanced technology in its country.

4.2.1.3 Trademarks

Trademark protection was firstly introduced in Singapore in 1939 by the Singapore Trade Marks Act (Cap. 332). The groundwork for trademark registration in this Act was taken from the UK Trademark Act 1938.[51] Nevertheless, various amendments were made after Singapore became an independent state in 1965. One noteworthy reformation was the enactment of the Trademark Act 1998,[52] which made amendments based on the UK Trademark Act 1994 and the Australian Trademark Act 1995.[53] This reform resulted in an expansion of trademark subject matter to include non-traditional trademarks, namely colours and three-dimensional shape.[54] The provisions regarding shape marks were almost identical to those provided under the UK Trademark Act 1994.[55] Introducing a registration system for non-traditional marks demonstrates a significant development in trademark registration in Singapore.

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[50] See Article 16.7 (7) US – Singapore FTA.
[51] Endeshaw (n 23) 31.
[52] ibid.
[53] ibid.
[54] See Section 2 of the Trademark Act 1998; Ted Chwu, 'Protection for non-traditional trade marks in Asia' <http://www.twobirds.com/en/news/articles/2005/protection-for-nontraditional-trade-marks-in-asia> accessed 23 March 2014.
[55] M Ravindran and Adrian Kwong 'Shaping Up Under the New Trade Marks Act: Shapes as Considered in Consolidated High Court Suits 619/2004 and 674/2004 (*Nation Fittings (M) Sdn Bhd vs Oystertec plc and Oystertec plc vs Best Ceramic Pte Ltd*)' <http://www.lawgazette.com.sg/2006-5/May06-feature4.htm> accessed 22 March 2014.

Similar to in Australia, Singapore decided to adopt the 'first to use' system,[56] while the UK uses the 'first-to-file' regime.[57] Under the Trademark Act 1998 person who firstly uses a mark in Singapore rather than a person who files a trademark application at a later date would be granted the trademark.[58] Additionally, the Trademark Act 1998 was passed in order to fulfill obligations required by international IP agreements, particularly the TRIPs agreement.[59]

The ratification of the FTA between the US and Singapore in 2003 also obliged Singapore to further amend its national trademark legislation, further resulting in a strengthening of its trademark protection. For instance, in the area of well-known trademark protection, the FTA expands the protection of such marks to dissimilar goods and services. However, there must be a connection between the trademark owner and the goods or services as a result of the use of the well-known mark in relation to dissimilar goods or services.[60] Furthermore, the use of such well-known trademark is likely to destroy the interests of the trademark owner for the protection to be afforded.[61] Concerning the protection for non-traditional marks, the FTA also requires a removal of the condition that signs be visible, and establishes protection for scent marks.[62] Amending the law to accommodate more types of non-traditional mark and expanding the scope of protection in this manner increases the scope of trademark law beyond the traditional definition of trademark. Signing FTA with US also led to

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[56] Australian Government, 'Intellectual Property Passport Singapore' <http://www.ipaustralia.gov.au/uploaded-files/publications/singapore-ip-passport-aug-2012.pdf> accessed 21 march 2014.
[57] Edwards Angell Palmer & Dodge UK LLP, 'Taking the time to reduce expense' (2011) WTR, 90 <http://www.worldtrademarkreview.com/issues/article.ashx?g=9101355d-e513-4d4a-88a9-6dd622a8d28d> accessed 22 March 2014.
[58] Australian Government (n 56).
[59] Ravindran and Kwong (n 55).
[60] United States International Trade Commission (n 38).
[61] ibid.
[62] Article 16.2 of US-Singapore FTA.

introduction of statutory damages for use of counterfeit trademark. [63] When infringement involves the use of counterfeit trademark, the court may award statutory damages to trademark owners whose rights have been infringed by a counterfeit trademark.[64]

Additionally, Singapore is considered an active player in the international IP community. Three international trademark treaties namely the Nice Agreement, the Madrid Protocol, and the Singapore Treaty on the Law of Trade Marks (STLT) have all been ratified. Singapore was the first country to ratify the STLT in 2007 reflecting its keenness to strandardise trademark registration.[65] The STLT was ratified in 2006 in order to harmonise trademark administrative procedures and create a modern and dynamic framework for trademark registration at the international level.[66] In addition to providing rules regarding trademark registration, the STLT explicitly recognises both visible and non-visible non-traditional marks and is regarded as the first international agreement to do so.[67] This treaty provides a broader scope of trademark protection, and increased certainty and predictability in the trademark registration procedures. An accession to the STLT and the resulting obligations led to an enactment of the Trademarks (Amendment) Act 2007.

Singapore is a country with progressive trademark protection that is consistent with the international standard. Singapore is one of the first countries to expand trademark

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[63] David Llewelyn, 'Statutory Damages for Use of a "Counterfeit Trade Mark" and for Copyright Infringement in Singapore – A Radical Remedy in the Law of Intellectual Property or One in Need of a Rethink?' (2016) 28 SAcLJ 61, 61.
[64] ibid.
[65] IPOS, 'The Quest' (2007) 27 <http://www.ipos.gov.sg/Portals/0/Annual%20Report/2006-2007/6FINALIPOSARTheQuest.pdf> accessed 23 March 2014.
[66] Joachim Kobuss, Alexander Bretz and Arian Hassani, *Become a Successful Designer: Protect and Manage Your Design Rights Internationally* (Walter de Gruyter 2013) 124
[67] WIPO, 'Summary of the Singapore Treaty on the Law of Trademarks (2006)' <http://www.wipo.int/treaties/en/ip/singapore/summary_singapore.html> accessed 23 March 2014.

protection to non-traditional marks. Furthermore, by joining the STLT, Singapore is perceived as a leading country in the standardisation of a modern trademark framework. This was a significant step in the development of the trademark system in Singapore.

4.2.1.4 Geographical Indications (GIs)

As a WTO member country, Singapore is obliged to incorporate GIs protection obligations in its national law. In Singapore, GIs are protected under the Geographical Indications Act (Cap. 117B), or alternatively granted trademark protection in accordance with the Trade Marks Act (Cap. 332). According to the Geographical Indications Act (Cap. 117B), there is no need to file an application for GIs protection.[68] Protection will automatically be accorded to the GIs of countries that are members of the WTO, a contracting party to the Paris Convention, or designated by the Singapore government as a qualifying country. Additionally, such GIs must be protected in its country of origin. The ratification of the EU-Singapore FTA required Singapore to enhance its existing GIs protection. One of the major improvements was the establishment of the new GIs registry, which would be governed by the IPOS. This system would accept applications for wines and spirits GIs, and GIs for selected categories of agricultural products and foodstuffs.[69] The level of protection for wines and spirits GIs would be at the same standard as the then current system, whereas agricultural products and foodstuffs would be accorded a higher standard than

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[68] Bernard O'Connor, *The Law of Geographical Indications* (Cameron May 2004) 75.

[69] Ministry of Trade and Industry (MTI), the Ministry of Law (MinLaw) and the IP Office of Singapore (IPOS), 'Geographical Indications Consultation Paper: List of Terms in relation to 196 Products' (2013) 2 <http://www.mti.gov.sg/MTIInsights/Documents/Geographical%20Indications%20Consultation%20Paper.pdf> accessed 23 March 2014.

provided under Article 22 of TRIPs.[70] The new system will be initiated after the EU-Singapore FTA comes into force, which is expected to be in 2016. Moreover, the establishment of this new GIs registry will require amendments to the Trademark Act in order for it to align with the requirement of establishing the new GIs registry. The EU-Singapore FTA proposes a rejection of a trademark application, which contains a GI that was previously registered under the new GI registry.[71] The establishment of a new GIs registration system reflects the EU's *sui generis* system of GIs protection.[72] The EU has been successful in promoting its approach of GIs protection through the ratification of bilateral trade agreements. The ratification of the EU-Singapore FTA will significantly increase GIs protection in Singapore.

4.2.2 ASEAN Members Classified as a Developing Country

The majority of ASEAN members are 'developing countries'. Thailand, Malaysia, Indonesia, Philippines, Brunei Darussalam and Vietnam are all categorised as such, though, as will be explained below. Among these countries, it seems that Brunei Darussalam has nearly earned 'developed country' status. According to the 2015 Human Development Report, Brunei Darussalam and Singapore were both categorised as having 'very high human development', while Malaysia and Thailand were regarded as 'high human development' countries.[73] Indonesia, Philippines and

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[70] ibid; Allen & Gledhill, 'IPOS proposes enhancements to Geographical Indications Act and Trade Marks Act: Enhanced protection regime for geographical indications' (2014) <http://www.singaporelawwatch.sg/slw/attachments/36922/Intellectual%20Property%20(2).PDF> accessed 23 March 2014.
[71] ibid.
[72] Bernard O'Connor, 'The European Union and the United States Conflicting Agendas on Geographical Indications - What's Happening in Asia?' (2014) 9 Global Trade & Customs J 66, 67.
[73] UNDP, *Human Development Report 2015: Work for Human Development* (n 13) 208-210.

Vietnam were all categorised as 'medium human development' countries.[74] Additionally, like Singapore, Brunei Darussalam was classified as 'high income economies' by the World Bank, whereas the other ASEAN developing countries were 'upper middle income' or 'lower middle income' countries per the World Bank.[75] However, the 2013 IMF's World Economic Outlook Report continued to classify Brunei Darussalam as a 'developing economy' as it did with Thailand, Malaysia, Philippines, Indonesia and Vietnam.[76] Among these countries, it appears that Brunei Darussalam has a higher level of development than others do in terms of human development and income. Though similarly categorised as 'developing countries', there are still disparities in their socio-economic development.

Furthermore, according to the Global Competitiveness Report 2013-2014 of the World Economic Forum, Malaysia is the 24th most competitive economy in the world, which is the highest position among the ASEAN developing countries. Vietnam is the lowest ranked developing country as the 70th most competitive economy.[77] Malaysia is ranked as having the 30th best IP protection in the world,[78] the highest position among these countries whereas Vietnam is ranked the lowest at 116th.[79] This shows a correlation between a countries' competitiveness and its IP regime. An effective IP system can enhance a country's competitiveness, have a positive impact on economic development, and facilitate overall economic growth of the country. These rankings also clearly demonstrate that there is still great disparity in the levels of IP standards among the ASEAN developing countries.

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[74] ibid 209-210.
[75] The World Bank, 'Countries and Economies' <http://data.worldbank.org/country/> accessed 14 April 2014.
[76] IMF (n 15).
[77] Schwab (n 18) 15.
[78] ibid 267.
[79] ibid 389.

4.2.2.1 Copyright

Copyright protection has long existed in Thailand, Malaysia, Indonesia, Philippines, Brunei Darussalam and Vietnam. Each country has developed its copyright law based on its unique characteristics and historical background. For instance, the first Indonesia copyright law, also known as the Copyright Law 1982 was influenced by Dutch law and that of other European countries.[80] This is understandable since Indonesia was under colonial rule by the Dutch and various other European countries for approximately 450 years.[81] Malaysia was colonised by Britain. Copyright Law 1969 of Malaysia was developed in accordance with UK copyright protection.[82] The The UK Copyright Act 1911 was in force until 2000 when the Emergency (Copyright) Order 1999 was enacted.[83] In Philippines, its copyright law was developed based on US legislation and jurisprudence.[84] As a result of these distinct backgrounds, there were differences in the standards of copyright protection afforded by these countries in the early stages of copyright development. This can be seen from the differences in the duration of copyright protection that was afforded. The Malaysian Copyright Act 1969 affords a term of protection of life of the authors plus 25 years. Whereas, the term of protection of copyrighted work under the Thai Copyright Act B.E. 2521 (1978) was life plus 50 years.[85]

Furthermore, there were differences in copyrightable material and the scope of

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[80] Endeshaw (n 23) 15.
[81] Jenny Meyer, Tracy Navichoque, and Grace Riccardi, 'Dutch Colonization in Indonesia' <http://weloveindonesia.tumblr.com/> accessed 26 March 2014.
[82] Khaw Lake Tee, 'Copyright Law in Malaysia: Does the Balance Hold?' (2004) 1 JMCL <http://www.commonlii.org/my/journals/JMCL/2004/2.html> accessed 27 March 2014.
[83] The US Embassy, 'IPR Toolkit for Brunei Darussalam' (2006) 2 <http://brunei.usembassy.gov/uploads/images/FtR_7Z-Jl6W6pmLZkxPlrA/2006IPRTOOLKIT.pdf> accessed 29 March 2014.
[84] Ang Kwee Tiang, 'Copyright Protection in Southeast Asia' <http://www.nira.or.jp/past/publ/review/95winter/ang.html> accessed 28 March 2014.
[85] Endeshaw (n 23) 39.

protection. Before the TRIPs agreement was adopted, the copyright law of each country developed in response to pressure from developed countries and to meet the particular needs of their country. For instance, Malaysia passed the Copyright Act 1987 to replace its first copyright law, the Copyright Act 1969, to extend copyright protection to computer software due to the diffusion of pirated software. In addition, the amendment was made in response to pressure from the US and the UK to bring copyright protection in Malaysia in line with the US and UK standards. This shows a strong influence by developed countries on the expansion and strengthening of IP protection outside their jurisdictions. To replace then existing copyright and other IP laws, Vietnam passed the Civil Code 1995 and various corresponding subordinate decrees.[86] This was a significant development of the IP system in Vietnam.[87] Additionally, in order to enhance protection for foreign copyrights, all six ASEAN developing countries have ratified the Berne Convention, which is the oldest multilateral agreement in the field of copyright.[88] This has resulted in making their laws more consistent with international standard.[89]

It can be seen that each country has used different approaches in regulating its copyright protection. Therefore, the level of copyright standards varies from country to country. The same subject matter that qualifies for copyright protection in one country might not be granted protection in other countries. However, copyright

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[86] Christoph Antons, 'Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments' (2006) JILT 1, 5.
[87] ASEAN Intellectual Property Association (ASEANIPA), 'IP Protection in Vietnam' <http://www.aseanipa.org/index.php/members/viet-nam/185-ipguidesvietnam/507-ip-guides-for-vietnam> accessed 30 March 2014.
[88] WIPO, 'WIPO-Administered Treaties' <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 5 April 2016.
[89] Alhaji Tejan-Cole, 'International Copyright Law-Part I: The Berne Convention for the Protection of Literary and Artistic Works, 1886' (2011) 1 <http://www.belipo.bz/wp-content/uploads/2011/12/copyrightlaw.pdf> accessed 30 March 2014.

protection in Thailand, Malaysia, Indonesia, Philippines, Brunei Darussalam and Vietnam became more consistent when these countries became members of the WTO and adopted the TRIPs agreement. Pursuant to TRIPs, each country was obliged to pass copyright laws that provided adequate and effective copyright protection and enforcement.[90] Developing countries had until 1 January 2000 to incorporate TRIPs.[91] During that time, each country amended and reformed their laws to conform to TRIPs. The Indonesian Copyright Act was amended in 1997 to provide rental rights for computer programs and cinematographic works.[92] Philippines enacted the IP Code (IPC) in 1997. The IPC introduced copyright protection for computer software and increased criminal penalties for infringement to enhance protection and enforcement.[93] Additionally, Brunei Darussalam, a country that had never enacted local copyright law, passed the Emergency (Copyright) Order 1999 that met the standards set by TRIPs.[94] Vietnam enacted the Civil Code 2005 and the IP Law 50/2005 in order to bring its IP regime in conformity with the TRIPs standard.[95]

The ratification of bilateral agreements also contributed to the revolution of IP right development. Vietnam ratified a BTA with the US, which came into effect on December 10, 2001.[96] This BTA requires Vietnam to adopt provisions consistent with TRIPs within the subsequent 2 years.[97] Vietnam was obliged to provide adequate

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[90] The International Intellectual Property Alliance, 'Copyright Enforcement under the TRIPs Agreement' (2004) 1 <http://www.iipa.com/rbi/2004_Oct19_TRIPS.pdf> accessed 31 March 2014.
[91] ibid.
[92] Christoph Antons, *Intellectual Property Law in Indonesia* (Kluwer Law International 2000) 54.
[93] Grace P. Nerona, 'The Battle Against Software Piracy: Software Copyright Protection in the Philippines' 9 Pac Rim L & Pol'Y J 651, 651.
[94] The US Embassy, 'IPR Toolkit for Brunei Darussalam' (n 83) 2.
[95] ASEAN Intellectual Property Association (ASEANIPA) (n 87).
[96] Steve Parker, Vinh Quang Phan and Ngoc Anh Nguyen, 'Has the U.S.-Vietnam Bilateral Trade Agreement Led to Higher FDI into Vietnam?' (2002) 2 Int J Appl Econ 199, 199.
[97] The US Embassy, 'Protecting IP Rights - Why It Is Important for Vietnam' <http://vietnam.usembassy.gov/econ6.html> accessed 4 April 2014.

copyright protection to US companies.[98] In 2009, a Partnership Cooperation Agreement between the EU and Indonesia was signed. According to Article 11 of that agreement, both parties were required to cooperate and improve IP enforcement of and protection from piracy. Additionally, various negotiations for FTAs, which usually provide extensive obligations regarding IP rights between developed countries, particularly the US and the EU, and ASEAN countries were formally launched. If these FTAs are successfully agreed to and ratified, the ASEAN countries will be required to reform their copyright laws to conform to TRIPs-Plus standard. This would impose a significant burden on them to reform their protection and enforcement in conformity with the standard established by these developed countries.

The copyright laws of the 'developing countries' in ASEAN are well developed and consistent with international IP standards. Nevertheless, although modern copyright protection has existed in these countries for many years, there is still a high rate of copyright infringement.[99] For example, Thailand has faced violations of IP rights, especially copyright piracy for many years. The situation has not improved as the US again placed Thailand on its 'priority watch list' in 2016 Special 301 Report.[100] The priority watch list refers to countries that 'present the most significant concerns regarding insufficient IPR protection or enforcement'.[101] Thailand has weak IP enforcement, especially in providing adequate and effective measures against

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[98] ibid.
[99] Tiang (n 84).
[100] USTR, '2016 Special 301 Report' (2016) 3 <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf> accessed 2 May 2016.
[101] USTR, 'USTR Releases Annual Special 301 Report on Intellectual Property Rights' <http://www.ustr.gov/about-us/press-office/press-releases/2013/may/ustr-releases-annual-special-301-report> accessed 1 April 2014.

copyright piracy on the internet.[102] Despite the desire to improve IP Protection and enforcement, the issue of copyright infringement was still not being taken seriously enough by Thai authorities.[103] In addition to Thailand, Indonesia was similarly grouped due to their continually growing rate of piracy.[104] In order to be removed from the priority watch list, Thailand and Indonesia were encouraged by the US to revise their copyright laws and enhance their level of IP protection and enforcement against copyright infringement.[105] Vietnam, which was placed on the Watch List is also considered as one of trading partner that has 'the most challenging copyright enforcement issue'.[106]

Brunei Darussalam's Emergency (Copyright) Order 1999 provides light criminal penalties for copyright infringement.[107] A person who commits the offense of copyright infringement can be imprisoned for a term of 1 to 10 years or subject to a fine not exceeding B$5,000.[108] Relatively light criminal penalties have resulted in Brunei Darussalam having a very high rate of piracy, especially pirated music, movies and computer software, which has caused a huge loss to the copyright industries in the US.[109] However, the situation is getting better. Brunei Darussalam was removed from the USTR Special 301 Watch List on IP Rights in 2013 because of its strong commitment to combat piracy and its plan to amend its copyright law and enhance its penalties and enforcement powers.[110] This shows progress in developing an effective

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[102] USTR, '2016 Special 301 Report' (n 100) 37-38.
[103] ibid.
[104] ibid 3.
[105] ibid 36-39.
[106] ibid 19.
[107] The US Embassy, 'IPR Toolkit for Brunei Darussalam' (n 83) 2.
[108] ibid.
[109] IIPA, '2012 Special 301 Report on Copyright Protection and Enforcement' (2012) 140 <http://www.iipa.com/rbc/2012/2012SPEC301BRUNEI.PDF> accessed 3 April 2014.
[110] BEDB, 'Brunei Darussalam move off of USTR Special 301 Watch List on IP Right'

copyright regime in conformity with international standards. As with Brunei Darussalam, Malaysia and Philippines have been removed from the US Priority Watch List and also from the ordinary watch list. Both Malaysia and Philippines were included in a special mention list in the USTR's 2014 301 special report since they have shown enormous progress toward establishing effective enforcement measures against piracy. However, these countries were still encouraged by the US to enhance their level of copyright protection and enforcement, particularly in online copyright infringement.[111]

Among ASEAN 'developing countries', there are still discrepancies in the standards of copyright protection and enforcement, particularly in anti-piracy measures. Brunei Darussalam, Malaysia and Philippines have shown positive development in establishing stronger IP enforcement against copyright infringement, whereas other members are still being criticised for their inadequate copyright regimes. Overall, ASEAN 'developing countries' have developed their IP systems to conform with the international standards established by the TRIPs agreement and other international IP agreements, such as the Berne Convention. Nevertheless, some countries, particularly Thailand, Indonesia and Vietnam still struggle with a growing rate of copyright infringement because of their weak IP enforcement measures. Major trading partners such as the US and the EU also seek a strong global IP standard particularly through FTAs. Being the case these ASEAN countries might feel pressure to reform their copyright protections and enforcement to surpass the TRIPs standard in exchange for continual trade and the resulting trade benefits. Additionally, significant progress shown by some ASEAN countries in strengthening their copyright systems and

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<http://www.bedb.com.bn/news_readmore.php?id=284> accessed 2 April 2014.

[111] IIPA, '2014 Special 301 Report on Copyright Protection and Enforcement' (n 102) 194 and 199.

generally combating piracy provides an incentive to other countries to achieve similar success in their copyright reforms. This could greatly contribute to resolving the problem of copyright infringement and help improve and standardise copyright protection and enforcement in these ASEAN countries.

4.2.2.2 Patents

Since patent protection can be used to promote innovativeness and encourage FDI, ASEAN developing countries have continually developed their patent laws to conform with the international standards, especially after the TRIPs agreement was adopted. Nevertheless, in the early stages, patent systems of these countries developed diversely because of their distinct backgrounds and colonial histories. Patent laws of the countries that were previously colonised by western countries were most often modeled after the colonising country. For instance, before establishing its own independent patent system with the Patent Act 1983, the system in Malaysia was based on the re-registration of patented grant in the UK.[112] The patent system in Vietnam was originally governed by a system requiring re-registration of patents that had previously been granted in France due to the influence of the French colonisation of Vietnam.[113] Thailand, on the other hand, is the only country in the region to have not been colonised. In the early stages, its patent system was developed without pressure from other countries. 'The Patents Act 1979 (B.E. 2522)' was Thailand's first patent protection and was based on the WIPO model law for developing

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[112] Uma Suthersanen and Lim Heng Gee, 'The ASEAN States' in Uma Suthersanen, Graham Dutfield and Kit Boey Chow (eds), *Innovation Without Patents: Harnessing the Creative Spirit in a Diverse World* (Edward Elgar Publishing 2007) 169.
[113] ibid 176.

countries.[114] It has been suggested that Thailand passed this regulation to stimulate economic development of the country.[115]

The revolution of the patent systems of the ASEAN developing countries was also influenced by pressure from developed countries to strengthen patent standards. For instance, Vietnam's 2000 BTA with the US required it to amend its patent law to comply with TRIPs within the subsequent 12 months.[116] The ratification of the US – Vietnam BTA has been regarded as a major force behind improvement of patent protection and enforcement in Vietnam.[117] To comply with requirements imposed by the US for stronger patent protection, Indonesia reformed its patent system and passed the Patent Law No. 14 of August 2001.[118] One of the major changes of this legislation was an extension from 14 to 20 years of the period of patent protection. Indonesia also adopted the US patent approach by eliminating an exclusion from patentability for animal and plant varieties.[119] Thailand also amended its patent law in response to outside pressure from their major trading partners, particularly the US.[120] For instance, in 1992, Thailand reformed its patent system by including pharmaceutical

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[114] Endeshaw (n 23) 40.
[115] Julia Sorg, 'Thailand' in Paul Goldstein and Joseph Straus (eds), *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009) 304.
[116] USA International Business Publications, *Us Vietnam Economic and Political Cooperation Handbook* (Int'l Business Publications 2007) 43.
[117] Thi Lan Anh Tran, 'Vietnam's membership of the WTO: an analysis of the Transformation of a Socialist Economy into an Open Economy with Special Reference to the TRIPS Regime and the Patent Law' (PhD Thesis, University of Leeds 2009) 200.
<http://etheses.whiterose.ac.uk/2688/1/uk_bl_ethos_509876.pdf> accessed 6 May 2014.
[118] Endeshaw (n 23) 18.
[119] ibid.
[120] Jakkrit Kuanpoth, *Patent Rights in Pharmaceuticals in Developing Countries: Major Challenges for the Future* (Edward Elgar Publishing 2010) 106.

products as patentable subject matter in response to pressure from the US government.[121]

Additionally, as WTO member countries, the ASEAN developing countries were also required to adhere to TRIPs when it came into force in 1995. In 1999, the Thai Patent Act 1979 was reformed to make its patent system align with the TRIPs agreement.[122] Among the ASEAN countries in this group, Vietnam was the last country to join the WTO. It did so in January 2007. In order to prepare for accession to the WTO, Vietnam reformed its IP law and issued the IP Law 50/2005, which provided more comprehensive legislation on patents and other IP rights.[123] After this reformation, all the patent provisions of TRIPs were fully incorporated into Vietnam's patent law. This represented significant progress in the development of the patent system in Vietnam.

In addition to the difficulties caused by implementing the minimum standards of the TRIPs agreement, the TRIPs-Plus standard has also created challenges for ASEAN developing countries. Trade negotiations with developed countries, particular the US, often result in obligations to implement a patent standard that exceeds TRIPs. Vietnam is the only ASEAN developing country that has signed a bilateral trade agreement with the US. BTA US-Vietnam requires Vietnam to provide greater patent protection in some aspects than that provided in the TRIPs agreements. For instance, in order to ensure patent protection on life forms, Vietnam is required to include

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[121] Duangrat Laohapakakul, 'United States - Thailand Free Trade Agreement Negotiations: Potential Effects on Pharmaceutical Patent Protection in Thailand' (2006 Third Year Paper, Harvard University) <http://dash.harvard.edu/bitstream/handle/1/8889472/Laohapakakul06.html?sequence=2> accessed 1 May 2014.
[122] ibid.
[123] Nguyen Nguyet Dzung, 'Vietnam Patent Law*:* Substantive Law Provisions and Existing Uncertainties' (2007) 6 Chi-Kent J Intell Prop 138, 140-141.

plants and animals as patentable subject matter. There are additional FTAs presently in negotiations between ASEAN developing countries such as Thailand and Malaysia, and the US and the EU that impose TRIPs-Plus patent standards. For instance, FTA negotiations between Thailand and the EU would require Thailand to extend the term of protection for drug patents to 25-30 years. This could adversely affect access to affordable generic medicine in Thailand.[124] The negotiations on US-Malaysia FTA also contained TRIPs-Plus provisions in the area of compulsory licensing (CL).[125] Harsh restrictions on CL would undermine its ability to utilise TRIPs CL flexibility to address public health crisis.[126] This would adversely affect access to affordable medicines in Malaysia. If these agreements are adopted, these ASEAN developing countries would be obliged to provide stronger patent protection, especially in the area of pharmaceuticals, which could have a negative impact on the public health systems of those countries. Hence, before an ASEAN developing country agrees an FTAs with developed countries, it must carefully weigh the potential trade benefits of the trade agreements against potential harm to the public interest.

Furthermore, all ASEAN countries in this group have already acceded to the Patent Cooperation Treaty (PCT). The PCT provides unified procedures for filing patent application. It allows a grant of protection encompassing all designated contracting states with the filing of a single international application. This simplified procedure provides benefits for the individual countries, its residents and non-resident inventors

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[124] Vieuws, 'EU-Thailand: Round three of trade talks kicks off' <http://www.vieuws.eu/eutradeinsights/eu-thailand-round-three-of-trade-talks-kicks-off/> accessed 5 May 2014; National Health Commission Office of Thailand, 'The Ministry of Public Health opposes the Thai-EU FTA and a Thai Pharmaceutical Manufacturers Association warns the government not to look only at short-term export benefits' <http://en.nationalhealth.or.th/node/290> accessed 8 April 2016.

[125] Michael F. Martin, 'The Proposed U.S. – Malaysia Free Trade Agreement' (2009) CRS Report RL33445, 7.

[126] ibid.

alike. By gradually modernising their patent laws to conform with the international standard, these countries experienced a continual increase in patent application, especially non-resident applications.[127] For instance, the number of patent filings in Indonesia from both domestic and foreign applicants continually rose during the ten-year span of 2001-2010.[128] After ratifying the PCT in 1997, most of patent applications, particularly foreign applications were filed via the PCT route.[129] The volume of patent applications filed and granted in Thailand also increased each year from 2009 to 2012.[130] Thailand ratified the PCT in 2010, and the proportion of foreign patent applications in Thailand via the PCT has significantly increased.[131]

All in all, ASEAN developing countries have been able to provide adequate patent protection consistent with the international standard, particularly the standard of the TRIPs agreement. These countries recognised the importance of patent rights and have continuously developed their patent systems to seek better protection. Given the PCT registration system meets international standard and is accepted by many countries, by becoming a contracting party to the PCT, it affirms that ASEAN developing countries' patent laws are increasingly brought into line with international standards. However, trade negotiations between developing countries and their major trading partners are ongoing. If successfully concluded, these ASEAN countries will

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[127] USPTO, 'Global Intellectual Property Perspectives and Strategies' (4th Global Forum on IP**,** August 2013) <http://www.uspto.gov/news/speeches/2013/rea_singapore.jsp> accessed 6 May 2014.
[128] WIPO, 'Statistical Country Profiles: Indonesia' <http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=ID> accessed 8 August 2016.
[129] Kenan Institute Asia, *Comparative Assessment Study of Patent and Trademark Offices in Southeast Asia* (Bangkok, Kenan Institute Asia 2012) 44.
[130] Thanomsak R. and Panun Y., 'Effective Utilization of the Patent Cooperation Treaty (PCT) and International Sharing Initiatives' (Tokyo, November 2013) <http://www.wipo.int/edocs/mdocs/aspac/en/wipo_reg_pct_tyo_13/wipo_reg_pct_tyo_13_t2j.pdf> accessed 6 May 2013.
[131] ibid.

need to establish patent regimes which provide for protection exceeding the TRIPs standard in exchange for tariff reductions and other trade benefits. Too stringent standard in some areas, particularly protection for pharmaceuticals may adversely affect public health and access to medicine in these countries.

4.2.2.3 Trademarks

In the early stages, the trademark protection revolution developed differently in the developing countries because of their distinct historical backgrounds and their particular national interests. For instance, the first Trademark Act of Indonesia was influenced by Dutch law even after Indonesia became an independent state.[132] The Trademark Act 1976 was passed in Malaysia to repeal British colonial laws, but it still essentially adopted the concept of the UK Trademark Act 1938.[133] In Thailand the Trademark Act B.E. 2474 (1931) was revised in 1961 based on the UK Trademark Act 1905.[134] This reflects the longstanding and continual influence of western countries on IP rights in the ASEAN region.

In the post-TRIPs era, each country has reformed its trademark system to bring its law in line with the global standard, which has resulted in an increased level of trademark protection. For example, before the TRIPs agreement was adopted, the old trademark law of Thailand failed to provide adequate protection and enforcement. The Thailand Trademark Act 1961 included no legal cause of action to the rights holder for

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[132] Antons (n 92) 204.
[133] Endeshaw (n 23) 20.
[134] ibid 38.

trademark infringement.[135] This fell below the international minimum IP standard. Article 41 of TRIPs requires member states to provide the rights holder with measures to enforce their trademark against infringement. Similarly, the IP code of Philippines was passed in 1997 to strengthen its IP protection and to comply with the TRIPs agreement. It reflected significant changes to its trademark law.[136]

ASEAN developing countries also modernised their laws to extend trademark protection to non-traditional marks. This broad protection is consistent with the TRIPs standard, which does not limit trademark subject matter to signs that are visually perceptible.[137] However, not all type of non-traditional marks are protected in these countries. For instance, Section 4 of the Thailand Trademark Act B.E. 2534 (1991), as amended by the Trademark Act (No. 3) B.E. 2559 provides that combinations of colour, shapes, sound or configurations of objects can be eligible for trademark protection. Other types of non-traditional marks such as smell and taste are not yet recognised. In Philippines, some kinds of non-traditional marks such as three-dimensional shapes and holograms can be granted trademark protection.[138] Since the definition of trademark is limited to 'visible sign' in accordance with Section 121(1) of the IP Code, non-traditional marks that are not visible such as sound and smell are not capable for trademark registration in Philippines.[139] Due to wide acceptance of non-conventional marks in the international arena, there have been attempts to broaden trademark protection to cover other types of non-traditional marks, especially non-visual marks. Thailand is an example. Protection of smell and sound marks have

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[135] Andrea Morgan, 'Trips to Thailand: The Act for the Establishment of and Procedure for IP and International Trade Court' (1999) 23 Fordham Int'l L J 795, 802.
[136] Endeshaw (n 23) 27.
[137] Article 15(1) of the TRIPs Agreement.
[138] Section 124 of the Intellectual Property Code of the Philippines
[139] APEC Intellectual Property Experts Group and APEC Committee on Trade and Investment, 'Report for APEC Survey on Non-Traditional Trade Marks' (2008) APEC#208-CT-01.1, 9.

been included in the latest draft of the Thailand's Trademark Act.[140] However, only sound marks was included in the amendment of the definition of mark the Thailand Trademark Act B.E. 2534 (1991), as amended by the Trademark Act (No. 3) B.E. 2559. The expanded trademark protection to include sound marks represents a noteworthy development in the trademark system in Thailand. Philippines also recognised the need to amend the law to cover non-visual signs like sounds, scents and tastes in order to respond the needs of all stakeholders.[141]

Trademark laws in ASEAN developing countries have been modernised to conform with international standards, particularly the TRIPs agreement, but they still struggle with ineffective and inadequate enforcement. For instance, Thailand, Indonesia and Vietnam are known to be prime markets for selling counterfeit products. They are regarded as significant exporters in the counterfeit industry. As a result, Thailand and and Indonesia remained on the US priority watch list included in the 2016 US Annual Special 301 Report.[142] Vietnam remained on the Watch List.[143] These countries were urged by the US to improve enforcement measures and address the growing rate of trademark infringement resulting from the sale of counterfeit goods on the Internet.[144] This clearly demonstrates that the overall level of IP enforcement in ASEAN developing countries needs to be improved.

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[140] Say Sujintaya and Jantapa Erjongmanee, 'Non-traditional trademarks: Registering sounds and smells' *Bangkok Post* (21 May 2012) <http://www.bangkokpost.com/business/economics/294348/non-traditional-trademarks-registering-sounds-and-smells> accessed 6 May 2014.
[141] INTA, 'Trademark Office Profile: Intellectual Property Office of the Philippines (IPOPHL)' <http://www.inta.org/INTABulletin/Pages/TrademarkOfficeProfileIntellectualPropertyOfficeofthePhilippinesIPOPHL.aspx> accessed 24 March 2016.
[142] USTR, '2016 Special 301 Report' (2016) 3 <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf> accessed 2 May 2016.
[143] ibid.
[144] ibid 16-17, 50.

Moreover, to ensure that ASEAN remains an active player in the international IP community, ASEAN members had a commitment to accede to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks by 2015 in accordance with the ASEAN IPRs Action Plan 2011-2015. Up to now, Vietnam and Philippines are the only ASEAN developing countries that have joined. Thailand has been preparing for accession to the Madrid system for many years and previously aimed to join the agreement in the latter part of 2014.[145] However, as of the present, Thailand has not yet acceded. The Madrid Protocol obligates contracting parties to revise their trademark systems and infrastructures to meet its required standards. Vietnam has established a new IP division to address international trademark applications under the Madrid System.[146]

Generally, ASEAN developing countries have continually modified their trademark systems to conform with the international standard. Some countries such as Philippines and Vietnam have demonstrated significant progress in trademark protection and have engaged in trademark harmonisation at a multilateral level. Moreover, accession to international agreements is a key trend that significantly contributes to IP modernisation. These ASEAN member states joining the Madrid Protocol will substantially improve their trademark systems and bring their trademark protections closer to the standards set by developed countries. However, although the ASEAN developing countries have comprehensive trademark legislation, they still face varying degrees of problems with enforcement. This disparity in enforcement

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[145] Sukontip Jitmongkolthong, Titirat Wattanachewanopakorn and Wiramrudee Mokkhavesa, 'Regional Focus: Southeast Asia' in World Trademark Review, Anti-counterfeiting 2013 - A Global Guide (Globe Business Publishing 2014) 54.

[146] Barbara Bennett, 'Study on Accession to Madrid System for the Internal Registration of Marks' (The World IP Organisation) 29 <http://www.wipo.int/export/sites/www/freepublications/en/marks/954/wipo_pub_954.pdf> accessed 6 May 2014.

and in the general IP standard inhibits harmonisation among the ASEAN countries themselves as well as with developed countries.

4.2.2.4 Geographical Indications (GIs)

The ASEAN region is rich in natural resources and traditional knowledge. These can be transformed into products with distinctive qualities. As such, GIs protection is essential. Granting GIs protection to these products can provide economic value to the communities and promote economic development of the countries. Providing incentives for communities to produce traditional products can help support rural development,[147] and thereby facilitate economic growth of a country. For instance, Malaysia has abundant natural resources. It understands that the agricultural sector has made a substantial contribution to its economic growth and development.[148] Consequently, it made a significant change to its GIs law to protect its natural resources and conform to the international standard.[149] Other ASEAN developing countries have recognised the importance and benefits of GIs and hence pursue improvements in this area. An enhancement of the level of GIs protection would have a positive impact on their economies.[150]

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[147] Cerkia Bramley, 'A Review of the Socio-economic Impact of Geographical Indications: Considerations for the Developing World' (The WIPO Worldwide Symposium on Geographical Indications June 22 – 24 2011, Lima, Peru) 6 <http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_lim_11/wipo_geo_lim_11_9.pdf> accessed 11 February 2016.

[148] Nor Azlina bt Mohd Noor and Ahmad Shamsul bin Abd. Aziz, 'Intellectual Property Rights and Agro-based Natural Product: Malaysia Legal Perspective' (2011) 4 J Pol & L 138, 138.

[149] ibid 140.

[150] Malobika Banerji, 'Geographical Indications: Which Way Should ASEAN Go?' (2012) BC Intell Prop & Tech F 1, 10.

The TRIPs agreement is considered the first international instrument to provide comprehensive GIs protection.[151] When ASEAN developing countries adopted TRIPs, they became obligated to reform their system and increase their level of GIs protection to align with the TRIPs standard. Malaysia and Thailand have established *sui generis* systems for the protection of GIs.[152] Contrarily, some other countries such as Philippines have not devised a separate system for GIs protection. Section 123.1(g) of Philippines IP Code states that GI can be protected under its trademark system. Thailand can be considered the leading ASEAN developing country in enhancing of its GIs protection. It devised a *sui generis* system of GIs through the enactment of the Protection of Geographical Indications Act B.E. 2546 (2003). The implementation of GIs protection in Thailand is moving forward. From 2004 to 2013, the volume of GIs applications continuously increased, especially Thai GIs applications.[153] Domestically, there are now 42 Thai registered GIs and 8 foreign registered GIs.[154] Additionally, Thailand has been granted GIs protection in the EU for Khao Hom Mali Thung Kula Ronghai Jasmine Rice, Doi Chaang and Doi Tung Coffee. This represents Thailand's international success in promoting its GIs, which enhances the country's competitive capacity and reputation in the global market.

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[151] Albrecht Conrad, 'The Protection of Geographical Indications on the TRIPs Agreement' (1996) 86 TMR 11, 46.
[152] Thitapha Wattanapruttipaisan, 'Trademarks and Geographical Indications:
Policy Issues and Options in Trade Negotiations and Implementation' (2009) 26 ASEAN Development Review 166, 170-171.
[153] ASEAN IP Portal, 'ASEAN Geographic Indications (GIs)'
<http://www.aseanip.org/ipportal/index.php?option=com_content&view=article&id=212&Itemid=69> accessed 4 May 2014.
[154] Pajchima Tanasantihttp, 'Geographical Indications – Where Do We Stand Today?' Department of Intellectual Property Thailand
<http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bkk_13/wipo_geo_bkk_13_5.pdf > accessed 6 May 2014.

GI is considered a powerful economic asset. It is usually addressed during FTA negotiations between developed countries, particularly those of the EU and ASEAN developing countries. The EU is perceived to be the world's leader in seeking stronger GIs protection through BTAs. It has continuously pursued FTA negotiations with ASEAN developing countries such as Malaysia, Thailand, and Vietnam. A key issue in these negotiations is often the TRIPs-Plus GIs protection standard. For instance, Vietnam is one of the EU's major trade partners in the wine and spirit industries. FTA negotiations between the EU and Vietnam require Vietnam to enhance its level of GIs protection in these industries to ensure more effective enforcement.[155] It has recently been announced that these FTA negotiations between the EU and Vietnam have concluded.[156] ASEAN countries have developed their GIs protections to conform to the TRIPs standard. However, if trade agreements with developed countries are reached, these ASEAN countries will be required to further strengthen their GIs systems and protections. This could increase disparity in the systems of the ASEAN member states, especially the countries that have weak GIs protection, and thus adversely affect the standardisation of the IP system within ASEAN. However, since ASEAN countries are full of unique agricultural and cultural products, foodstuffs, textiles and handicrafts, strengthening GIs protection might be advantageous and have a positive impact on economic development. For instance, if finalised, the EU-Vietnam FTA would protect 39 Vietnam's GIs in the EU.[157] This will help promote Vietnamese products, which are mostly agricultural and foodstuffs,

[155] Spirits Europe, 'Position Summary on the EU-Vietnam FTA' (2013) 4.
[156] European Commission, 'Countries and regions: Vietnam' <http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/> accessed 15 October 2015.
[157] Nick Redfearn, 'EU Vietnam FTA signed' (7 October 2015) <http://www.lexology.com/library/detail.aspx?g=c8efefdf-1849-4dd0-8338-3b6595a390c0> accessed 5 April 2016; 'Vietnam Manufacturing, 'The EU-Vietnam Free Trade Agreement (EVFTA)' (*Vietnam Manufacturing,* 18 August 2015) <http://vietnam-manufacturing.com/policy-news-slug/the-eu-vietnam-free-trade-agreement-evfta/> accessed 19 October 2015.

in the EU market, and thus provide a positive effect on its economic growth and development. Moreover, GI was claimed to be 'the best legal tool for the protection' of goods in developing countries.[158] A high level of GIs protection will provide an opportunity for GIs owners from developing countries to protect their products in foreign markets.[159] This has been used to support the argument that strengthening GIs protection consistent with the existing EU GIs law can benefit developing countries.[160] Consequently, compared to other areas, immediately enhancing GIs protection tends to provide more economic benefits to developing countries. However, such benefit might be hindered by a lack of sufficient administrative capacity and IP infrastructure to manage and enforce new laws. Therefore, more technical assistance from developed countries will be required.

4.2.3 ASEAN Members Classified as a Least Developed Country

The United Nations (UN) has categorised Cambodia, Lao PDR and Myanmar as 'least developed countries'. The UN used low income per capita (less than $1,035 measured by GNI per capita), weakness in human assets, and economic vulnerability as the three criteria to so categorise these countries.[161] In 2014, the World Bank classified Lao PDR and Myanmar as 'lower middle-income' countries based on their GNI per

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[158] Kaitlin Mara, 'Advocates Say Geographic Indications Will Benefit Developing Nations' (2008) <Intellectual Property Watch http://www.ip-watch.org/2008/07/11/advocates-say-geographical-indications-will-benefit-developing-nations/> accessed 15 June 2016.
[159] Michael Handler, 'Rethinking GI Extension' in Dev S. Gangjee, *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar Publishing) 175.
[160] ibid.
[161] UN, 'LDC Criteria' <http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml> accessed 13 May 2016.

capita of $1,046 - $4,125.[162] Lao PDR and Myanmar both have demonstrated significant economic development. Lao PDR's GNI per capita rose to $1,260 in 2012.[163] Myanmar's GNI per capita rose to $1,270 in 2014.[164] This development resulted in the change of the World Bank classification from 'low-income' country to 'lower-middle income' country. Meanwhile, Cambodia remained a 'low-income' country with GNI per capita of $1,045 or less.[165]

According to the UN's 2015 Human Development Report, Lao PDR, Cambodia, and Myanmar were ranked 141, 143 and 148 out of 188 countries respectively in terms of human development. Lao PDR and Cambodia were classified as 'medium human development' countries, whereas Myanmar was classified as a 'low human development' country.[166] Lao PDR and Cambodia have made substantial improvements in human development due to their continuous growth in GNI per capita, life expectancy and educational attainment.[167] All of these ASEAN least developed countries were classified as 'developing economies' in the 2013 IMF's World Economic Outlook Report.[168] Additionally, the Global Competitiveness Report 2013-2014 by the World Economic Forum lists Lao PDR, Cambodia and Myanmar as

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[162] The World Bank 'Country and Lending Group' < http://data.worldbank.org/about/country-and-lending-groups#Lower_middle_income > accessed 7 February 2016.
[163] The World Bank, 'Lao PDR' <http://data.worldbank.org/country/lao-pdr> accessed 6 May 2014.
[164] The World Bank, 'Myanmar' < http://data.worldbank.org/country/myanmar> accessed 7 February 2016.
[165] The World Bank, 'Low Income' <http://data.worldbank.org/income-level/LIC> accessed 6 May 2014.
[166] UNDP, *Human Development Report 2015: Work for Human Development* (n 13) 49.
[167] UNDP, 'Steady growth in human development for Lao PDR, inequality slowing down progress' <http://www.la.undp.org/content/lao_pdr/en/home/presscenter/pressreleases/2013/03/22/steady-growth-in-human-development-for-lao-pdr-inequality-slowing-down-progress/>; UNDP, 'Work underway for Cambodia Human Development Report 2014' <http://www.kh.undp.org/content/cambodia/en/home/presscenter/articles/2013/08/08/work-underway-for-cambodia-human-development-report-2014.html> accessed 6 May 2014.
[168] IMF, 'All countries / Emerging market and developing economies / Emerging and developing Asia' <http://www.imf.org/external/pubs/ft/weo/2014/01/weodata/weoselco.aspx?g=2505&sg=All+countries+%2f+Emerging+market+and+developing+economies+%2f+Emerging+and+developing+Asia> accessed 5 May 2014.

the 81st, 88th and 139th ranked economies out of 148 countries. Lao PDR's IP regime was ranked the highest among ASEAN least developed countries at 64th,[169] whereas Cambodia's and Myanmar's IP regimes were ranked 99th[170] and 126th[171] respectively. This affirms a correlation between the efficiency of a country's IP system and the country's competitiveness.

Myanmar, Cambodia and Lao PDR are all members of the WTO. Lao PDR is the last ASEAN country to join the WTO in 2013. Consequently, they are all obliged to implement IP protection in conformity with the TRIPs agreement. However, because the WTO has classified these countries as 'least developed' countries. Article 66.1 of TRIPs grants these countries until 1 July 2021 to conform to TRIPs. This is an extension of the previous deadline of 1 July 2013.[172] Therefore, upon application, these countries will have more time to standardise their IP laws to be in line with the international standard.

In general, even among the ASEAN least developed countries, there is still a lot of disparity in their levels of development. Lao PDR seems to have made the most significant progress in human, economic and IP development. It also has a goal of advancing from having 'least developed country' status to becoming a 'developing country' by 2020.[173] If this can be achieved, it would help reduce the development gap between the ASEAN least developed countries and the other member states.

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[169] Schwab (n 18) 245.
[170] ibid 145.
[171] ibid 289.
[172] WTO, 'Responding to least developed countries' special needs in Intellectual Property' <http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm> accessed 3 May 2014.
[173] The World Bank, 'Lao PDR Overview' <http://www.worldbank.org/en/country/lao/overviewaccessed> accessed 3 May 2014.

4.2.3.1 Copyright

Compared to ASEAN developed and developing countries, the ASEAN least developed countries have developed their IP systems more slowly. Copyright protections exist in Lao PDR, Cambodia and Myanmar, but there are discrepancies in the protection standards resulting from the members' distinct historical backgrounds and particular national interests. For instance, due to its colonial history, Myanmar's Copyright Act 1914 was developed based on the UK Copyright Act 1911.[174] The Myanmar Copyright Act 1914 is still in force. Meanwhile, the development of copyright protection in Cambodia just began in 2003 when the Copyright and Related Rights Act of March 5, 2003 was enacted.[175] This Act was influenced by the Continental European author's right tradition.[176] Compared to the Myanmar Copyright Act, the Cambodia copyright Act is better developed. The Cambodia copyright law was issued prior to Cambodia's accession to the WTO, therefore the law provides provisions that are consistent with a WTO member commitment.[177] Lao PDR joined the Universal Copyright Convention (UCC) in 1954, but copyright did not become a relevant issue until the enactment of the new Lao PDR IP Code.[178]

Myanmar, Cambodia and Lao PDR are members of the WTO and are required to provide copyright protection in conformity with the TRIPs standard within the

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[174] U Khin Maung Win, 'Copyright in Myanmar Since 1914' in Asia/Pacific Cultural Centre for UNESCO (ACCU), *Asian Copyright Handbook* (National Workshop for Copyright Awareness and Production and Utilization of Myanmar, Yangon, Myanmar, 7-9 September 2005) 40 <http://www.accu.or.jp/appreb/10copyr/pdf_ws0509/2_4_kin.pdf> accessed 6 May 2014.
[175] Peter Ganea, 'Cambodia' in Paul Goldstein and Joseph Straus (eds.) *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009) 5.
[176] ibid.
[177] European Commission, 'ASEAN IPR SME Helpdesk - IP Country Factsheet: Cambodia' (2013) 1 <http://www.asean-iprhelpdesk.eu/sites/default/files/publications/Cambodia%20Factsheet.pdf> accessed 6 May 2014.
[178] Peter Ganea, 'Laos' in Paul Goldstein and Joseph Straus (eds) *Intellectual Property in Asia: Law, Economics, History and Politics* (Springer 2009) 158.

previously extended transition periods. Among these countries, Myanmar seems to have weakest copyright protection. Although Myanmar has been a WTO member and a signatory to TRIPs since 1995, the Myanmar Copyright Law remains inadequate and inconsistent with the TRIPs agreement. The Myanmar Copyright Act 1914 contains only 13 Sections, which do not cover all copyright aspects as required by TRIPs.[179] Furthermore, absent reformation, this Act will not be able to adequately respond to new copyright issues arising in the modern digital, technological era.[180] In 2004, Myanmar began to address this and redrafted its law to ensure that its copyright protection coincided with the international standard. Myanmar's proposed, amended copyright law was based on the WIPO model law and the TRIPs agreement.[181] However, up to now, this new copyright law has not yet been passed. Cambodia and Lao PDR, which have been the members of the WTO since 2004 and 2013, respectively, modernised their copyright laws prior to their accession to the WTO. Cambodia issued the Copyright and Related Rights Act in 2003, the general copyright concepts and principles of which were modeled after the laws of other countries.[182] A significant development in copyright protection in Lao PDR occurred in 2011. The Law No. 01/NA on IP was passed of December 20, 2011. It provided copyright and related rights protection consistent with the WIPO model law and the

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[179] Kyi Thwin, 'Current status of the preparation for the accession to the Madrid System (Myanmar)' <http://www.wipo.int/edocs/mdocs/aspac/en/wipo_inn_tyo_09/wipo_inn_tyo_09_ref_myanmar.pdf> accessed 5 May 2014.

[180] Thein Aung, 'Country Report' (18th Recognised Country Group of APAA, 2012) 5 <http://www.apaaonline.org/pdf/2012/Reports_of_the_Recognised_Groups_2012/MyanmarRecognizedGroupReport_2012.pdf> accessed 5 May 2014.

[181] U Khin Maung Win, 'Copyright in Myanmar Since 1914' in --, *Asian Copyright Handbook* (National Workshop for Copyright Awareness and Production and Utilization of Myanmar, Yangon, Myanmar, 7-9 September 2005) 43 <http://www.accu.or.jp/appreb/10copyr/pdf_ws0509/2_4_kin.pdf> accessed 6 May 2014.

[182] Sotheavy Chea, *Guide to Business in Cambodia* (BNG Legal, 2010) 40 <http://www.academia.edu/1570009/Guide_to_Business_in_Cambodia> accessed 4 May 2014.

TRIPs requirements. [183] This clearly shows the diversities in the levels of copyright protection that currently exist in the ASEAN least developed countries.

In general, there have been significant developments in copyright in these countries over the past few years. Particularly developed countries, however, have a different perspective. It is viewed that copyright protection and enforcement in ASEAN least developed countries, particularly Myanmar is still inadequate and ineffective. Foreign copyrights are still not recognised under the current copyright law of Myanmar.[184] Furthermore, although Lao PDR have modernised its IP law to meet the international standards, deficiency in effective IP administrative capacity and infrastructure still leads to weak enforcement of IP rights.[185] Although Cambodia has shown significant development in the area of IP rights, it is still in the early steps of the standardisation.[186] Cambodia still faces the problem of the enforcement of IP rights due to its lack of effective IP administration and infrastructure.[187] Copyright infringement in Cambodia is widespread.[188] A wide variety of products pirated from other countries such as music and videos, are sold throughout the country.[189] This adversely affects the image of the country in the international arena. However, due to

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[183] WIPO, 'Lao People's Democratic Republic: Intellectual Property Laws' <http://www.wipo.int/wipolex/en/details.jsp?id=5890> accessed 6 May 2014.
[184] European Commission, 'ASEAN IPR SME Helpdesk Guide: Guide to Copyright Protection in Southeast Asia (2014) 5 <http://southeastasia-iprhelpdesk.eu/sites/default/files/publications/Copyright-English.pdf> accessed 9 May 2016.
[185] The South-East Asia IPR SME Helpdesk, 'ASEAN IPR SME Helpdesk - IP Country Factsheet: Laos' (2014) 1 <http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Laos%20Factsheet.pdf> accessed 29 July 2016.
[186] Ganea, 'Cambodia' (n 175) 1.
[187] European Commission, 'ASEAN IPR SME Helpdesk - IP Country Factsheet: Cambodia' (n 170) 1.
[188] Ganea, 'Cambodia' (n 175) 2.
[189] Ipinfos, 'Copyright infringement in Cambodia' <http://www.ipinfos.com/copyright-infringement-cambodia.html> accessed 6 May 2014.

the small size of the market, Cambodia has not been much criticised by the international trade community.[190]

In order to enhance their social and economic development, ASEAN 'least developed countries' have acknowledged that an improvement in IP protection is an urgent need. Nevertheless, due to a lack of experience, resources and infrastructure, the revolution of IP laws is proceeding slowly, particularly in Myanmar. Comprehensive legislation regarding copyright protection was enacted in Lao PDR and Cambodia, but those laws are not effective and particularly do not effectively deal with copyright infringement. Therefore, more assistance from developed countries and international organisations is urgently required to bring the level of copyright protection and enforcement in these ASEAN countries in line with international standards.

4.2.3.2 Patents

Since patents can promote innovation and economic growth, Lao PDR, Cambodia and Myanmar consider patent protection as one of their important policies. However, due to differences in each country's background and capacity, the scope and standard of their patent systems are varied. Among these countries, Myanmar seems to have weakest patent protection. Although Myanmar issued the Myanmar Patents and Design Act 1945 and the Myanmar Patents and Designs (Emergency Provisions) Act 1946, they did not deal with patents effectively in practice. The 1945 Act was not brought into force and repealed in 1993.[191] The Act of 1946 is still existing in

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[190] Ganea, 'Cambodia' (n 175) 2.
[191] WIPO, 'Country: Myanmar'< http://www.wipo.int/export/sites/www/ip-development/en/pdf/asean/myanmar.pdf> accessed 9 February 2016.

Myanmar. It came into force when the Act of 1945 was repealed in 1993.[192] However, this Act is essentially defunct.[193] Since then, Myanmar has begun to draft new patent law in conformity with the TRIPs standard.[194] Unfortunately, this law has not been passed. Currently, there is no effective patent law in Myanmar. However, patents may be registered under Section 18(f) of the Registration Act.[195]

Cambodia enacted the Patents, Utility Models and Industrial Designs Act in 2003 in order fulfill the requirements of the WTO. This Act provides a comprehensive set of regulations governing patent protection that comply with international standards. However, Article 4 of this Act, excludes pharmaceutical products from patentable subject matter until 2016. Since drug patent waiver for least developed countries was extended until 2033, least developed countries can choose whether or not to protect pharmaceutical patents before 2033. Therefore, Cambodia's law is not contrary to TRIPs. Cambodia is still in the period to transition to compliance with TRIPs. The country still has time to utilise this transition period, reform its law and develop its ability to manufacture medicine. Furthermore, from 2007 to 2014, most patent applications came from non-residents.[196] There were only three patent application filings from Cambodian residents.[197] Although Cambodia has taken steps to

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[192] WIPO, 'Myanmar: Patents and Designs (Emergency Provisions) Act of 1946' <http://www.wipo.int/wipolex/en/details.jsp?id=6177> accessed 6 April 2016.
[193] See WIPO, 'Country: Myanmar' (n 191).
[194] WIPO, 'Myanmar: Patents and Designs (Emergency Provisions) Act of 1946' (n 192).
[195] ASEAN Intellectual Property Association, 'IP guides in Myanmar' <http://www.aseanipa.org/index.php/members/thailand1/560-ip-guides-for-myanmar> accessed 5 April 2016; Saweeya Benhar, 'All the news Brief overview of the patent system in Myanmar' <http://www.vidon.com/en/news/160-brief-overview-of-the-patent-system-in-myanmar.html> accessed 17 June 2014.
[196] WIPO, 'Statistical Country Profiles: Cambodia' <http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=KH> accessed 8 August 2016.
[197] ibid.

modernise its patent system since 2003, its first patent was not granted until 2015 and it was to a Singaporean.[198]

Lao PDR has continually taken steps to conform its patent system to the international standard since 2002. Detailed provisions governing patent protection were included in the new IP code of the Lao PDR as amended in 2011, but similar to Cambodia's law, pharmaceutical products are not eligible for patent protection.[199] As a 'least developed' country, Lao PDR still has time to satisfy its obligations until 2033. However, Lao PDR recognised the need to provide patent protection in the area of pharmaceutical products in order to receive benefits from TRIPs flexibilities for access to medicine.[200] Additionally, the modernisation of its patent system resulted in a continual increase in patent applications since 2004, especially in foreign patent application.[201] Lao PDR has shown further progress in developing its international patent system by acceding to the Patent Cooperation Treaty (PCT) in 2006. Since then, more than a hundred international patent applications designating Lao PDR have been filed under the PCT.[202] The international patent system of the PCT can have advantages to nationals of least developed countries who pay reduced patent

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[198] IPOS, 'First Singapore patent recognised in Cambodia' <https://www.ipos.gov.sg/MediaEvents/Readnews/tabid/873/articleid/304/category/Press%20Releases/parentId/80/year/2015/Default.aspx> accessed 15 October 2015.

[199] Ministry of Industry and Commerce, Foreign Trade Policy Department, 'Lao Trade Magazine' (2010) 4 <http://laosaft.org/documents/magazineIsue3.pdf> accessed 18 October 2015

[200] ibid.

[201] Department of Intellectual Property Standardization and Metrology, National Authority for Science and Technology (NAST), 'Patent System in Lao PDR' <http://www.wipo.int/edocs/mdocs/aspac/en/wipo_inn_bkk_10/wipo_inn_bkk_10_ref_lao.pdf> accessed 29 July 2016.

[202] Department of IP Intellectual Property, Ministry of Science and Technology, 'Effective Unitilisation of the Patent Cooperation Treaty (PCT) and International Work Sharing Initiatives' (26-18 November 2013, Tokyo) <http://www.wipo.int/edocs/mdocs/aspac/en/wipo_reg_pct_tyo_13/wipo_reg_pct_tyo_13_t2e.pdf> accessed 19 October 2015.

application fees.[203] This can encourage patent filings in these countries and promote innovation and the transfer of technology. However, in spite of the increased number of application, no patent has been granted in Lao PDR.[204] The major reasons for delays in the examination and grant of patent applications were lack of well-trained examiners and inadequate information technology (IT) infrastructure to facilitate patent procedure.[205]

An increasing number of patent applications affirms that strengthening patent protection can create a more attractive investment environment, and thereby attract FDI. Nonetheless, the minimal number of patents that have been granted demonstrates weak institutional capacity in patent administration. The patent system is not yet effective in promoting innovation and enhancing economic growth in ASEAN least developed countries. Patent infringement is not yet a serious issue in ASEAN least developed countries. They lack sufficient indigenous innovative and technological capacity to violate foreign patent rights.[206]

ASEAN least developed countries are still at the early stages of standardisation, and lack sufficient IP administrative capacity and infrastructure. Moreover, they generally lack the capacity and resource to utilise patents for promoting innovation and technological transfer. Therefore, in order to help improve the patent administration of ASEAN least developed countries, more assistance from experienced developed, developing countries, and international organisations is required. Furthermore, patent systems of least developed countries should be developed while striking a balance

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[203] Ganea, 'Laos' (n 178) 157.
[204] WIPO, 'Statistical Country Profiles' <http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=LA> accessed 5 April 2016.
[205] Kenan Institute Asia (n 129) 60.
[206] See Ganea, 'Cambodia' (n 175) 2.

between their particular national interest and the other benefits of providing a high level of patent protection.

4.2.3.3 Trademarks

Trademark law in Myanmar, Cambodia and Lao PDR have been diversely developed. As a result, there are disparities in the level of trademark protection among these countries. Presently, Myanmar has no specific trademark law. Trademark can be registered under the Registration Act as a declaration of ownership. Existing laws provide no period of trademark registration.[207] However, in practice, trademark renewal is commonly accomplished through re-registration and re-publication once every three year after the first registration to show continuance of ownership.[208] The Registration Act cannot effectively deal with trademark matters because it does not maintain a database of examination processes and results. For instance, loopholes allow the same mark to be recorded by different owners.[209] However, with the assistance of the WTO, WIPO and other international organisations, Myanmar is currently drafting trademark legislation.[210] The draft regulation provides substantive trademark provisions in conformity with the TRIPs standards. Additionally, it incorporates the latest trademark protection approaches by allowing non-traditional marks, and visible and non-visible signs such as colours, combination of colours,

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[207] WIPO, 'Country: Myanmar' (n 191).
[208] ibid.
[209] Darani Vachanavuttivong, 'Trademarks in Myanmar: An Emerging Intellectual Property Regime' (2014) 1 <http://documents.lexology.com/7ca8ce2e-9f06-4a82-b475-ce2628bb864c.pdf#page=1> accessed 19 June 2014.
[210] Shwe Zin Ko, 'The Role of Trademarks in Myanmar: A Glance at the Trademark Registration System of Myanmar' <http://www.lawgazette.com.sg/2012-01/305.htm> accessed 19 June 2014.

sounds and smells to be registered as trademarks.[211] The law was expected to be enacted in 2015.[212] Nevertheless, it has not yet come into effect, and no new effective date has been set. If the draft trademark law can be passed, the level of trademark protection in Myanmar will significantly increase, thereby clearly evidencing progress and improvement in Myanmar's trademark system. Cambodia's Trademark, Trade Names and Acts of Unfair Competition Act was issued in 2002 and represents a significant development in its trademark system. This Act provides a comprehensive set of provisions regarding trademark protection that meet the requirements of TRIPs. Additionally, some non-traditional marks in visible forms such as three-dimensional marks, holograms and combinations of colours can be registered as a trademark.[213] This reflects Cambodia's development to be in line with the international standard. The number of trademark applications from both residents and non-residents has continuously increased since the Trademark Act was enacted in 2002.[214] Also noteworthy is Cambodia acceding to the Madrid Protocol in June 2015. This is considered a significant achievement in IP development for a 'least developed' country and one that surpassed expectations of a 'least developed' country.[215]

Similarly, Lao PDR has steadily developed its trademark system to align with international standards. The latest amendment of its trademark law was in 2011 when the Law No. 01/NA of December 20, 2011 on IP (as amended) was issued. This

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[211] Vachanavuttivong (n 209) 2.
[212] US Department of State, 'Burma Investment Climate Statement 2015' (2015 Investment Climate Statement) 16 <http://www.state.gov/documents/organization/241712.pdf> accessed 8 April 2016.
[213] Ella Cheong, 'Non-Traditional Trade Mark East Asian and Pacific Subcommittee 2008-2009' (INTA 2009) <http://www.inta.org/Advocacy/Documents/INTANontraditionalMatrixEastAsiaPacific2009.pdf> accessed 20 June 2014.
[214] WIPO, 'Statistical Country Profiles: Cambodia' (n 196).
[215] Darani Vachanavuttivong and Nearirath Sreng, 'Thailand: Cambodia's Swift Accession to the Madrid Protocol' <http://www.managingip.com/Article/3456797/Thailand-Cambodias-swift-accession-to-the-Madrid-Protocol.html> accessed 5 February 2016.

ensured that Laos' trademark law was consistent with the TRIPs Agreement and the Madrid Protocol and thus is noteworthy in the development of the Lao PDR's trademark system.[216] In December 2015, Lao PDR became a member of the Madrid Protocol and is the latest ASEAN country to do so. Joining the Madrid System is expected to help attract foreign investors by providing the requisite protection for the goods and services brought to Lao PDR.[217] This can be considered as a noteworthy achievement and an exceptional example of an ASEAN 'least developed' country incorporating itself into the international IP community.

Trademark infringement is still one of the most important problems facing these countries. Cambodia is a prime example. Although Cambodia has reformed its trademark protection to meet the requirement of the TRIPs agreement, 'trademark infringement is rampant in Cambodia'.[218] Despite having an IP law consistent with international standards, enforcement of IP rights remains a problem. Failure to rectify this problem will have a significantly negative impact on investment climate and FDI inflows in individual countries and in the entire region.

In general, Myanmar, Cambodia and Lao PDR have recognised the importance of trademark and have been zealous in strengthening their trademark systems. Cambodia and Lao PDR's success in joining the Madrid Protocol should be a point of reference for Myanmar in preparing for accession to the Madrid Protocol. Doing so will help bring trademark laws in ASEAN 'least developed' countries more in line with

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[216] Ratsamee Phanthavong, 'Current status of the preparation for the accession to the Madrid system of Lao PDR accession to the Madrid system of Lao PDR' <http://www.wipo.int/edocs/mdocs/aspac/en/wipo_tm_tyo_12/wipo_tm_tyo_12_z_lao.pdf> accessed 20 June 2014.
[217] WIPO, 'The Lao People's Democratic Republic Joins the Madrid System' <http://www.wipo.int/madrid/en/news/2015/news_0023.html> accessed 10 February 2016.
[218] Ganea, 'Cambodia' (n 175) 2.

international standards. Moreover, IP infringement should be treated more seriously to improve overall enforcement of IP rights. Having an effective mechanism to deal with the violation of IP rights is crucial to a successful system. Additionally, raising awareness of IP to make people respect other people's IP rights is also necessary.

4.2.3.4 Geographical Indications (GIs)

ASEAN 'least developed' countries have also recognised the importance of providing a GIs protection regime. However, GI is quite a new concept to these countries, and the development of these GIs systems are still at a nascent stage. Cambodia seems to have made the most significant progress in this area. It recently established a *sui generis* system for GIs by passing specific legislation dealing with GIs protection. The Law on Geographical Indications of Goods came into force in January 2014. The drafting process began in 2005 with technical and financial support from the French government.[219] Before the enactment of this law, GIs could be registered by following the specifics outlined in 'Prakas on the Procedures for the Registration and Protection of Marks of Goods which include a Geographical Indication'. The first two GIs in Cambodia were so registered in 2010. Nevertheless, only limited types of registrable subject matter could be registered under this order.[220] Moreover, the Prakas failed to provide a mechanism to address GIs infringement. Consequently, a small number of

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[219] Ministry of Commerce and Ministry of Agriculture, Forestries and Fishery, Fishery, 'Protected Geographical Indications in Cambodia' (2010) 3 <http://www.afd.fr/webdav/shared/PORTAILS/PAYS/CAMBODGE_2/PDF/Brochure%20GI%20-%20Cambodia%20-%20EN.pdf> accessed 20 June 2014.

[220] INTA, 'Cambodia: First Geographical Indications Registered' <http://www.inta.org/INTABulletin/Pages/CAMBODIAFirstGeographicalIndicationsRegistered.aspx> accessed 21 June 2014.

GIs have been registered since 2010.[221] Therefore, by passing its new GIs law, Cambodia has increased its standard of GIs protection and conformed it to international standards, particularly those of the TRIPs agreement. This should enhance GIs protection and result in an increase of applications to register GIs.

Lao PDR is also keen on developing GIs protection. GI has been more of a topic of concern since 2006 when the National Institute of IP of France assisted Lao PDR in drafting legislation on GIs.[222] GIs protection was initially recognised under Lao PDR law in 2007. This IP code provided a comprehensive set of regulations governing major areas of IP rights and was enacted in that year. Consequently, the number of GIs applications and registrations in Lao PDR has continuously increased.[223]

Myanmar has made the least progress in GIs protection. GI is quite new to Myanmar and they currently have no specific legislation governing GIs protection. However, Myanmar has recognised the importance of GIs protection. As reported by the International Trademark Association (INTA), there are provisions governing a registration system for GIs included in the Myanmar draft trademark law.[224] Prior to the effective date of the new trademark law, GIs protection can be granted based on prior use in Myanmar or through recordation with the Registry of Deeds and Assurance.[225] In 2013, 'Champagne' was the first GI officially granted protection in Myanmar through the recordation procedure of the Registry of Deeds and

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[221] ASEAN IP Portal (n 153).
[222] Khamnhong Sichanthavonghttp, 'Round table on Geographical Indications, Local Communities, Indications, Local Communities, and Small and Medium Sized and Small and Medium Sized Enterprises' (ASEAN–USPTO Workshop on Geographical Indications Bangkok, Thailand, 27-28 February 2007) <http//www.asean.org/archive/21489-9.pdf> accessed 20 June 2014.
[223] ASEAN IP Portal (n 153).
[224] INTA, 'Comments by the International Trademark Association on the Myanmar Draft Trademark Law', 4-6 <http://www.inta.org/Advocacy/Documents/January82013Comments.pdf> accessed 29 July 2016.
[225] Fabrice Mattei, 'Protection of Geographical Indications in Myanmar: soon a registration system in place' <http://winelexasia.blogspot.co.uk/2012_12_01_archive.html> accessed 21 June 2014.

Assurance.[226] Although Myanmar is still in the early stages of developing a GIs system, it is making progress and is determined to create a proper GIs regime.

ASEAN 'least developed' countries have generally recognised the potential benefits that they could derive from strengthening their GIs protection. Although these countries are in the early stages of developing GIs protection, IP awareness in this area is increasing. This demonstrates a positive trend towards establishing an adequate and effective GIs protection system, which would foster economic development in the ASEAN 'least developed' countries. The lack of sufficient IP administrative capacity and infrastructure dictates that external assistance from other ASEAN members is required. The EU is widely accepted as having the most advanced GIs system. Its assistance, along with that from other international organisations such as the WIPO, is also necessary if these countries wish to establish effective GIs protection.

4.2.4 Remarks

IP systems among the ASEAN countries have diversely developed. Most ASEAN countries developed their IP law based on their distinct colonial history, except for Thailand, which was never colonised. IP laws were mostly modeled after those of their mother country. Subsequently, even before the TRIPs agreement was adopted, ASEAN countries had to reform their laws. These countries were forced to yield to pressure from the EU, the US and other developed countries to increase their level of IP protection in order to continue trade partnerships beneficial to them. After the

[226] Fabrice Mattei, 'Champagne' is first GI to be officially protected' (2013) World Trademark Review Daily <http://www.rouse.com/media/54730/champagne_is_first_gi_to_be_officially_protected.pdf> accessed 24 June 2014.

TRIPs agreement was adopted, the ASEAN members that were members of the WTO were required to further reform their IP laws to conform to the TRIPs standard. Therefore, IP protection among the ASEAN countries became further homogenised.

Although most ASEAN countries enacted comprehensive IP law consistent with international standards, ASEAN 'developing' and 'least developed' countries still struggle with IP administration and enforcement. A lack of funds, experience, resources, and infrastructure contribute to ineffective administration and rampant IP infringement particularly copyright and trademark infringement. Thus, a wide gap in the development of IP protection and enforcement among the ASEAN countries remains. The gap is significantly wider between ASEAN 'developed countries' like Singapore and ASEAN 'least developed countries' such as Myanmar. By signing FTA with the US, some IP protection in Singapore exceeds the TRIPs standard. Meanwhile, the IP standard of Myanmar remains below international minimum standards. IP laws in Myanmar are quite outdated. There is still no specific law dealing with many areas of IP rights such as patents, trademarks and GIs. This is a clear reflection of the wide disparity in IP protection between ASEAN members and evidence of obstructed IP harmonisation at the regional level.

Notwithstanding, the disparity gap is showing a downward trend as all ASEAN members are members of the WTO. Lao PDR was the latest to join in 2013. Consequently, all ASEAN members are required to amend their IP laws to be in line with TRIPs. The IP laws in ASEAN 'least developed' countries in copyright, patents, trademarks and GIs still fall below international standards. However, these countries appear eager to upgrade their IP systems to be fully compliant with international requirements. Lao PDR and Cambodia have made significant progress towards

strengthening their IP protection, evidence of which is their acceding to the Madrid Protocol. Myanmar has shown the least and slowest IP development but is currently drafting new IP laws that conform to international standards. This shows that all of these ASEAN countries are on track to enhance their IP systems to meet the international standard. Participating in the international IP community in this fashion will decrease the disparity in IP laws and increase harmonisation of those laws in the ASEAN member states.

All in all, the standardisation of IP laws in ASEAN is trending upward. The current trend throughout the world is to use bilateral trade agreement, especially FTAs. FTAs will result in ASEAN members having to increase their level of IP protection beyond TRIPs in order to maintain good relations with their trade partners. This could impose a significant burden on ASEAN countries, particularly ASEAN 'developing' and 'least developed' countries, to immediately reform their IP systems to provide such an elevated level of protection. These countries generally lack of sufficient administrative capacity and infrastructure to implement these standards. Moreover, too stringent standards in some areas, particularly in pharmaceutical patents, could result in limited access to vital medicine at affordable prices. This would be contrary to the the public interest. Thus, before signing any trade agreement providing TRIPs-plus obligations, ASEAN countries, particularly 'developing' and 'least developed' members should carefully weigh potential trade benefits of an agreement against their readiness and capacity to implement an agreement, and the overall impact it will have on the public interest of their country.

4.3 Cooperation in Harmonising IP Law in ASEAN

To foster deeper economic integration, harmonisation of laws is essentially required.[227] According to Singapore's Minister for Home Affairs and Law, K. Shanmugam, harmonisation of legal rules can help to 'remove uncertainty, reduce cost, generate greater business confidence, and ultimately advance ASEAN community-building goals'.[228] Regionalising laws, particularly those relating to trade and investment is crucial to facilitate the free movement of goods, services, capital and labour within ASEAN common market.[229] Among all areas, the harmonisation of IP laws and the establishment of AEC are prime objectives and challenges of ASEAN.[230] To ensure that IP rights granted by member states do not create barriers to trade, harmonisation of member states' laws on IP rights is necessary. Since IP rights are limited to the territory of the state granting it, disparity in Member States' national IP law would be an obstacle to a well-functioning common market. Given these factors, internal and external cooperation with significant trading partners has been developed to pursue a higher level of IP harmonisation. In order to evaluate the degree of IP cooperation among ASEAN members, various initiatives and joint projects that have played a significant role in integrating the IP systems in this region will be analysed.

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[227] NG Jing Yng, 'Rule of law key for ASEAN's progress, says Shanmugam' (20 June 2012) *Today Online* <http://www.todayonline.com/world/asia/rule-law-key-aseans-progress-says-shanmugam> accessed 23 April 2016.
[228] ibid.
[229] Lawan Thanadsillapakul, 'The Harmonisation of ASEAN Competition Laws and Policy and Economic Integration' (2004) 9 Unif L Rev ns 479, 480.
[230] Thomas J. Treutler, Siraprapha Rungpry, and Anh Mai Duong, 'Implications of the AEC in the IP field' (2012) Thai-Norwegian Business Review 18, 18.

4.3.1 The Adoption of Significant ASEAN IP Cooperation Initiatives

4.3.1.1 The Ratification of the ASEAN Framework Agreement on IP Cooperation (The Framework Agreement)

An initial step of ASEAN in providing a clear legal framework on regional IP cooperation began in 1995 when ASEAN adopted the Framework Agreement. This agreement 'marked an important step forward for regional IP integration'.[231] Like the EU, ASEAN member states recognised the need to enhance cooperation on IP to ensure that IP rights do not obstruct the free movement goods between countries.[232] The core objectives of the Framework Agreement were to strengthen and promote cooperation on IP rights issues, enhance IP protection, and make it consistent with international standards. The agreement also explored the possibility of ASEAN establishing regional patent and trademark IP systems, including regional patent and trademark offices to help promote a regional system.[233]

Program of Action 1996-1998 on ASEAN IP cooperation, which introduced various initiatives, was adopted in pursuit of these objectives.[234] Additionally, the ASEAN Working Group on IP Cooperation (AWGIPC), comprising of IP offices of the ASEAN members, was created to implement these activities and be responsible for dealing with IP matters in the region.[235] AWGIPC plays an active role in devising and implementing IP programmes to enhance the capacity and intensify cooperation

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[231] Elizabeth Siew-Kuan Ng, 'ASEAN IP Harmonization: Striking the Delicate Balance' (2013) 25 Pace Int'l L Rev 129, 137.
[232] Jakkrit Kuanpoth, 'Patent and the Emerging Markets of Asia: ASEAN and Thailand' in Frederick Frederick M. Abbott, Carlos M. Correa and Peter Drahos (eds), *Emerging Markets and the World Patent Order* (Edward Elgar Publishing 2013) 306.
[233] Article 1 of the ASEAN Framework Agreement on Intellectual Property Cooperation.
[234] WIPO, 'The Use of Intellectual Property as a Tool for Economic Growth in the Association of South East Asian Nations (ASEAN) Region' (2004) 9.
[235] ibid.

among the member states. For instance, to explore the possibility in establishing regional trademark and patent system, the ASEAN Patent Expert Group and the ASEAN Trademark Experts Group were established by AWGIPC.[236] Since their inception, the experts group have met several times to develop common form for domestic application and regional filing form.[237] However, because of the complex nature of patent system and discrepancies in patent law between member states, not much progress has been made on work on regional patent.[238] On the contrary, the concept paper on the appropriate regional trademark system has been developed.[239] According to this concept paper, the adoption for a regional trademark filing system has been proposed.[240] Under this system, trademark application can be filed at any ASEAN members' trademark office acting as a receiving office and forwarding the application to other offices designated by the applicant.[241] Although this would not result in ASEAN-wide trademark protection, it would help streamline trademark procedures and thereby facilitate further harmonisation. This demonstrates that ASEAN has made a steady effort in this area in pursuit of the objectives of the Framework Agreement. To build on regional cooperation, various regional IP initiatives were adopted after the Program of Action 1996-1998 expired.

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[236] ibid.
[237] Weerawit Weeraworawit, 'The Harmonisaion of Intellectual Property Rights in ASEAN' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 213.
[238] ibid 214.
[239] ibid 211.
[240] ibid.
[241] ibid.

4.3.1.2 Hanoi Plan of Action (HPA) 1999-2004

The HPA was adopted at the 6th ASEAN Summit in Vietnam in 1998. Its purpose was to implement ASEAN Vision 2020 (which was subsequently accelerated to 2015). The goal of ASEAN Vision 2020 was to transform ASEAN into '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'.[242] The concept paper on the regional trademark system was also submitted at the Summit and incorporated into the HPA. Generally, the HPA covered the three main IP areas of protection, facilitation and cooperation. Primary tasks were specified as enhancing IP protection and enforcement to be compliant with international standards, particularly the TRIPs agreement, and closer cooperation in IP matters between the member states. The HPA also aimed to stimulate an exchange of IP policies and databases between ASEAN members to further facilitate region-wide IP protection. The HPA also pursued the objectives of the Framework Agreement of integrating patent and trademark systems through the establishment of ASEAN Regional Trademark and Patent filing system and regional trademark or patent offices (on voluntary basis).[243] Moreover, to build on the work of the ASEAN patent and trademark expert groups, the HPA also aimed to finalise and implement ASEAN Common Form for Trademark and patent applications.[244]

HPA provided ASEAN with a clearer framework for a long-term plan to harmonise the IP systems within the region. This framework was used as a guideline for

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[242] ASEAN, 'Hanoi Plan of Action' <http://www.asean.org/news/item/hanoi-plan-of-action> accessed 3 September 2014.
[243] Article 2.7.3 of the HPA
[244] ibid.

AWGIPC in setting up IP policies and initiatives within ASEAN.[245] However, despite the clear mandate of these undertakings, ASEAN could not achieve its goal of establishing a regional trademark and patent filing system in accordance with the HPA. One of major reason was the lack of readiness of the ASEAN members.[246] Various member countries, particularly ASEAN 'least developed' countries had weaker IP protection and enforcement. Furthermore, lack of political will among member states has been another major factor slowing down this process. [247] Nevertheless, the ASEAN Trademark Experts Group made significant progress by successfully introducing an ASEAN Common Form for Domestic Filing for Trademarks and finalising an ASEAN Filing Form for trademarks.[248] The common form for domestic application is available for the member states to adopt. It aims to help applicant familiar with trademark application in different ASEAN countries. Meanwhile, the regional filing form has been finalised and under consideration. It contains many common filing requirements and also room for specific requirements.[249] This clearly could not be regarded as complete harmonisation of the trademark system. Member states still had to rely on their national trademark systems. However, if the regional filing form is adopted, certain filing procedures will be harmonised. [250] Member states might need to amend their filing procedures to

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[245] WIPO, 'The Use of Intellectual Property as a Tool for Economic Growth in the Association of South East Asian Nations (ASEAN) Region' (n 234) 10.
[246] Weerawit Weeraworawit, 'The Harmonisaion of Intellectual Property Rights in ASEAN' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 208.
[247] Siew-Kuan Ng (n 231) 141-142.
[248] WIPO, 'The Use of Intellectual Property as a Tool for Economic Growth in the Association of South East Asian Nations (ASEAN) Region' (n 234) 9; ASEAN, 'Overview' <http://www.asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/intellectual-property/overview/> accessed 2 May 2016.
[249] WIPO, 'The Use of Intellectual Property as a Tool for Economic Growth in the Association of South East Asian Nations (ASEAN) Region' (n 234) 9; Shwe Zin Ko (n 188).
[250] Weeraworawit (n 231) 211.

accommodate regional filing of applications.[251] This would decrease the discrepancies in the trademark filing processes of the member states. These achievements can represent a step toward the establishment of a regional trademark filing system.

4.3.1.3 ASEAN IPR Action Plan 2004-2010

In order to move towards achieving goal of having closer regional cooperation in IP protection and build on previous initiatives taken by the member states, ASEAN IPR Action Plan 2004-2010 was adopted.[252] An important project of the IPR Action Plan was to harmonise IP rights and develop a regional IP system.[253] Strategic programs were developed to create an ASEAN regional IP identity.[254] These programs aimed to harmonise and simplify the IP registration process of ASEAN members. Their goals also included exploring the possibility of establishing an ASEAN regional trademark and design system.[255] Member states are encouraged to accede to major international IP agreements such as the WIPO Internet Treaty, the Madrid Protocol, the Hague Agreement, the Paris Convention, Berne Convention, the Patent Cooperation Treaty and the Budapest Treaty.[256] They also sought to increase public awareness of IP rights and improve IP infrastructure.[257]

In order for ASEAN to be deeply integrated into the AEC, IP was included as a priority integration sector under the AEC Blueprint. The Blueprint clearly states that

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[251] ibid.
[252] ASEAN, 'ASEAN Intellectual Property Right Action Plan 2004-2010' <http://www.asean.org/?static_post=asean-intellectual-property-right-action-plan-2004-2010> accessed 18 May 2016.
[253] Irini A. Stamatoudi, *Copyright Enforcement and the Internet* (Kluwer Law International 2010) 96.
[254] ASEAN, 'ASEAN Intellectual Property Right Action Plan 2004-2010' (n 252).
[255] ibid.
[256] ibid.
[257] ibid.

regional IP cooperation in ASEAN is to be governed by ASEAN IPR Action Plan 2004-2010. This Action Plan was 'a step toward a fully functional regional IPR system'.[258] This demonstrates the crucial role of ASEAN IPR Action Plan 2004-2010 in IP harmonisation in ASEAN. Though the Action Plan provided a clear framework for strengthening regional IP cooperation, ASEAN did not attain its goal of establishing a regional trademark and design system within its established timeframe. Different levels of IP protection and enforcement, country's capacity to carry out its commitment and different levels of economic development all contributed to the failure to achieve this goal. The huge gaps between the members posed a big challenge to ASEAN, which required a strong political will from the members to overcome such diversities.[259] In order to build on the progress from the expiring ASEAN IPR Action Plan 2004-2010, the second phase, ASEAN IPR Action Plan covering 2011-2015, was adopted.

4.3.1.4 ASEAN IPR Action Plan 2011-2015

ASEAN adopted the ASEAN IPR Action Plan 2011-2015 to ensure continued development of regional cooperation. Generally, this action plan built on past accomplishments of previous ASEAN IPR Action plans, the Work Plan for ASEAN Copyright Cooperation, and the work plan under the AEC Blueprint. However, since ASEAN accelerated the time by which to form the AEC from 2020 to 2015, the ASEAN IPR Action Plan 2011-2015 was designed to fulfill the AEC's goal of

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[258] Wisarn Pupphavesa and others, 'Completion Policies, Infrastructure and Intellectual Property Rights' in Michael G Plummer and Chia Siow Yue (eds.), *Realizing the ASEAN Economic Community: A Comprehensive Assessment* (Institute of Southeast Asian Studies 2009) 67.
[259] ibid.

transforming ASEAN into 'a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy'.[260] This Action Plan aimed to intensify IP cooperation between the members by taking into account the different levels of capacity of its member states, balancing incentives for creativity and access to IP rights and the then current global IP system trends.[261] Therefore, the ASEAN IP strategic goals were set up under this Action Plan to use IP rights as a tool to transform ASEAN into 'an innovative and competitive region' and to ensure that ASEAN would remain as 'an active player' in the international IP community.[262]

ASEAN has five strategic goals pursuant to the 2011-2015 Action Plan. Firstly, various initiatives were introduced to establish a balanced IP system that takes into account the different level of development and diversities in IP standards and infrastructure between the member states.[263] A significant objective was to establish the ASEAN Patent Search and Examination Cooperation (ASPEC) by 2012 with a purpose of sharing patent search and examination results between IP offices of participating ASEAN members.[264] Doing so would increase the efficiency of the patent system and promote regional IP integration.[265] This would lead to a reduction of duplicate work in searching and examining patent results and facilitate the overall patent application process. Applicants would be able to obtain corresponding patents

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[260] ASEAN, *ASEAN Economic Community Blueprint* (n 10) 2.
[261] ASEAN Secretariat, 'ASEAN IPR Action Plan 2011-2015' (2011) 2 <http://www.asean.org/archive/documents/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf> accessed 4 September 2014.
[262] ibid
[263] ibid 4.
[264] ASEAN, 'ASEAN Enhances ASEAN Patent Examination Co-operation Programme' <http://www.asean.org/news/asean-secretariat-news/item/asean-enhances-asean-patent-examination-co-operation-programme> accessed 4 September 2014.
[265] ibid 5.

faster.[266] This would provide benefits to ASEAN member states, to domestic and foreign applicants alike, and stimulate innovativeness and a transfer of technology within the region.

Secondly, ASEAN members were required to accede to significant world IP agreements by 2015. Joining the Madrid Protocol, the Hague Agreement, and the PCT would improve IP administration and infrastructure at both the national and regional levels and enable ASEAN to participate in the global IP system.[267] This action plan reflects a more flexible approach by ASEAN to harmonise the IP regimes and pursue further IP cooperation within the region. ASEAN members are still widely diverse, particularly in IP and economic development. Different degrees of IP protection and administrative capacity in member states makes harmonisation much more difficult to achieve. Adopting too strict of an approach and immediately establishing a regional IP system as what attempted in the previous action plans might not be appropriate. Though not resulting in the establishment of region-wide IP system, ASEAN members joining these international IP regimes would have a positive impact on the development of IP harmonisation within ASEAN. It would help standardise the IP systems in ASEAN countries, make them consistent with international standards, and reduce the IP gap between the member states.

Thirdly, to enhance IP creation, awareness and utilisation in ASEAN, various initiatives that aim to provide information about IP rights and access to knowledge were introduced. IP rights originate in western countries. The majority of ASEAN

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[266] IPOS, 'ASEAN Patent Examination Co-operation (ASPEC)' <http://www.ipos.gov.sg/AboutIP/TypesofIPWhatisIntellectualProperty/Whatisapatent/Applyingforapatent/ASEANPatentExaminationCo-operationASPEC.aspx> accessed 18 May 2016.
[267] ASEAN Secretariat, 'ASEAN IPR Action Plan 2011-2015' (n 261) 10-12.

members are countries in the developing world and lack sufficient awareness and understanding of IP rights. To raise awareness and ensure that IP rights can be effectively used as a tool for stimulating innovativeness, transferring technology, accessing information and providing knowledge, various initiatives were introduced.[268] For instance, ASEAN plans to incorporate information and instruction about IP in educational institutions throughout the region provide knowledge and promote innovativeness and technological development. ASEAN planned to establish at least 20 regional patent libraries or patent search and examination databases in schools and universities in ASEAN member countries. Additionally, ASEAN aimed to create the ASEAN Portal to provide news, activities, a database and related IP system resources to ASEAN member states.[269] The ASEAN IP Portal can be a substantial contributor to ASEAN regional IP cooperation since it is a gateway to comprehensive and relevant information on IP rights in all ASEAN member states. It can promote IP awareness and increase accessibility to IP resources in the entire ASEAN region. This would provide benefits to all IP stakeholders, both ASEAN residents and foreigners.

Fourthly, to develop closer cooperation between ASEAN, its dialogue partners and international organisations, various projects and activities were set up in order to help ASEAN deal with IP matters more effectively. Projects were set up to facilitate ASEAN taking an active role in the international IP community. For instance, the ASEAN-Australia-New Zealand Free Trade Agreement, ratification of the Financing Agreement of the EC-ASEAN IP Rights Cooperation Programme (ECAP III), agreeing to a Memorandum of Understanding for Cooperation on IP between ASEAN

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[268] ibid 12-14.
[269] ibid 14.

and China, were all implemented.[270] Additionally, cooperation between ASEAN and international organisations such as the work plan on IP right between ASEAN and the WIPO was adopted.[271] This demonstrates that ASEAN is eager to strengthen cooperation on IP matters with its trading partners and international IP organisations. Doing so will enhance institutional capacity and human resource development in IP rights matters, thereby improving IP administrative capacity and infrastructure in ASEAN members. This can help ASEAN further its goal of harmonising the IP systems in the region.

Lastly, ASEAN strives to intensify cooperation between its members in order to increase the capability of the national IP offices within the region.[272] Therefore, various initiatives have been taken to improve human and institutional competence. For instance, various training courses were provided in order to enhance the proficiency of patent, industrial design and trademark examiners.[273] Moreover, IP infrastructure such as databases and IT systems are being modernised to support the digital environment.[274] This will help ASEAN countries improve their IP infrastructures to meet international standards.

Generally, the 2011-2015 ASEAN IPR Action Plan provides a clear framework covering various aspects of IP rights. It adopts a more flexible approach than the previous plan, which resolved to establish a region-wide IP system. Under this action plan, ASEAN departed from this ambitious goal. The diversity of IP standards among ASEAN members is considered as a major factor inhibiting regional integration.

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[270] ibid 15-16.
[271] ibid 15.
[272] ibid 17.
[273] ibid 17-18.
[274] ibid 18.

Therefore, Action Plan 2011-2015 strived to improve IP infrastructure and promote closer intra-ASEAN IP cooperation and cooperation between ASEAN and its external partners to reduce incompatibilities in the IP systems of the member states. As of April 2015, timeframe for completing 10 out of the 28 initiatives was extended to 2016.[275] As of March 2016, more than 80% of the 108 deliverables has been completed.[276] Some initiatives such as the establishment of patent libraries and completion of accession to the major IP treaties will be carried forward to the new ASEAN IPR Action Plan 2016-2025. However, despite the remaining unimplemented initiatives, certain progress has been made on ASEAN IP harmonisation. This would help increase consistency in the IP standard and cultivate ASEAN's goal of creating a regional IP regime. These achievements will be further discussed in 4.3.2.

4.3.1.5 ASEAN IPR Action Plan 2016–2025

To continue pursuing goal in transforming ASEAN into an innovative and competitive region through the use of IP, ASEAN has formulated the 2016-2025 ASEAN IPR Action Plan, which has not yet finalised and approved by AWGIPC.[277] Therefore, its released date has not been officially announced. This new work plan aims to narrow the gaps in IP regimes between more developed and less developed

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[275] 'Report of the Secretary-General of ASEAN on the work of ASEAN (November 2014 - April 2015)' 26th ASEAN Summit Kuala Lumpur, Malaysia, 26 – 27 April 2015.
[276] The South-East Asia IPR SME Helpdesk, 'Intellectual Property and the ASEAN Economic Community' (2016) 2.
[277] Denis Croze, 'WIPO's Support of the ASEAN IP Ecosystem' (ASEAN – IPA Conference, 4-6 March 2016, Kuala Lumpur) 14. <http://www.aseanipa.org/attachments/article/653/02.%20Denis%20Croze-WIPO%20Support%20of%20ASEAN%20IP%20Ecosystem.pdf> accessed 2 March 2016.

members.[278] During the ASEAN IPA Annual Meeting and Conference, four strategic goals were identified. Firstly, ASEAN will develop a more robust IP system through strengthening IP offices and building IP infrastructures among the member states.[279] The feasibility in developing a common set of formality requirements for trademarks and industrial designs across the region will be explored.[280] Initiative in acceding to the international treaties such as the Madrid Protocol, the PCT, the Hague Agreement, and other WIPO-administered treaties will still remain for the remaining ASEAN countries.[281] Also, programmes for enhancing capacity building of the member states will be developed with special focus on Cambodia, Laos PDR, and Myanmar (CLM).[282] Secondly, regional IP platforms will be developed to contribute to enhancing the AEC.[283] To achieve this goal, the creation of online filing system for trademarks will be pursued.[284] The possibility of establishing an ASEAN Trademark registration system will be examined.[285] Establishing a regional network of patent libraries within schools and universities in ASEAN countries also included in this strategic goal.[286] Thirdly, an expanded and inclusive ASEAN IP ecosystem will be developed.[287] For instance, to enhance regional cooperation on IP rights enforcement,

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[278] James Nurton, 'Interview: Dato Shamsiah Kamaruddin, Director General, My IPO' <http://www.managingip.com/Article/3562852/Interview-Dato-Shamsiah-Kamaruddin-director-general-MyIPO.html> accessed 17 July 2016.
[279] ASEAN IPA, 'The ASEAN Intellectual Property Rights Action Plan 2016-2025' (ASEAN IPA Annual Meeting & Conference, Kuala Lumpur, Malaysia, 4-6 March 2016) <http://www.aseanipa.org/attachments/article/653/01.%20AWGIPC-ASEAN%20IP%20Plan.pdf> accessed 18 May 2016.
[280] INTA, 'Shahrinah Yusof Khan, Director General, Brunei Intellectual Property Office' (2015) 70 INTA Bulletin <http://www.inta.org/INTABulletin/Pages/Brunei_IP_Office_DG_Interview_7019.aspx> accessed 18 May 2016.
[281] ibid.
[282] ASEAN IPA (n 279).
[283] ibid.
[284] INTA (n 264).
[285] ibid.
[286] ASEAN IPA (n 279).
[287] ibid.

an ASEAN IP network (IP, judiciary, customs and other enforcement agencies) will be established.[288] Lastly, to promote awareness of the value of IP as a financial asset and commercialisation, particularly in the area of GIs, regional mechanisms will be developed.[289]

It appears that there is a clearer indication of harmonising IP regimes among the member states under the upcoming action plan such as developing online filing system for trademarks, exploring possibility of establishing regional trademark system, and creating an inclusive IP ecosystem. If this action plan is finally approved, implementing all the initiatives would help decrease the disparities in IP regimes among ASEAN member, and thereby facilitates the development of a harmonised regional IP system.

4.3.2 Significant Progress and Achievements on IP Harmonisation in ASEAN

Some of the targets in relation to regional IP integration have been missed. However, significant progress has been made towards achieving the strategic goals within the scheduled timeframe, and thereby represents important steps towards achieving a higher degree of harmonisation. These achievements result from closer internal cooperation between member states and external cooperation with significant trading partners.

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[288] ibid.
[289] ibid.

4.3.2.1 Collaboration between ASEAN Members

(a) The Establishment of ASEAN Patent Examination Cooperation (ASPEC)

ASPEC is the first regional patent work-sharing programme among ASEAN members. Myanmar remains without patent law. However, all other ASEAN countries have IP offices that participate in the ASPEC programme, which strives, among other things, to share patent search and examination results. Because of the many distinct languages of the ASEAN countries, English was chosen to be the common language to be used in ASPEC programme. An intended function of the ASPEC programme is to streamline search and examination of patents by sharing results between the ASEAN participating IP offices.[290] Access to this kind of information could potentially reduce duplication in the process of granting patents. More importantly, it can help bring capacity of IP offices in less developed members in examining patent up to the level of more developed members.[291] However, results of searches and examinations conducted by one of the participating IP offices are non-binding.[292] Other participating IP offices are not obligated to follow or adopt the conclusions or findings of another office.[293] The granting of patents remains dependent upon the laws and processes of the participating countries. As such, it does not introduce a high level of harmonisation into the process.

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[290] IPOS, 'ASEAN Patent Examination Cooperation (ASPEC)' <http://www.ipos.gov.sg/Portals/0/Patents/1.%20ASPEC%20Brochure%20%28Revised%2012%20Feb%202014%29.pdf> accessed 3 September 2014.
[291] Kenan Institute Asia (n 129) 23.
[292] IPOS, 'ASEAN Patent Examination Cooperation (ASPEC)' (n 290).
[293] ibid.

As shown above, granting and enforcement of patent rights continue to be subject to different standards and interpretations of different national laws. However, the creation of the ASPEC reflects significant progress in patent integration between ASEAN members. The ASPEC programme was implemented to further the strategic goal of the 2011-2015 ASEAN IPR Action Plan in enhancing efficiency of IP administration. It can speed up patent process. ASEAN IP offices can provide more effective patent service. Securing patent protection quicker and cheaper would lead to growth rate of patent applications in ASEAN countries, and thereby fostering innovation and the transfer of technology. Moreover, other ASEAN members should encourage and provide assistance to Myanmar to establish a patent system and join the ASPEC programme so that the entire region can enjoy its benefits.

(b) Launch of ASEAN IP Direct

ASEAN 'IP Direct' was initiated by Singapore and successfully launched in 2009. It is an online directory that serves as a place for 'one stop' service. IP Direct provides relevant and useful IP resources such as IP legislation, dispute resolution bodies, sources of grants and loans, lists of research and development, and technology transfer offices.[294] Notwithstanding, no information from Lao PDR and Cambodia is available, though information from the other eight countries is available.[295] Establishing this database and making extensive and relevant information accessible will benefit potential investors and all interested parties.[296] This will promote trade,

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[294] IPOS, 'ASEAN IP Direct' <http://www.ipos.gov.sg/AboutIP/IPResources/UsefulLinks/RegionalOrganisations/ASEANIPDirect.aspx> accessed 3 September 2014.
[295] ibid.
[296] ASEAN, 'ASEAN To Launch "IP DIRECT"' (1 June 2009) <http://www.asean.org/archive/PR-Launch-IPDirect.pdf> accessed 1 September 2014.

investment and innovation in ASEAN. However, there is still room for improvement. Lao PDR and Cambodia should be encouraged to participate in the ASEAN IP Direct.

(C) Launch of ASEAN IP Portal

The ASEAN IP Portal was successfully launched in 2013. Thailand and Singapore were the lead countries spearheading cooperation from all member states in this effort to further the objectives of ASEAN IPR Action Plan 2011-2015.[297] It was developed to make comprehensive information available such as ASEAN members' IP legislation, ASEAN IP activities, notice and procedures of the ASPEC programme, and links to all IP offices of the ASEAN member countries. Consolidating all relevant IP information in this portal facilitates access to IP information for all the IP stakeholders from both inside and outside the region. Consequently, this would help ASEAN deal with the problem of differing levels of expertise of the ASEAN members' IP offices.[298] It will also enhance the efficiency of the IP system and increase IP awareness of the ASEAN members.[299] Therefore, the ASEAN IP Portal was called 'an important milestone'[300] in the development of ASEAN IP cooperation in furtherance of the strategic goal of the 2011-2015 ASEAN IPR Action Plan to stimulate IP creation, awareness and utilisation.

ASEAN IP Direct and ASEAN IP Portal are databases that complement each other. However, ASEAN IP Portal provides more expansive information than the ASEAN

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[297] ASEAN Secretariat, 'ASEAN IPR Action Plan 2011-2015' (n 261) 14.
[298] Jakkrit Kuanpoth, 'Patents and the Emerging Markets of Asia: ASEAN and Thailand' in Frederick M. Abbott, Carlos M. Correa and Peter Drahos (eds), *Emerging Markets and the World Patent Order* (Edward Elgar Publishing 2013) 323.
[299] IPOS, 'Launch of ASEAN IP Portal' <http://www.ipos.gov.sg/News/Readnews/tabid/873/articleid/234/category/Others/parentId/80/year/2013/Default.aspx> accessed 3 September 2014.
[300] ECAP III, 'Launching of the ASEAN IP Portal' <http://www.ecap-project.org/events/launching-asean-ip-portal> accessed 6 September 2014.

IP Direct about many aspects of IP rights in all 10 ASEAN member states. This reflects a higher level of regional cooperation and is evidence of ASEAN's resolve for further harmonisation. The ASEAN IP Portal generally provides useful IP information for all interested stakeholders such as IP officers, businessmen and students. Nevertheless, limited progress has been made on harmonising IP laws between member states.

(d) The Implementation of an 'ASEAN-help-ASEAN' Approach

In order to help standardise IP standards, an 'ASEAN-help-ASEAN' approach was adopted. Its purpose was to develop and increase the IP capacity of the ASEAN member states, particularly the CLMV countries.[301] The 'ASEAN-help-ASEAN' approach has been implemented wherever feasible in order to enhance the capacity of the ASEAN members in the field of IP.[302]

The assistance that is provided by this approach takes the form of sharing and exchanging IP policies, experiences, and expertise. [303] This enables ASEAN least developed countries to catch up to other ASEAN countries and reduce the diversity in IP standards and infrastructure. A Memorandum of Understanding (MOU) between Intellectual Property Office of Singapore (IPOS) and Cambodia's Ministry of Industry and Handicrafts (MIH) is a good example. This successful collaboration between Singapore and Cambodia resulted in the first Singapore patent granted in Cambodia, the first patent recognised in Cambodia.[304] It was pointed out by Minister

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[301] S. Pushpanathan, 'ASEAN's Readiness in Achieving the AEC 2015: Prospects and Challenges' in Sanchita Basu Das (ed), *Achieving the ASEAN Economic Community 2015: Challenges for Member Countries & Business* (Institute of Southeast Asian Studies 2012) 17.
[302] ASEAN Secretariat, *ASEAN Economic Community Factbook* (ASEAN Secretariat 2011) 56.
[303] ibid.
[304] IPOS, 'First Singapore patent recognised in Cambodia' (n 198).

Prasidh that 'This is a momentous moment in the history of intellectual property cooperation between Cambodia and Singapore.'[305] This bilateral cooperation has led to significant development of Cambodia's IP system, which can promote cross border investment and access to the regional common market.[306] By having assistance from IPOS in processing patent applications, it can help facilitate transfer of IP knowledge between IPOS and Cambodia's MIH,[307] and thereby foster capacity building in IP in Cambodia. Moreover, closer cooperation between these countries has been considered as a measure that would support ASEAN in moving towards regional IP harmonisation.[308]

It appears that implementation of the 'ASEAN-help-ASEAN' approach promotes intra-ASEAN cooperation and enhances human and institutional capacity of ASEAN members' IP offices pursuant to the goals of the ASEAN IPR Action Plan 2011-2015.[309] Maintaining a good relationship with major dialogue partners and international IP organisations is not enough. ASEAN should obtain 'deeper and meaningful cooperation' among its members.[310] This would help improve the capacity of ASEAN as a whole.

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[305] ibid.
[306] IPOS, 'Singapore furthers IP cooperation with Cambodia to expedite quality patent grants' <https://www.ipos.gov.sg/MediaEvents/Readnews/TabID/873/articleid/330/Default.aspx> accessed 25 March 2016
[307] ibid.
[308] ibid.
[309] ASEAN Secretariat, 'ASEAN IPR Action Plan 2011-2015' (n 261) 4.
[310] ibid 17.

4.3.2.2 Collaboration between ASEAN and External Partners

ASEAN has various dialogue partners that have supported and assisted its strengthening of its IP system. The EU is regarded as the most committed partner. ASEAN's first cooperation project with the EU was called 'the ASEAN-EU Patents and Trademarks Programme (ECAP I)' and it covered the period from 1993 to 1997. This programme was the first collaboration in IP that 'brought ASEAN countries together'.[311] Originally, Thailand, Singapore, Brunei Darussalam, Malaysia, Indonesia and Philippines participated in this project. Vietnam later joined in 1995. The ECAP I focused on an improvement of national IP systems by providing advisory services, training courses, seminars and workshops, and establishing a programme to study/visit in the EU.[312] This resulted in a modernisation of IP protection and enforcement in ASEAN.[313] For instance, after joining this programme, Vietnam amended its IP system. Patent protection was expanded from 15 to 20 years and its patent examination procedure was reformed. These changes made Vietnam's patent system consistent with the international standard.[314]

The EC-ASEAN IP Rights Cooperation Programme (ECAP II 2000-2007) followed. Its purpose was to further assist ASEAN's harmonisation efforts and enhance the IP rights capacity of its members. The ECAP II expanded its objectives to cover all areas of IP rights, namely copyright and related rights, patents, trademarks, industrial designs, GIs, layout designs of integrated circuits and protection of undisclosed

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[311] ECAPIII, 'ECAP Project Overview (1993-2016)' <http://www.ecap-project.org/about/ecap-project-overview-1993-2016> accessed 5 April 2016.
[312] ibid.
[313] ASEAN, 'Cooperation in Intellectual Property' <http://www.asean.org/communities/asean-economic-community/item/cooperation-in-intellectual-property> accessed 1 September 2014.
[314] Michelle Castillo, 'Legal Environment' in Information Technology Landscape in Vietnam (MBA report, American University 2000) <http://www1.american.edu/carmel/mc5916a/property_rights.htm> 3 September 2014.

information. Myanmar was the only ASEAN country that did not participate.[315] Therefore, compared to the previous ECAP project, ECAP II provided broader objectives and was carried out in closer cooperation among the ASEAN members. By adopting the ECAP II project, IP legislative frameworks and administrative procedures in the ASEAN countries have been significantly improved.[316] Most IP laws became more consistent with international standards, particularly the TRIPs Agreement.[317] For instance, Malaysia IP officials claimed that the ECAP II was 'a decisive contribution to the modernisation of Malaysia's IP legal framework in line with international standards'.[318] This demonstrates the significant contribution that closer cooperation between the EU and ASEAN can have.

The third phase of the ECAP programme was adopted in 2010, Phase I of ECAP III (2010-2011) was implemented by the European Patent office (EPO).[319] The ECAP III strove to build on the achievements and lessons derived from the ECAP I and ECAP II projects. It endeavored to further integrate ASEAN into the global economy and to facilitate IP integration at the regional level.[320] Consequently, various activities were organised to enhance the capacity of ASEAN countries to deal with IP enforcement and to harmonise IP rights at the regional level. Programs additionally focused on

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[315] The Evaluation Unit, 'Evaluation of EC co-operation with ASEAN' (2009) Final Report, Volume 2, 25 <http://www.oecd.org/derec/ec/47377499.pdf> accessed 18 October 2015.
[316] ibid 24.
[317] ibid 25.
[318] ibid 26.
[319] ECAP III, 'ECAP Project Overview (1993-2016)' (n 311).
[320] ASEAM 'Europe and ASEAN to embark on a € 5.1 million partnership to protect and promote IP Rights in the region' (2010) 2-3 <http://www.asean.org/archive/documents/FINAL_SCM1_Press%20Release_Eng.pdf> accessed 14 October 2015.

using IP to stimulate economic growth and development, and on establishing a regional network of IP education, training and research.[321]

In 2012, EU and ASEAN redevelop content of ECAP III to ensure that it covered expansive areas of IP rights and was in furtherance of the objectives of the 2011-2015 ASEAN IPR Action Plan.[322] Phase II of ECAP III was adopted to additionally cover 2013 to 2015. The EUIPO was entrusted to implement this project.[323] Moreover, the implementation period of ECAP III has been extended until February 2017.[324] The specific objective of Phase II was to focus on regional IP harmonisation in the areas of trademarks, industrial designs, GIs, including IP enforcement.[325] As a result, various initiatives were introduced in order to strengthen regional cooperation and help achieve further IP harmonisation. Moreover, it recognised diversity in the capacity of the ASEAN member states and programs were implemented which specifically took this into account. Phase II encouraged all ASEAN members to take part in the initiatives based on their needs and interests.[326] However, particular attention was given to the ASEAN 'least developed countries' in order to help them effectively and fully participate in these projects.[327] For instance, it was reported that the implementation of ECAP III has helped Cambodia improve capacity and efficiency of national IP institutions thereby improving overall IP administration.[328] This would help ASEAN gradually and carefully proceed toward IP harmonisation and create a balanced IP system within the region.

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[321] ibid. 3.
[322] ECAP III, 'ECAP Project Overview (1993-2016)' (n 311).
[323] ibid.
[324] ECAP III, 'ECAP III Phase II' <http://www.ecap-project.org/about/ecap-iii-phase-ii> accessed 25 March 2016.
[325] ibid.
[326] ECAPIII, 'ECAP III Phase II' (n 324).
[327] ibid.
[328] Kenan Institute Asia (n 129) 31.

In 2014, an ASEAN online trademark information tool (TMview) was launched. It was developed by the IP offices of ASEAN countries with support from EUIPO. TMview provides users free access to information on trademark registration and applications in all ASEAN countries except for Myanmar.[329] It is expected that Myanmar will join soon. This enables ASEAN countries to exhibit the trademark landscape in their country for all interested stakeholders and help promote filing trademark applications. Additionally the development of ASEAN Designview, which provide free online access to information on designs registration in having effects in the participating ASEAN countries, has been completed.[330] It began operation in 2015.[331] All ASEAN countries except Myanmar and Indonesia have joined this database.[332] These tools are significant achievements resulting from the collaboration between ASEAN and EU in the pursuit of regional integration and further harmonisation of the IP regime.[333] Additionally, with the assistance of the ECAP project, the AWGIPC successfully adopted the ASEAN Common Guidelines on Substantive Examination of Trademarks in December 2014.[334] The guidelines are available for interested IP offices to incorporate into their national trademark examinations.[335] This would help reduce discrepancies in IP administrative

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[329] ASEAN, 'ASEAN TMview', <http://www.asean-tmview.org/tmview/welcome.html> accessed 15 January 2016.
[330] ASEAN, 'Designview', <http://www.asean-designview.org/tmdsview-web/welcome> accessed 15 January 2016.
[331] ECAP III, 'Program Activities' <http://ecap-project.org/activities/tools-enabling-asean-ip-offices-make-trade-mark-and-design-information-widely-available> accessed 15 January 2016.
[332] ASEAN, 'Designview' (n 330).
[333] ECAP III, 'About ECAP' <http://www.ecap-project.org/about/ecap-iii-phase-ii> accessed 15 January 2016.
[334] ECAP III, 'Guidelines for the substantive examination of trademarks' <http://www.ecap3.org/activities/guidelines-substantive-examination-trademarks> accessed 2 May 2016.
[335] ibid.

procedures among ASEAN IP offices.[336] This clearly demonstrates that the EU provides steady and considerable assistance to ASEAN. The implementation of the ECAP projects enhance ASEAN members' capacity in IP protection and enforcement and bring them more in line with international standards resulting in further harmonisation.

The US has also provided assistance to ASEAN in its quest for regional economic integration. An agreement for long-term cooperation between the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) and the United States Patent and Trademark Office (USTPO) was reached and in effect from 2004 to 2010.[337] Various regional capacity building programmes and activities were implemented with the support of the USTPO.[338] This helped ASEAN enhance IP rights protection and enforcement across the region. Consequently, to build on the previous achievement, this joint project has been extended for another 5 years in order to support the establishment of the AEC in 2015.[339] Numerous IP workshops, training courses and seminars have been regularly carried out in ASEAN. The continuous partnership between AWGIPC and USPTO in enhancing IP capacity of ASEAN countries has led to significant improvement of the IP environment in the region.[340] Strong

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[336] Ignacio de Medrano Caballero, 'Regional integration and interoperability of the ASEAN Trademarks and Designs Systems under the ASEAN IPR Action Plan 2016-2025' (ASEAN IPA Annual Conference, Kuala Lumpur, 5 March 2016) <http://www.aseanipa.org/attachments/article/653/03.%20Ignacio-ECAP%20III%20-%20Regional%20Integration.pdf> accessed 2 May 2016.
[337] ASEAN Secretariat, 'ASEAN Economic Community Factbook' (n 302) 56.
[338] ASEAN, *ASEAN Annual Report 2007-2008* (ASEAN Secretariat 2008).
[339] Embassy of the United States, 'U.S. and ASEAN Convene Regional Workshop on Trademark Examination' <http://cambodia.usembassy.gov/trademark_examination.html> accessed 2 September 2014.
[340] Subdit Ksln, 'Press Release: ASEAN and United States Patent and Trademark Office Mark 10th Anniversary of Cooperation on Intellectual Property Rights (IPR) Protection and Enforcement' <http://ksp.dgip.go.id/press-release-asean-and-united-states-patent-and-trademark-office-mark-10th-anniversary-of-cooperation-on-intellectual-property-rights-ipr-protection-and-enforcement/> accessed 15 January 2015.

collaboration between AWGIPC and USPTO over the past 10 years shows that ASEAN has a strong commitment to improve its IP regimes for the benefits of IP rights owners and consumers.[341]

In addition to the EU and US, ASEAN and Japan have collaborated. In 2012, a memorandum of cooperation on IP between Japan IP Office (JPO) and ASEAN IP Offices was entered into force. Its goal was to enhance the effectiveness of the IP system and the human and institutional proficiency of the IP offices. In addition, it sought to increase public awareness of IP within ASEAN.[342] ASEAN IPOs – JPO IPR Action Plan 2012-2013 was adopted to implement the objectives of this memorandum of cooperation. According to this action plan, various activities and cooperation between Japan and ASEAN were organised. Assistance to ASEAN in developing human resources and an IP IT system was provided. Efforts were made to improve measures to combat counterfeit products and to assist ASEAN in acceding to major international IP agreements in the areas of trademarks and industrial designs.[343] Although the Action Plan expired in 2013, the JPO continues to provide support to the ASEAN IP offices. The JPO continued to assist ASEAN strengthen its IP systems and infrastructures through the implementation of a wide variety of activities. To this end, Japan–ASEAN Cooperation Program 2014-2015 and Medium-to-Long Term

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[341] ibid.
[342] ASEAN, 'ASEAN – Japan Signed Agreement to Further Cooperate on Intellectual Property' <http://www.aseanip.org/ipportal/index.php?option=com_content&view=article&id=204:asean-japan-sign-agreement-to-further-cooperate-on-intellectual-property&catid=194&Itemid=605> accessed 1 September 2014.
[343] Ministry of Economy, Trade and Industry, 'Conclusion of Memorandum of Cooperation on IP between the Japan Patent Office and the ASEAN IP Offices' <http://www.meti.go.jp/english/press/2012/0711_02.html> accessed 3 September 2014.

Cooperative Initiatives for 2015 and beyond have been adopted.[344] Cooperation Program 2014-2015 was implemented in order to build on the 2012-2013 action plan.[345] The Cooperative Initiatives for 2015 and beyond were introduced in order to affirm that the JPO would continue providing support to ASEAN. It was to show intensified cooperation with each ASEAN members' IP office in order to help them expand their IP resources, administrative schemes, and infrastructure.[346]

Continued collaboration between ASEAN and its dialogue partners can help ASEAN countries improve their IP administrative capacities and infrastructures, and reduce the gap in IP standards that exist between the member states. Improvement of human and institutional capacity of member states, particularly ASEAN developing and least developed countries would enable them to develop their IP systems in a way that is suitable for their existing level of development and particular circumstances. Doing so will help ASEAN attain the goals of the 2011-2015 ASEAN IPR action plan that aims to create a balanced IP system and enable ASEAN to play an active role in international IP community.

4.3.2.3 Participation in the International IP Community

The 2011-2015 ASEAN IPR Action Plan demanded ASEAN members to participate in the global IP community. In order to bring their IP systems in line with international standards, ASEAN members were required to accede to major international IP agreements. Some ASEAN members have missed the 2015 deadline

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[344] Ministry of Economy, Trade and Industry, 'JPO will Strengthen Cooperative Relationship with ASEAN in the Field of IP' <http://www.meti.go.jp/english/press/2014/0702_03.html> accessed 4 September 2014.
[345] ibid.
[346] ibid.

to accede to the PCT, the Madrid Protocol and the Hague Agreement. However, this objective remains. The ASEAN Economic Community Blueprint 2025 states that all member states are required to complete accession to the PCT, the Madrid Protocol, and the Hague Agreement.[347] Member states are also encouraged to accede to other WIPO-Administered Treaties.[348] These commitments are also one of the initiatives under the upcoming ASEAN IPR Action Plan (2016-2025). This demonstrates ASEAN's sustaining intent to strengthen its IP regimes and bring them in-line with international standards.

All ASEAN countries are members of WTO and thereby party to the TRIPs agreement. The majority of ASEAN countries have also acceded to the landmark WIPO-administered treaties such as the Paris Convention and the Berne Convention. All ASEAN countries except Myanmar have joined the Paris Convention. The Berne Convention has been ratified by all of the ASEAN countries except Myanmar and Cambodia. Progress has also been made in accession to the PCT. Every country except Cambodia and Myanmar has ratified it. Singapore, Philippines, Vietnam, Cambodia and Lao PDR are contracting states of the Madrid Protocol. Singapore and Brunei Darussalam are the only ASEAN countries that are contracting parties to the Hague Agreement. Some ASEAN countries have insufficient IP administrative capacity and infrastructure leading to under developed IP systems. As a result, not all countries have ratified these agreements. Many of them are still in the process of preparing themselves to be ready for an accession to these international systems.

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[347] ASEAN, *ASEAN Economic Community Blueprint 2025* (ASEAN Secretariat 2015) 14.
[348] ibid.

However, due to closer and continuous cooperation between member states and dialogue partners, various countries have made great progress, particularly on accession to the Madrid Protocol. Cambodia and Lao PDR joined the Madrid Protocol in June 2015 and December 2015, respectively. Thailand has successfully proposed an amendment to the Thai Trademark Act, which is pending approval, in its preparation for accession to the Madrid Protocol.[349] Thailand will be able to join the Madrid Protocol upon approval of the amendment.[350] Malaysia, Indonesia, and Brunei Darussalam are in their final stages of joining the Madrid Protocol.[351] Progress in acceding to the Hague Agreement seems to be the slowest. The majority of ASEAN countries not yet a party are in the process of preparing for accession. A regional workshop was recently held to assist ASEAN members in acceding to the Hague Agreement. It was jointly organised by EUIPO and WIPO with the support of the ECAP III project. Sharing of experience and workshops conducted by experts will help ASEAN countries to be well prepared for accession and prepared to join this system.[352]

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[349] Darani Vachanavuttivong, 'Thailand's Accession to the Madrid System: Possible in 2014' (2012) <http://www.tilleke.com/resources/thailand%E2%80%99s-accession-madrid-system-possible-2014> accessed 1 September 2014.
[350] ibid.
[351] Quaratul-Ain Bandial, 'Strong IP laws in Brunei will promote economic growth, boost investor confidence' *The Brunei Times* (16 April 2016) <http://www.asianews.network/content/strong-ip-laws-brunei-will-promote-economic-growth-boost-investor-confidence-15383> accessed 13 May 2016; Vedderprice, 'IP Strategies' (2013) 5 <http://www.vedderprice.com/files/Publication/7e1ee00f-d2f7-46d0-b7fc-4a2cf2ab851e/Presentation/PublicationAttachment/2d3f73df-c16e-4b0c-89df-1002da8f372f/2013.01%20IP%20Strategies-Digital.pdf> accessed 2 September 2014.
[352] ECAP III, 'Events: Regional Workshop on The Hague System' <http://www.ecap3.org/events/regional-workshop-hague-system> accessed 10 February 2016.

Table 2: Progress in Participating in the International IP Community

	Paris Convention	Berne Convention	PCT	Madrid Protocol	Hague Agreement	TRIPs Agreement
Singapore	✔	✔	✔	✔	✔	✔
Brunei Darussalam	✔	✔	✔	✖	✔	✔
Philippines	✔	✔	✔	✔	✖	✔
Malaysia	✔	✔	✔	✖	✖	✔
Thailand	✔	✔	✔	✖	✖	✔
Indonesia	✔	✔	✔	✖	✖	✔
Vietnam	✔	✔	✔	✔	✖	✔
Lao PDR	✔	✔	✔	✔	✖	✔
Cambodia	✔	✖	✖	✔	✖	✔
Myanmar	✖	✖	✖	✖	✖	✔

Source: WIPO and WTO

It can be seen that ASEAN has a strong desire to integrate into the global IP community and transform itself into an innovative and competitive region. With ASEAN's continuing efforts to actively participate in the international IP community,

it is highly likely that all the ASEAN countries will be able to accede to the major international IP treaties in the near future.

4.4 Concluding Remarks

The analysis of this chapter demonstrates that ASEAN recognised the need and significance of IP harmonisation in order to facilitate cross-border trade. ASEAN has clearly set a goal of harmonising IP laws at the regional level to firmly establish the AEC. The IP laws of ASEAN members need to be harmonised in order to serve as a tool in facilitating deeper regional economic integration. Consequently, clear frameworks, including internal and external cooperation have been steadily developed in the quest for greater IP harmonisation. However, ASEAN has achieved minimal harmonisation when compared to the EU. There remain dissimilarities in the IP laws of ASEAN members because of different histories and bases for development. An inequality in the administrative capacity and infrastructure of ASEAN members leads to a divergent capacity to regulate IP policies and use IP regimes to foster economic growth and technological advancement. Accordingly, instead of establishing a harmonised regional IP regime, ASEAN has tended to focus on bringing national IP legislation in harmony with international standards. ASEAN chose to adopt a more flexible approach that relies so much on member states' readiness and capacity to enhance regional IP cooperation and strengthen IP laws of the member states.

All in all, steady and determined collaborations between ASEAN and their dialogue partners can help member states improve their administrative capacity and bring their substantive IP laws more in line with international standards. What has been achieved can lead to significant, additional improvements to the IP environment, although

much work remains to be done. ASEAN has been able to create programs and systems that provide relevant IP resources and databases such as the ASPEC program, ASEAN IP Direct, ASEAN IP Portal, ASEAN TMview and ASEAN Designview. These provide IP data to all interested stakeholders and thereby lead to increased IP awareness, creation and utilisation. However, to ensure that all regional IP policies are effectively implemented, more internal and external cooperation on capacity building to promote TRIPs compliance, greater efficiency of IP administration and more effective IP enforcement is indispensable.

Despite many achievements, it would too ambitious a goal for ASEAN to promptly create a unified IP system at this stage due to numerous constraints arising from disparities among member states, particularly in levels of social and economic development. Notwithstanding, although they succeed in attaining only partial harmonisation, they represent a good start and a good step upon which ASEAN can build in its quest for a higher degree of IP harmonisation.

CHAPTER 5 THE PROSPECT OF DEVISING A REGIONAL IP SYSTEM IN ASEAN

The establishment of the AEC in 2015 was considered 'a major milestone in the regional economic integration agenda in ASEAN'.[1] However, the December 2015 date for realising the core pillars of the AEC has officially been missed. There are still remaining unfinished measures that need to be implemented. As of 31 October 2015, the implementation rate of the full AEC scorecard stood at 79.5%.[2] This is not beyond expectation. The 2015 deadline was claimed to be overly optimistic.[3] Jayant Menon, lead economist from the Office of Regional Economic Integration at the Asian Development Bank (ADB) also opined that 'it's highly unlikely that the Asean will meet all the targets by 2015. That's quite clear. Even the Asean scorecards show that. A more realistic deadline, keeping in mind the new member-countries, will be 2025.' To build on the AEC Blueprint 2015, the AEC Blueprint 2025 was adopted. It provides broad directions for the AEC from 2016-2025.

However, considerable progress has been made in tariff elimination.[4] The ASEAN-6 (Singapore, Malaysia, Thailand, Philippines, Indonesia and Brunei Darussalam) have successfully eliminated their import duties with 99.2% of tariff lines at 0%.[5] The CLMV (Cambodia, Lao PDR, Myanmar and Vietnam) have made significant

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[1] ASEAN, 'ASEAN Economic Community' <http://www.asean.org/asean-economic-community/> accessed 27 March 2016.
[2] ASEAN, *A Blueprint for Growth ASEAN Economic Community 2015: Progress and Key Achievements* (ASEAN Secretariat 2015) 10.
[3] 'South-East Asia Summit 2014 Summary' (2014) The Economist 2014, 2.
[4] ASEAN, *A Blueprint for Growth ASEAN Economic Community 2015: Progress and Key Achievements* (n 2) 10.
[5] ibid.

progress by reducing their tariffs to 0 in 90.86% of their tariff lines.[6] Little progress has been made to address non-tariff barriers (NTBs), and thereby inhibit ASEAN from realising the full potential of the AEC.[7] NTBs is seen as the most challenging obstacles to the establishment of a single market and production base.[8] One form of NBTs that can obstruct the free flow of goods across national borders is IP rights. As discussed in Chapter 3, the EU experience has shown that a high degree of IP harmonisation is clearly linked to well-functioning of internal market. Without IP harmonisation, the free movement of goods cannot be guaranteed. It is acknowledged that the national territorial nature of IP rights is incompatible with the idea of an internal market.[9] Differences in national IP laws can obstruct the well-functioning of the internal market. To ensure that disparity of national IP laws and the territoriality of IP rights would not become barriers to intra-community trade and thereby partition the internal market, the establishment of ASEAN regional IP system with unitary effect is deemed necessary. It was pointed out that it is not likely for ASEAN to create a common market if IP rights are treated differently from nation to nation.[10] Therefore, in order for ASEAN to effectively eliminate all barriers to the establishment of the ASEAN common market, and thereby achieve deeper regional economic integration, regionalising IP laws is essentially required. However, achieving complete harmonisation, which is the ideal level of IP law harmonisation, is

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[6] ibid.
[7] Sanchita Basu Das and others, *The ASEAN Economic Community: A Work in Progress* (Institute of Southeast Asian Studies 2013).
[8] Rodolfo C. Severino and Jayant Menon, 'Overview' in Sanchita Basu Das and others, *The ASEAN Economic Community: A Work in Progress* (Institute of Southeast Asian Studies 2013) 14-15.
[9] Ashish Lall and R. Ian McEwin, 'Competition and Intellectual Property Laws in the ASEAN 'Single Market'' in Sanchita Basu Das and others, *The ASEAN Economic Community: A Work in Progress* (Institute of Southeast Asian Studies 2013) 211.
[10] Koo Jin Shen, 'No regional IP system that covers all of ASEAN' The Brunei Times (Bandar Seri Begawan, 13 March 2015) <http://www.bt.com.bn/business-national/2015/03/13/'no-regional-ip-system-covers-all-asean'#sthash.6ZMmyOTX.qHxMqeIt.dpbs> accessed 17 July 2016.

not an easy task. Despite the EU's continuous efforts in this area, creating a uniform IP system is still an ongoing process. Therefore, a unified IP system in ASEAN should be incrementally developed by taking into account readiness, capacity of the member states, as well as overall impact of IP harmonisation.

In examining the prospect of devising a regional IP regime in ASEAN, the first part of this chapter will explore major impediments to IP harmonisation, which are diversity between the ASEAN members, ASEAN's practice and institutional structure, and disparity in IP protection and enforcement. All these factors can be considered as the limitations for ASEAN to follow the EU footsteps in achieving a high degree of IP harmonisation. The second part of the chapter will then propose an appropriate solution for ASEAN in developing a regional IP system, which results from an analysis of the development of IP harmonisation in the EU and ASEAN. Finally, concluding remarks of the chapter will be provided. The outcome of the analysis conducted in this chapter would help ASEAN move towards achieving its goals in creating a harmonised IP regime, and thereby reduce impediment to the free movement of goods in ASEAN's internal market.

5.1 Major Impediments to IP Harmonisation in ASEAN

5.1.1 Diversity between ASEAN Members

5.1.1.1 The Development Gap between the Older and Newer ASEAN Countries

As previously discussed in Chapter 4, ASEAN consists of member states that have large social and economic development gaps. Such disparities lead to different capacities to regulate IP policies and thus result in differing degrees of IP protection

and enforcement. Due to this disparity, progress in harmonising the IP law has been delayed.[11] Therefore, to help ASEAN attain its goal of a harmonised IP regime, narrowing the development gaps should be considered a high priority.

Disparities among ASEAN members still exist despite its long integration process. These disparities are clearly apparent between the older and the more recent members. The result of expansion has yielded an organisation with six older and more developed members and four newer, less developed ones. The older ASEAN members are sometimes referred as the ASEAN-6 countries (Singapore, Malaysia, Thailand, Philippines, Indonesia and Brunei Darussalam), whereas the newer ones are widely known as the CLMV (Cambodia, Lao PDR, Myanmar and Vietnam) countries.

Various measurements are used to determine a country's level of development. Two indicators used extensively to measure a country's level of economic and social development is GDP per capita and the Human Development Index (HDI) created by the UNDP (United Nations Development Programme).[12] GDP per capita is considered a good measure of a country's economic performance.[13] However, since the measure of GDP growth is one-dimensional in income, it has been argued that GDP per capita may not be appropriate to measure a country's well-being.[14] Consequently, the HDI, which is composed of multi-dimensional indicators, is acknowledged as the measure

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[11] Assafa Endeshaw, 'The Momentum for Review of TRIPS and Harmonisation of Intellectual Property in ASEAN' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 140.
[12] Rokiah Alavi and Aisha Al-Alim Ramadan, 'Narrowing Development Gaps in ASEAN' (2008) 1 J Econ Coop 29, 31.
[13] Surajit Deb, 'Gap between GDP and HDI: Are the Rich Country Experiences Different from the Poor?' (IARIW-OECD Special Conference: "W(h)ither the SNA?" Paris, France, April 16-17, 2015) <http://iariw.org/papers/2015/deb.pdf> accessed 21 May 2016.
[14] ibid.

of human and social progress.[15]

There is a significant income gap between ASEAN countries, particularly between the ASEAN high-income countries (Singapore and Brunei Darussalam) and the ASEAN low-income country (Cambodia). According to World Bank data of GDP per capita in 2015, Singapore had the highest GDP per capita of US $56,284.3 followed by Brunei Darussalam with US $40,979.6. Cambodia had the lowest GDP per capita of US $1,094.6. ASEAN members also have noteworthy gap in their human and social development.[16] The 2015 Human Development Report by the UNDP contains indicators that reflect the levels of health, education, income, and poverty of each country. In this report, Singapore and Brunei Darussalam were ranked the highest and classified as 'very high human development' countries. Singapore was ranked 11th, while Brunei Darussalam was ranked 31st. A high ranking in HDI indicates that a country has high achievements in human development; it is a country whose citizens enjoy 'a long and healthy life, being knowledgeable and have a decent standard of living'.[17] On the contrary, Myanmar was ranked 148th out of 188, which is the lowest ranking of any ASEAN country. Myanmar was categorised as a 'low human development' country. The other ASEAN countries are classified as 'high human development' or 'medium human development' countries. Malaysia and Thailand were considered to be 'high human development' countries, whereas Indonesia, Philippines, Vietnam, Cambodia and Lao PDR were classified as 'medium human development' countries. There seems to be a positive correlation between HDI

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[15] ibid.
[16] David Carpenter and Izyani Zulkifli and Mark McGullivray, 'Narrowing the Development Gap in ASEAN: Context and Approach' in Mark McGillivray and David Carpenter (eds), *Narrowing the Development Gap in ASEAN: Drivers and Policy Options* (Routledge 2013) 3.
[17] UNDP, 'Human Development Index (HDI)' <http://hdr.undp.org/en/content/human-development-index-hdi> accessed 7 March 2015.

ranking in 2014 and GDP per capita with the exception of Myanmar. This implies that when GDP per capita increases, there is a strong likelihood that that HDI value increases. (See Table 3)

Table 3: GDP Per Capita and HDI Ranking of ASEAN Countries in 2014

Country	GDP Per Capita (current US$)	HDI Value	HDI Ranking (out of 188 countries)
Singapore	56,284.3	0.912	11
Brunei Darussalam	40,979.6	0.856	31
Malaysia	11,307.1	0.779	62
Thailand	5,977.4	0.726	93
Indonesia	3,491.9	0.684	110
Philippines	2,872.5	0.668	115
Vietnam	2,052.3	0.666	116
Lao PDR	1,793.5	0.575	141
Myanmar	1,203.8	0.555	148
Cambodia	1,094.6	0.536	143

Source: World Bank and 2015 HDI Report

These statistics show that ASEAN countries still have wide disparities in quality of life. The gap is significantly wider between the older and newer ASEAN countries, particularly between the highly-developed country, Singapore and the least developed countries, Cambodia and Myanmar. This makes it more difficult for ASEAN to achieve deeper regional integration. It would not be easy for countries in lower stages

of social and economic development to be fully engaged in the integration process. The development gap results from 'differential development achievements'. [18] Different backgrounds and circumstances of each country have led to varying levels of achievement in developing income, health and education. Moreover, achievements in these three dimensions are interrelated.[19] For instance, although growth of income alone cannot guarantee high achievements in health and education, it is undeniable that it is one of the major driving forces behind such achievement.[20] Therefore, strengthening both economic and human development are required to foster overall development of a country. To this end, various initiatives resulting from cooperation between the ASEAN countries and between ASEAN and its dialogue partners were adopted in order to reduce development disparity between ASEAN members.

5.1.1.2 Measures for Reducing the Development Gap in ASEAN

ASEAN's justified concern over the disparities in social and economic development between the members has resulted in the adoption of various initiatives to attempt reduce these gaps. For instance, narrowing these development gaps was a core objective of the Hanoi Plan of Action (HPA) and Initiative for ASEAN Integration (IAI). Moreover, a major concern of the AEC Blueprint 2015, was the importance of narrowing the development gap between ASEAN members. The AEC Blueprint states that one objective in establishing the AEC is to enhance economic growth and reduce poverty within the region. It is expected that an ASEAN common market can enhance

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[18] Mark McGillivray, Simon Feeny and Sasi Iamsiraroj, 'Understanding the ASEAN Development Gap' in Mark McGillivray and David Carpenter (eds), *Narrowing the Development Gap in ASEAN: Drivers and Policy Options* (Routledge 2013) 42.
[19] ibid.
[20] ibid.

trade and investment within ASEAN, and thus contribute to economic growth and poverty reduction.[21] However, due to the wide development gaps between its members, the result could turn out differently. The AEC may actually widen the economic disparity and generate unequal benefits, particularly between the ASEAN-6 and CLMV countries.[22] This underlines the importance of ASEAN's task in narrowing economic gaps between its members. Doing so will ensure that a full-fledged AEC will be established and equal benefits will inure to all ASEAN members.

ASEAN has launched various initiatives to narrow the development gap between its members. Most importantly is the IAI since it provides a concrete plan to reduce disparity among the ASEAN countries and between ASEAN and other countries in the world. The IAI Work Plan adopted various activities and programs that aimed to enhance the human and institutional capacities of the CLMV countries.[23] The work plan was divided into two phases. The first phase encompassed 2002-2008 and addressed the development of infrastructure, human resources, information and communications technology, and regional economic integration.[24] To achieve this goal, 232 projects/programs were implemented. Financial support was provided by the ASEAN-6 countries, as well as dialogue partners, and development agencies such as the EU, Australia, Japan, the World Bank, and UNDP.[25] The IAI Work Plan II, which covers the period of 2009 to 2015, was adopted. It reflected key program areas

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[21] Abuzar Asra and Gemma Esther Estrada and Ernesto M. Pernia, 'ASEAN economic Community: Implications for Poverty Reduction in Southeast Asia' in Denis Hew Wei-Yen, *Roadmap to ASEAN Economic Community* (ISEAS Publications 2005) 234.
[22] ibid.
[23] Carpenter, Zulkifli and McGullivray (n 16) 8.
[24] ASEAN, 'IAI Work Plan I (2002-2008)' <http://www.asean.org/communities/asean-economic-community/item/iai-work-plan-i-2002-2008> accessed 8 March 2015.
[25] Carpenter, Zulkifli and McGullivray (n 16) 8.

that support three pillars of the ASEAN Community.[26] The IAI Work Plan II also emphasised that additional attention and support should be given to the CLMV countries in order to reduce the development gap and accelerate the economic integration of these countries.[27] According to 2014-2015 ASEAN Annual Report, as of 1 April 2015, 68 out of the 182 action lines have been implemented.[28] All projects were carried out with the support of ASEAN-6 and dialogue partners.[29] By the end of 2015, it was expected that all priority areas would be implemented. Although some action lines remain unimplemented, it was claimed that positive progress has been made in implementing the IAI Work Plan II.[30] As the IAI Work Plan II is now expired, ASEAN has adopted the IAI Work Plan III, taking into account the strengths and weaknesses in the drafting process and implementation of the previous IAI work plans.[31] Particular attention will be given to CLMV.[32] The new work plan aims to better serve the strategic needs of these countries.[33]

By being genuinely concerned about the development gap and devising a clear policy framework to address it, the disparities, particularly between the ASEAN-6 and the CLMV, tend to converge.[34] It was found that there is a slow convergence of the level

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[26] ASEAN, 'Initiative for ASEAN Integration (IAI) and Narrowing the Development Gap (NDG)' <http://www.asean.org/asean-economic-community/initiative-for-asean-integration-iai-and-narrowing-the-development-gap-ndg/> accessed 27 March 2016.
[27] ASEAN, 'Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015)' (2009) <http://www.asean.org/storage/images/archive/22325.pdf> accessed 11 May 2016.
[28] ASEAN, *Annual Report 2014-2015* (The ASEAN Secretariat 2015) 22-23.
[29] ibid.
[30] ASEAN, *ASEAN 2025: Forging Ahead Together* (ASEAN Secretariat 2015) 13.
[31] See ASEAN, 'Initiative For ASEAN Integration (IAI) Work Plan III' <http://asean.org/?static_post=initiative-asean-integration-iai-work-plan-iii> accessed 9 December 2016; ASEAN, 'ASEAN-Australia Development Cooperation Program (AADCP) Phase II: Consultancy for the Development of Post 2015 Work Plan for the Initiative of ASEAN Integration (IAI)' (2015) 1 <http://aadcp2.org/wp-content/uploads/FINAL-IAI-Workplan-III_TOR.pdf> accessed 27 March 2016.
[32] ibid.
[33] ibid.
[34] McGillivray, Feeny and Iamsiraroj (n 18) 29.

of GDP per capita between more and less developed ASEAN members.[35] For instance, in 2010, Singapore had the highest GDP per capita of $46,569.7, approximately 59.5 times that of Cambodia (US $782.7), 40.59 times that of Lao PDR (US $1147.1), and 34.92 times that of Vietnam (US $1,333.6). However, the income gap between these countries is shrinking. Continuous economic growth in Cambodia, Lao PDR and Vietnam has reduced their GDP per capita differentials with Singapore. In 2014, Singapore's GDP per capita (US $56,284.3) was approximately 50 times that of Cambodia (US $1,094.6), 31.38 times that of Lao PDR (US $1,793.5), and 27.42 that of Vietnam (US $1094.6). (See Table 4)

Table 4: GDP per capita (current US$) in Singapore, Vietnam, Lao PDR and Cambodia, 2010-2014

Year	Singapore	Vietnam	Lao PDR	Cambodia
2010	46,569.7	1,333.6	1,147.1	782.7
2011	53,121.4	1,542.7	1,301.0	879.2
2012	54,576.8	1,754.5	1,445.9	946.5
2013	55,980.2	1,907.6	1,701.0	1,024.6
2014	56,284.3	2,052.3	1,793.5	1,094.6

Source: World Bank

Moreover, HDI statistics reflect that differences in human development between the ASEAN-6 and the CLMV gradually decreased from 2000 to 2011.[36] The human

[35] Rupal Chowdhary and others, 'Convergence of GDP Per Capita in ASEAN Countries' (2011) 4 PIJMR 1, 8.
[36] ibid 30.

development gap decreased by 13% during that 11 year time span.[37] According to Human Development Index Trends, 1990-2014 in 2015 Human Development Report, HDI scores have been improving in all ASEAN countries, though significant gaps remain.[38] ASEAN countries, particularly ASEAN developing and least developed countries tend to perform better on the HDI. (See Table 5)

[37] David Carpenter, Rohiah Alavi and Izyani Zulkifli, 'Regional Development Cooperation and Narrowing the Development Gap in ASEAN' in Mark McGillivray and David Carpenter (eds), *Narrowing the Development Gap in ASEAN: Drivers and Policy Options* (Routledge 2013) 134
[38] UNDP, *Human Development Report 2015: Work for Human Development* (UNDP 2015) 212-215.

Table 5: HDI Value in ASEAN Countries, 2011-2014

Country	2010	2011	2012	2013	2014	HDI Annual Growth (%) (2010-2014)	HDI Ranking (2014)
Singapore	0.897	0.903	0.905	0.909	0.912	0.41	11
Brunei Darussalam	0.843	0.847	0.852	0.852	0.856	0.37	31
Malaysia	0.769	0.772	0.774	0.777	0.779	0.32	62
Thailand	0.716	0.721	0.723	0.724	0.726	0.35	93
Indonesia	0.665	0.671	0.678	0.681	0.684	0.71	115
Philippines	0.654	0.653	0.657	0.664	0.668	0.52	110
Vietnam	0.653	0.657	0.660	0.663	0.666	0.47	116
Lao PDR	0.539	0.552	0.562	0.570	0.575	1.62	141
Cambodia	0.536	0.541	0.546	0.550	0.555	0.87	143
Myanmar	0.520	0.524	0.528	0.531	0.536	0.72	148

Source: 2015 HDI Report

It is likely that ASEAN is moving in the right direction in initiating projects and providing funds to support activities to narrow development gaps. However, although the differences in the level of human development between the two tiers of ASEAN countries has tended to decrease, the remaining gap is still significant.[39] It might take 25 to 27 years for the CLMV countries to reach the average level of human

[39] McGillivray, Feeny and Iamsiraroj (n 18) 29.

development of the ASEAN-6 countries.[40] This demonstrates that despite the convergence trend between the ASEAN-6 and the CLMV countries, the development gap among them is still remains. The speed at which the less developed members are catching up with the more developed members is quite slow.

5.1.1.3 Challenges and the Need for Further Changes

Although the ASEAN least developed countries have taken a significant step forward, they still face social and economic development problems. The action plans ASEAN have launched in an effort to reduce the gap among its members have failed to have the desired effect on the disparity in economic and social development. This is evidenced by wide disparities in GDP per capita and HDI rankings between the highly developed and less developed members. The major obstacles for ASEAN are funding and lack of effective implementation.[41] ASEAN programs and initiatives largely rely on funding from external development agencies. In addition, the funds are normally not spent in accordance with the plan.[42] This would adversely affect the effectiveness of any programme or/and initiative let alone those that require large amounts of funding to help the CLMV countries catch up. Furthermore, ASEAN's lack of political will to ensure that all of the action plans are properly implemented obstructs its overall effort to narrow the development gaps between its members.[43] The significant development gap between the ASEAN-6 and CLMV countries can hinder IP harmonisation and regional economic integration, which is a threat to a well-

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[40] ibid 31
[41] Alavi and Ramadan (n 12) 55.
[42] ibid.
[43] Alavi and Ramadan (n 12) 54.

functioning common market and ASEAN's competitiveness. Therefore, narrowing these development gaps is an important objective and a priority for ASEAN.

After expansion, the EU also experienced a development gap among its member states. The development disparities between the older and newer members became more apparent when the EU expanded its membership from 15 to 25 member states in 2004.[44] Ten new members in Central and Eastern Europe are less economically advanced than the older members.[45] Bridging the development gap between the older and newer members, therefore, has become an important issue of the EU.[46] Furthermore, EU expansion from 25 to 27 member states in 2007 resulted in the largest increase ever in regional development inequalities.[47] Bulgaria and Romania joined the EU in 2007 and are considered the poorest EU members.[48] Given the lower levels of social and economic development of the newer members, the EU gave emphasis to this issue and a lot of financial support to EU newcomers was provided by the member states, particularly by the wealthier members.[49] Finances were considered the most important element of EU accession negotiations.[50] According to 2014-2020 EU Cohesion Policy, the EU's main investment policy, the EU allocated almost one third of the total budget to address the diverse development of the member

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[44] Lorraine Carlos Salazar and Sanchita Basu, 'Bridging the ASEAN. Developmental Divide*:* Challenges and Prospects' (2007) 24 ASEAN Economic Bulletin 1, *8.*
[45] ibid.
[46] ibid.
[47] József Benedek and Ibolya Kurkó, 'Convergence or divergence? The Position of Romania in the Spatial Structure of the European Union' (2012) 2 Transylvanian Review 116-125.
[48] Eurtiv.com, 'Analyst: Bulgaria and Romania's EU accession 'was right'' <http://www.euractiv.com/enlargement/analyst-bulgaria-romanias-eu-acc-news-509933> accessed 26 January 2016.
[49] Douglas Massey, 'Caution: NAFTA at work - How Europe's trade model could solve America's immigration problem' Miller-McCune Magazine, March 4.
[50] Alan Mayhew, 'The Financial and Budgetary Impact of Enlargement and Accession' in Christophe Hillion (ed.) *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 143.

states.[51] Special attention is given to less developed members to reduce the disparities and help them catch up with other members.[52] Funds from the EU can help the newer, generally poorer members catch up to the older members. This financial support from the EU can help accelerate the development of transportation and environmental infrastructure.[53] Structural and Investment Funds have been used by the EU to narrow social and economic development gaps between the member states. An effective tool is the European Regional Development Fund (ERDF). Financial aid from this fund was given to the poorer member countries to stimulate economic growth, increase employment, and improve quality of life, infrastructure and investment environment.[54] Furthermore, the European Social Fund (ESF) was set up in order to provide support for education, training programs and employment.[55] The Cohesion Fund (CF) was also established in order to improve the environment and transport infrastructure.[56] Clearly, the policy of using structural and cohesion funds has had a positive impact on the social and economic development in poorer member countries.[57] Consequently, the development gap between the EU members has continuously decreased. The newer members could successfully integrate into the system, and all EU members would be able enjoy benefits and advantages from the regional integration process.

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[51] European Commission, 'An Introduction to EU Cohesion Policy 2014-2020' (June 2014) <http://ec.europa.eu/regional_policy/sources/docgener/informat/basic/basic_2014_en.pdf> accessed 8 May 2016.
[52] European Commission, 'The EU's Main Investment Policy' <http://ec.europa.eu/regional_policy/en/policy/what/investment-policy/> accessed 8 May 2016.
[53] Mayhew (n 50) 143.
[54] European Funding, 'European Regional Development Fund' <http://www.europeanfundingne.co.uk/european-regional-development-fund-erdf.html> accessed 16 March 2016.
[55] Europa, 'Structural Funds and Cohesion Fund' <http://europa.eu/legislation_summaries/glossary/structural_cohesion_fund_en.htm> accessed 7 April 2015.
[56] ibid.
[57] Alavi and Ramadan (n 12).

ASEAN has recognised that considerable financial and other resources are necessary for effective regional integration. In 2005, the ASEAN Development Fund (ADF) was established to address the shortfall in funding necessary to support the implementation of projects under the Vientiane Action Programme (VAP), including IAI. It serves as ASEAN's common pool of financial resources that is important to assist ASEAN's efforts to narrow the development gaps within the region.[58] The ADF receives contributions from all the member states, dialogue partners and donor institutions.[59] It was instituted with US $10,000,000 converted from the earlier ASEAN fund and another US $1,000,000 from equal contributions from 10 ASEAN countries.[60] However, the members were encouraged to contribute additional funds in any amount and at any time. In addition to mandatory contributions, Singapore and Malaysia made additional voluntary contributions of US $500,000 to the ADF.[61] Contributions from dialogue partners include Australia, China and India.[62] Nonetheless, the ADF has not proven to be successful due to limited financial resources.[63] ASEAN still relied much on contributions from external donors to support tasks that ASEAN needs to get done.[64]

In 2011 the ASEAN Infrastructure Fund (AIF) was set up. It is considered to be 'the

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[58] Joseph Francois, Pradumna B. Rana and Ganeshan Wignaraja, *National Strategies for Regional Integration: South and East Asian Case Studies* (Anthem Press 2011) 20.
[59] Hang Chuon Naron**,** *Cambodian Economy:* Charting the Course of a Brighter Future: a Survey of Progress, Problems, and Prospects (Institute of Southeast Asian Studies 2011) 519.
[60] ASEAN, *Annual Report 2006-2007* (ASEAN Secretariat 2007) 13.
[61] ibid; Ministry of Foreign Affairs, 'Ministry of Foreign Affairs Press Statement: Singapore's Enhanced Contribution to the Initiative for ASEAN Integration, 20 November 2007' <https://www.mfa.gov.sg/content/mfa/overseasmission/washington/newsroom/press_statements/2007/200711/press_200711_04.html> accessed 22 May 2016.
[62] Manuel Riesco, 'Regional Social Policies in Latin America – Binding Material for a Young Ginat' in Bob Deacon and others (eds), *World-Regional Social Policy and Global Governance: New research and policy agendas in Africa, Asia, Europe and Latin America* (Routledge 2009); ASEAN, *Annual Report 2006-2007* (n 60) 13.
[63] Jacques Pelkmans, *The ASEAN Economic Community: A Conceptual Approach* (Cambridge University Press 2016) 102.
[64] ibid.

largest ASEAN-led financial initiative in its history'.[65] Its purpose was to boost infrastructure development in ASEAN countries.[66] ASEAN recognised that good infrastructure is crucial to enhance connectivity, thereby contributing to narrowing development gaps.[67] The AIF was created with an initial equity contribution of US $485.2 million, of which US $335.2 million came from 9 ASEAN members and US $150 million came from the Asian Development Bank (ADB).[68] It is expected that funds from the AIF will help overall development by focusing on infrastructure development. To establish an effective and integrated common market, connectivity between the member states is crucial. The AIF is considered a major financial resource that aims to finance the development of infrastructure within the region in order to ensure that the member states are well-connected.[69] ASEAN countries have indicated an intention to apply for AIF financing.[70] Various projects have been approved for funding. For instance, a US $100 million loan has been approved to improve a 66.4-kilometre section of road connecting the towns of Eindu and Kawkareik in Myanmar's Kayin state in order to help connect Vietnam's central Da Nang city and Myanmar.[71] Recently, the Second Greater Mekong Subregion (GMS) Corridor Towns Development Project, which is the second phase of the ongoing GMS

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[65] Asian Development Bank, 'The ASEAN Infrastructure Fund' <http://www.adb.org/news/infographics/asean-infrastructure-fund> accessed 10 March 2015.
[66] ibid.
[67] ASEAN, *Master Plan on ASEAN Connectivity* (ASEAN Secretariat 2011) 2-3.
[68] ASEAN, 'ASEAN Infrastructure Fund Targets US$13 billion towards ASEAN Connectivity' <http://www.asean.org/news/asean-secretariat-news/item/asean-infrastructure-fund-targets-us13-billion-towards-asean-connectivity> accessed 10 March 2015.
[69] S. Pushpanathan, 'ASEAN's Readiness in Achieving the AEC 2015: Prospects and Challenges' in Sanchita Basu Das (ed), *Achieving the ASEAN Economic Community 2015:* Challenges for Member Countries & Business (Institute of Southeast Asian Studies, 2012) 15.
[70] Sundaran Annamalai, 'ASEAN Infrastructure Fund (AIF)' (25 November 2015) <http://www.unescap.org/sites/default/files/5b%20-%20ASEAN%20Infrastructure%20Fund.pdf> accessed 8 April 2016.
[71] ADB, 'ADB Loan to Help Upgrade Road in Kayin State on GMS Corridor Route' <http://www.adb.org/news/adb-loan-help-upgrade-road-kayin-state-gms-corridor-route> accessed 22 May 2016.

Corridor Towns Development Project in Cambodia, Lao PDR and Vietnam, has also been approved to strengthen infrastructure linkages, facilitate the development of cross-border trade, investment, tourism and human resources.[72] However, the size of the fund is relatively small compared with estimated financing needs required through 2020.[73]

Particularly for the CLMV countries, access to these new financial resources is significant and essential to their development and thus to the development of the entire region. Establishing the ADF can help further facilitate the implementation of IAI, ASEAN's main tool to address the development gap. Moreover, having the AIF can support ASEAN in moving towards a more-connected region. Improving essential infrastructure such as transportation, electricity and water supplies will have a positive impact on economic growth and human development and the development gap between them and the older members will narrow. This would finally help ASEAN move closer to its goal of achieving deeper regional economic integration.

It can be seen that steady and intense regional cooperation between the ASEAN countries, dialogue partners and development agencies has helped ASEAN address the problems of its development gap more effectively. The development gap existing between the ASEAN-6 countries and the CLMV has steadily narrowed. The higher GDP per capita and HDI score in less developed members, particularly in Vietnam indicate improvements in the well-being of their people and nations. Rather than primarily relying on external assistance from donor countries, international

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[72] ADB, 'Cambodia: Second Greater Mekong Subregion Corridor Towns Development Project' <http://www.adb.org/projects/46443-002/main> accessed 22 May 2016.
[73] Sanchita Basu Das, *The ASEAN Economic Community and Beyond: Myths and Realities* (ISEAS–Yusof Ishak Institute 2016) 210.

organisations, and development agencies, ASEAN has established its own funds that require contribution from ASEAN members. This demonstrates more cooperation and more progress in narrowing the development gap. However, the remaining gap is still significant. The ADF cannot effectively play the role that the EU regional funds are playing in narrowing the development gap between member states. The amount received from the member states' contributions is disproportionate to the tasks that need to be achieved. Similarly, there is a need to increase the AIF's size in order to provide sufficient funds to finance essential infrastructure projects. Consequently, ASEAN should devise policies that ensure that the poorer member countries can obtain more benefits to catch up with more developed countries such as Singapore.[74] The wealthier members should take more responsibility and make bigger contributions to reduce the inequalities within the region. For instance, although contributions to the ADF are voluntary, more funds should come from the better off countries. In the EU, although all member states contribute to the EU Budget, wealthier members such as the UK and Germany are significant net contributors.[75] Less developed members can obtain benefits with ERDF at the expense of wealthier members.[76] Having sufficient resources to implement initiatives and develop infrastructure would permit the CLMV to narrow the gap with other members. Continuously increasing economic growth in the CLMV would enable them to catch up with the ASEAN-6 by 2030.[77] Moreover, without strong political will from all the member states, this cannot be achieved. It is very important that all commitments and

[74] David Carpenter and Mark McGillivray, 'Narrowing the Development Gap: Policy Recommendations for ASEAN and Development Partners' in Mark McGillivray and David Carpenter (eds), *Narrowing the Development Gap in ASEAN: Drivers and Policy Options* (Routledge 2013) 199.
[75] Carolyn M. Dudek, *EU Accession and Spanish Regional Development: Winners and Losers* (Peter Lang 2005) 127.
[76] ibid 132.
[77] Asian Development Bank Institute (ADBI), *ASEAN 2030: toward a Borderless Economic Community* (Brookings Institution Press 2014) 76.

initiatives are consistently implemented by ASEAN members. ASEAN should play a major role in 'fostering political support' to minimise the development gap.[78] Intensive cooperation and deeper integration between the ASEAN members could help ASEAN move forward in more a unified manner. This would be a key success in reducing inequality in socio-economic development. However, it raises the question of whether ASEAN's practice or the 'ASEAN Way', which largely relies on the ideas of non-interference, informality, and loose arrangements, would allow ASEAN to do so.

5.1.2 ASEAN's Practice and Institutional Structure

5.1.2.1 The 'ASEAN Way'

ASEAN's loose and informal cooperation is known as the 'ASEAN Way', which was defined as 'a process of regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontational bargaining styles'.[79] The key components of the 'ASEAN Way' are the principle of national sovereignty, the principle of non-interference and consensus-based decision making.[80] This has led to wide criticism among scholars. Although the 'ASEAN Way' can lead to less conflict and retained stability among members, it is an 'ineffective and inefficient' mechanism in solving problems at the regional level.[81] The 'ASEAN Way' pursues a 'consensus

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[78] ibid.
[79] Amitav Acharya, *Constructing a Security Community in South East Asia: ASEAN and the Problem of Regional Order* (Routledge 2014) 63.
[80] Christopher Roberts, *ASEAN's Myanmar Crisis: Challenges to the Pursuit of a Security Community* (Institute of Southeast Asian 2010) 108.
[81] ASEAN, 'ASEAN-10: Meeting the Challenges, by Termsak Chalermpalanupap' <http://www.asean.org/asean-10-meeting-the-challenges-by-termsak-chalermpalanupap/> accessed 27 March 2016.

based decision-making process'. This was defined as a process which ensures that 'each and every action taken in the name of ASEAN must either contribute to or be neutral, but not detract from, the perceived national interests of the individual ASEAN member state.'[82] Following such a process may lead to decision paralysis.[83] It should be noted that the consensus procedure does not mean that unanimity has to be found.[84] Not all member states have to agree explicitly.[85] Consensus can be reached so long as member states' interests were not disregarded.[86] However, this might be harder to achieve when all ten members' national interests are at stake.[87] In other words, consensus seems difficult to obtain when more member states, which have different level of development and policy priorities are involved. Consequently, it was suggested that to facilitate more effective decision making ASEAN should move away from consensus-based decision making and adopt more flexible mechanisms.[88] For instance, when consensus can not be achieved, decisions should be made through voting.[89] Also, 'ASEAN minus-x' formula, which had been occasionally used in economic matters,[90] should be adopted.[91] However, consensus-based decision making should still be applied to all sensitive important issues.[92] In the

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[82] Bilson Kurus, 'The ASEAN Triad: National Interest, Consensus-Seeking, and Economic Co-operation' (1995) 16 Contemporary Southeast Asia 404, 405.
[83] Ulaş Başar Gezgin, *Vietnam & Asia in Flux, 2008: Economy, Tourism, Corruption, Education and ASEAN Regional Integration in Vietnam and Asia* (Öz Yapım Messel 2009) 88.
[84] Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-general* (Institute of Southeast Asian Studies 2006) 34.
[85] ibid.
[86] *The Straits Times* (Singapore), November 13, 1994, 17.
[87] Alan Collins, *The Security Dilemmas of Southeast Asia* (Palgrave Macmillan 2000) 119.
[88] ASEAN 'Report of the Eminent Group on the ASEAN Charter' (December 2006) 6 <http://www.asean.org/archive/19247.pdf> accessed 5 April 2016.
[89] ibid.
[90] Avery Dorothy Howard Poole, 'Institutional Change in Regional Organizations: The Emergence and Evolution of ASEAN Norms' (DPhil thesis, University of British Columbia 2013) 106-107.
[91] ASEAN 'Report of the Eminent Group on the ASEAN Charter' (n 88) 6.
[92] ibid.

EU, decision making mechanisms range from qualified majority vote (QMV)[93] to unanimity depending on policy area.[94] In a post enlargement EU, unanimity will be more difficult to achieve.[95] The EU move from unanimity to QMV in some areas. By using QMV, decisions can be made more easily.[96] It was pointed out that EU is more effective in trade than other areas since it uses QMV to make decision.[97] However, there are still some sensitive areas such as taxation, social security or foreign policy and defense where unanimity is still required.[98] Moreover, to deal more effectively with challenges arising from a globalised world, it was proposed that 'two-speed' development should be adopted.[99] This approach would allow a small group of member states that is ready to go ahead immediately, while other members would follow later at its own speed.[100] It was argued that the two-speed integration has already been adopted in some areas such as border controls and monetary policy.[101] This approach allowed the EU to develop closer cooperation in a flexible manner, taking into consideration the level of economic development and particular interests of the member states.[102]

It can be seen that ASEAN places much emphasis on national sovereignty of the

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[93] Under QMV, each member state is allocated a certain number of votes in the council of the EU, weighted according to the size of population of member states. For further knowledge, see Europa, 'The new system of qualified majority voting' <http://europa.eu/scadplus/constitution/doublemajority_en.htm> accessed 21 July 2016.
[94] Jens-Uwe Wunderlich, 'The EU an Actor *Sui Generis*? A Comparison of EU and ASEAN Actorness' (2012) 50 JCMS 653, 662.
[95] Europa, 'The Union's decision-making procedures' <http://europa.eu/scadplus/european_convention/majority_en.htm> accessed 2 July 2016.
[96] Wunderlich (n 94) 663.
[97] Tobias Lenz and Gary Marks, 'Regional Institutional Design' in Thomas Risse (ed), *The Oxford Handbook of Comparative Regionalism* (OUP 2016) 527.
[98] Olivier Costa and Nathalie Brack, *How the EU Really Works* (Routledge 2016) 101.
[99] For a more detailed analysis, see Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).
[100] ibid 6-7.
[101] ibid 62.
[102] ibid.

member states in its decision making process. ASEAN member countries tend to prioritise state autonomy over the ASEAN community as a whole.[103] In other words, ASEAN is reluctant to conduct regional affairs that could undermine sovereignty of the member states. ASEAN's decision making is also largely non-binding. The decision-making process relies mostly on 'friendship rather than power, stability rather than adventurism'.[104] ASEAN tends to use informal communication, which imposes non-legally binding obligations.[105] Non-binding commitments have also led to a problem of non-implementation.[106] This supports the view that 'many ASEAN agreements were never intended to be implemented'.[107] Additionally, the adoption of a non-interference policy was claimed to be major obstacle for ASEAN in dealing with affairs both inside and outside the region.[108] The 'ASEAN Way' can have negative effects on its decision-making process. Strict reliance on the consensus decision-making process, preservation of national sovereignty and non-interference with other members' internal affairs can limit success in regional affairs and adversely affect ASEAN's overall effectiveness. This could obstruct ASEAN's effort to deepen integration and establish the ASEAN community.

ASEAN has fully recognised that to successfully establish the AEC, stronger cooperation between the member states in harmonising IP is essential. In the early stages, ASEAN resolved to establish regional trademark and patent systems,

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[103] Jurgen Ruland, 'Southeast Asian regionalism and global governance: "multilateral utility" or "hedging utility"?' 33 Contemporary Southeast Asia. 83-112.
[104] Rodrigo Tavares, *Regional Security: The Capacity of International Organizations* (Routledge 2010) 87.
[105] Yi-Hung Chiou, 'Unraveling the Logic of ASEAN's Decision-Making: Theoretical Analysis and Case Examination' (2010) 2 Asian Politics & Policy 371, 374.
[106] Takeshi Yuzawa, 'The Fallacy of Socialization?: Rethinking the ASEAN Way of Institution-building' in Ralf Emmers (ed), *ASEAN and the Institutionalization of East Asia* (Routledge 2011) 87.
[107] Simon Chesterman, *From Community to Compliance?: The Evolution of Monitoring Obligations in ASEAN* (Cambridge University Press 2015) 10.
[108] S. S. TAN, 'Is Asia-Pacific regionalism outgrowing ASEAN?' (2011) 156 The RUSI Journal 58-62.

including ASEAN Trademark and Patent Offices. This is clearly reflected in the ASEAN Framework Agreement on IP Cooperation, the Hanoi Plan of Action, and the first phase of ASEAN IPR Action Plan (2004-2010). Nevertheless, that stringent approach seems to be incompatible with the 'ASEAN Way'. Various initiatives, particularly those relating regionalisation of IP have not been achieved within the target timeframe. The 'ASEAN Way' of non-binding commitments fosters 'habits of non-implementation',[109] thereby having a negative effect on the implementation of regional policies and projects. The ASEAN Secretary-General was established and given authority to foster cooperation and the implementation of ASEAN's initiatives. In practicality, his power in monitoring compliance was limited due to ASEAN's weak institutional structure.[110] Moreover, without possible sanctions for failure to participate or mechanisms to ensure compliance, adoption of policies is essentially voluntary. Member states lack of strong incentive to honour their commitments.[111] Non-compliance and limited effectiveness of ASEAN IP policies are real possibilities.

To 'ensure expeditious and legally binding resolution of any economic disputes', the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Vientiane Protocol or EDSM) was adopted.[112] The EDSM is the primary mechanism for disputes relating to economic agreements. The ASEAN Framework Agreement on IP Cooperation is one of the covered agreements set out in Annex I of the EDSM

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[109] Yuzawa (n 106) 82.
[110] Lin Chun Hung, 'ASEAN Charter: Deeper Regional Integration under International Law?' (2010) 9 Chi J Int'l L 821, 829.
[111] Yuzawa (n 106) 82.
[112] See 2003 Declaration of ASEAN Concord II (Bali Concord II), 9th ASEAN Summit, Bali, Indonesia, 7 October 2003, Article B para 3.

Protocol. This was regarded as 'noteworthy for its level of ambition'.[113] Among other things, it shifted dispute resolution from a diplomatic mechanism to legal one. This seems contrary to the traditional practice that tended to avoid using formal settlement mechanism. The EDSM established a set of non-adjudicatory mechanisms, such as good offices, consultations, conciliation and mediation, and formal adjudicatory mechanisms for resolving disputes that arise from ASEAN economic agreements, unless specific mechanism is provided.[114] To resolve dispute through adjudication process, similar to the WTO dispute settlement mechanism, the EDSM comprises Panels and Appellate Body to assess disputes.[115] Therefore, when there is a case of non-compliance the panel or appellate body may request a member state to take measures to bring itself into conformity with the agreement.[116] Compliance measures are also provided. Failing to implement findings and recommendations of the panel and appellate body within specified term may lead to compensation and suspension of concession.[117] However, to date, the EDSM has never been used by any member country.[118] ASEAN members still lack confidence in using the ASEAN EDSM.[119] For instance, to resolve economic dispute regarding tobacco between Thailand and Philippines, the parties have previously opted to use WTO dispute settlement

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[113] Lionel Yee Woon Chin, 'Implementation of International Agreements in the Realisation of the ASEAN Charter', 5. <http://www.aseanlawassociation.org/11GAdocs/workshop4-sg.pdf> accessed 1 July 2015.
[114] Krit Kraichitti, 'Dispute Settlement Mechanisms for ASEAN Community: Experiences, Challenges and Way Forward' Workshop on Trade and Investment ASEAN Law Association 12th General Assembly 25-28 February 2015, Manila, Philippines, 6 <http://www.aseanlawassociation.org/12GAdocs/workshop5-thailand.pdf> accessed 27 May 2016.
[115] ibid.
[116] Joseph Wira Koesnaidi and others, 'For a More Effective and Competitive ASEAN Dispute Settlement Mechanism' (June 2014) SECO / WTI Academic Cooperation Project Working Paper Series 2014/06, 9 <http://ssrn.com/abstract=2613871> accessed 1 July 2015
[117] Article 16 of the EDSM.
[118] Kraichitti (n 114) 10.
[119] Edmund W. Sim, 'The Outstanding of Legal Norms and Institutions by the ASEAN Economic Community' (2014) 1 Indon j int'l & comp l 314, 315.

instead.[120] ASEAN members prefer to settle their disputes through the WTO dispute resolution, which is more predictable, reliable and practical.[121] It has been suggested that confidence of the ASEAN members in ASEAN-based legal norms should be fostered in order to build a greater legitimacy in ASEAN.[122] To achieve this goal, the ASEAN dispute resolution procedures should be strengthened to provide more legal certainty.

Despite progress in providing mechanisms for ensuring compliance and resolving economic disputes, the implementation of ASEAN's initiatives is still behind schedule. The significant differences in the levels of development, its practices and loose institutional structures foster ASEAN's adoption of more flexible approaches to pursuing its goal of harmonising IP rights. This can clearly be seen in the ASEAN IPR Action Plan covering period 2011-2015. More flexible cooperation policy is compatible with the 'ASEAN Way'. This action plan requires member states to participate in international IP community rather than formulate a single set of regional harmonised IP laws. However, in order for ASEAN to firmly establish a common market by allowing goods to freely move with ASEAN countries, merely using the soft law approach that is commitments are often voluntary and non-binding would be inadequate. Additionally, more intense cooperation between the member states and a higher degree of regionalisation needs to be done to help ASEAN achieve its ambitious goal.

Compared with the EU, ASEAN has lesser degree of institutionalisation. ASEAN

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[120] Stefano Inama and Edmund W. Sim, *The Foundation of the ASEAN Economic Community* (Cambridge University Press 2015) 161.
[121] Kraichitti (n 114) 10.
[122] ibid.

lacks of conditions that are presented at the EU level, particularly the existence of supranational institutions that allow and facilitate the development of IP harmonisation. In its initial stages, ASEAN was not designed to develop into a supranational organisation, which could require member states to limit their national sovereignty for common gains. In 1967, ASEAN was established by Indonesia, Thailand, Malaysia, Philippines, and Singapore, five non-communist countries. These countries were motivated by a common fear of communism, the principle of non-interference and respect for sovereignty.[123] It was not their purpose to construct a supranational organisation. ASEAN adopted an informal process decision making process and completely rejected any form of supranational decision-making in order to preserve national sovereignty of the member states.[124] This led to weak institutionalism of ASEAN. On the contrary, the EU is not merely an intergovernmental organisation but also a supranational organisation. EU member states agreed to transfer part of their national sovereignty on some social and economic matters to EU institutions. This gives the EU decision-making system a supranational quality.[125] Having supranational characteristics has helped the EU achieve a high level of harmonisation of laws within its community,[126] including IP law. Moreover, the EU consists of institutional bodies that have authority to pass legislation and ensure consistent interpretation and application of the law in all the member states. By definition, legislation with such expansive coverage is 'supranational'. The EU took an 'institutional building approach.' ASEAN, on the

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[123] Acharya (n 79) 58.
[124] Katja Weber, 'ASEAN: A Prime Example of Regionalism in Southeast Asia' (2009) 6 EUMA 3, 7.
[125] Kristin Archick, 'The European Union: Questions and Answers' (2015) CRS Report for Congress RS21372 <http://fas.org/sgp/crs/row/RS21372.pdf> accessed 15 October 2015.
[126] Silvia Fazio, *The Harmonization of International Commercial Law* (Kluwer Law International 2007) 117.

other hand, has attempted to develop regional integration through functional cooperation.[127] Although ASEAN has been inspired by the progress of European integration, it has not followed EU's philosophy of establishing a supranational organisation. The EU strives for further integration by restraining national sovereignty of its members. ASEAN style integration prioritises the preservation of national sovereignty. This demonstrates a significant difference between ASEAN and the EU and exemplifies a reason IP harmonisation within ASEAN has been obstructed and delayed.

The 'ASEAN Way' is a major reason ASEAN remains an intergovernmental organisation[128] and is not a supranational one. It appears that the 'ASEAN Way' is an impediment to regional cooperation and further instutionalisation. Only by modifying or abandoning some aspects of the 'ASEAN Way' and by introducing further institutional change can healthier regional economic integration be achieved.

5.1.2.2 Further Institutional Change after the Adoption of the ASEAN Charter

The ASEAN Charter became effective in December 2008. It is considered to be the constitution of ASEAN. Its purposes include enhancing integration and facilitating 'community building towards an ASEAN Community and beyond'.[129] The ASEAN Charter outlines significant institutional frameworks of ASEAN. The Charter

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[127] ASEAN, '"Advancing ASEAN-EU Relations in the 21st Century" by H.E Mr. Ong Keng Yong' <http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/advancing-asean-eu-relations-in-the-21st-century-by-he-mr-ong-keng-yong> accessed 15 March 2015.

[128] S. Simon, 'ASEAN and Multilateralism: The Long, Bumpy Road to Community' (2008) 30 Contemporary Southeast Asia 264–292.

[129] ASEAN, 'Kuala Lumpur Declaration' <http://www.asean.org/asean/asean-charter/kuala-lumpur-declaration> accessed 16 March 2015.

transforms ASEAN from a loose and informal organisation to a more rule-based organisation.[130] It has been suggested that after the adoption of the Charter, ASEAN was more likely to accept a binding agreement.[131] The Charter also establishes ASEAN as a legal entity separate and independent of the member states. As an independent legal entity, ASEAN could sue or be sued, and would have an increased capacity to involve itself in the international arena. In the pre-Charter period, the lack of an independent legal existence constrained ASEAN from effectively concluding and implementing regional agreements.[132] The adoption of the ASEAN Charter helped move ASEAN closer to the EU-style of regional integration and move away from the non-interference principle.[133] The transformation of ASEAN into a rule-based organisation as a distinct legal entity marks a significant step in the quest for more expansive institutionalisation.

The ASEAN Charter established three groups of decision-making and policy implementation bodies. The ASEAN Summit, the ASEAN Coordinating Council, and the ASEAN Community Council. The ASEAN Summit is ASEAN's highest decision-making authority. It is comprised of the heads of state of all ASEAN members. The ASEAN Coordinating Council coordinates the implementation of agreements and decisions of the ASEAN Summit and coordinates with the ASEAN Community Council. The ASEAN Coordinate Council is made up of ASEAN foreign ministers and is regarded as one of the important decision-making and implementation bodies

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[130] Yeo Lay Hwee, 'From AFTA to ASEAN Economic Community – Is ASEAN Moving Towards EU-Style Economic Integration?' in Finn Laursen (ed), *Comparative Regional Integration: Europe and Beyond* (Ashgate Publishing 2010) 221.
[131] Chesterman (n 107) 97.
[132] Chun Hung Lin, 'EU-Style Integration? Future of Southeast Asian Countries After ASEAN Charter' (Whatever Happened to North-South? IPSA-ECPR Joint Conference, University of Sao Paulo, Brazil, 19 February 2011) 7 <http://paperroom.ipsa.org/papers/paper_26431.pdf> accessed 29 April 2016.
[133] Hung (n 110) 1.

of ASEAN. Because of the Council's importance, it has been suggested that other ministries, not only foreign ministers should also take part.[134] Including different ministries could effectively increase implementation of ASEAN decisions and policies. These ministries would be able to more effectively deal with issues that fall within the scope of their individual responsibilities. The ASEAN Community Council is comprised of the three pillars of ASEAN community, namely the ASEAN Political-Security Community Council, the ASEAN Economic Community Council and the ASEAN Socio-Cultural Community Council. They were established to facilitate ASEAN's efforts to further integrate. It is expected that the clearer and more hierarchical structure resulting from the adoption of the ASEAN Charter will lead to significant improvement in ASEAN's decision-making and implementation.

To fulfil its goal of becoming a rule-based ASEAN Community that respects the rule of law, dispute resolution mechanisms should be strengthened. Before the ASEAN Charter came into force in 2008, ASEAN members tended to avoid formal dispute settlement procedures.[135] However, after the adoption of the Charter, all members committed to the peaceful settlement of disputes.[136] The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms was enacted in 2010 based on this commitment.[137] It was established in accordance with Article 25 of the ASEAN Charter in order to solve the disputes concern the interpretation or application of the ASEAN Charter and other ASEAN instruments. This resulted in improved dispute

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[134] Fidel V. Ramos, The World to Come: ASEAN's Political and Economic Prospects in the New Century, Global Forum 2000: The World to Come—Value and Price of Globalization, 17 May 2000 (as cited in Lin Chun Hung, 'ASEAN Charter: Deeper Regional Integration under International Law?' (2010) 9 Chi J Int'l L 821).
[135] Gino J. Naldi, 'The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal' (2014) J Int Disp Settlement: idt031v1-idt031.
[136] ibid 1.
[137] ibid.

resolution in the region.[138] ASEAN has established dispute settlement mechanisms in all fields of ASEAN cooperation in accordance with Article 22 of the ASEAN Charter. For disputes relating to the interpretation and application of ASEAN economic agreements, there is the Vientiane Protocol (EDSM).[139] Non-economic disputes are settled in accordance with the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms. That said, disputes concerning the interpretation or application of the ASEAN Charter and other ASEAN instruments that do not specifically provide for dispute settlement mechanisms are covered by the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms. Moreover, regional issues remaining unsolved after undergoing the applicable dispute settlement mechanism will be referred to the ASEAN Summit for a decision accordance with Article 26 of the ASEAN Charter.[140] Article 20 states that in cases where there is no consensus, the ASEAN Summit may decide how a specific decision can be made. Moreover, according to Article 21(2), 'ASEAN minus-x' formula was adopted in order to allow dissenting states to opt out decisions relating to the implementation of economic commitments. Using the 'ASEAN minus-x' approach would also allow flexible implementation of commitments. The most prepared member states can begin implementing commitments with one or more country, and the others can join later. The principle of consensus decision making is still enshrined in the ASEAN Charter. However, these are examples of how ASEAN's reliance on consensus-based decision-making is more flexible. Providing dispute settlement mechanisms including through the ASEAN Summit can help ensure that disputes will would not remain unresolved

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[138] Hung (n 110) 835.
[139] Article 24(3) of the ASEAN Charter.
[140] Walter Woon, 'The ASEAN Charter Dispute Settlement Mechanisms' in Tommy Koh and Rosario G. Manalo and Walter C. M. Woon, *The Making of the ASEAN Charter* (World Scientific 2009) 75.

for indefinite periods of time. However, referring unresolved disputes to the ASEAN Summit, which is a political body of national leaders could 'undermine the strength and legal certainty of the dispute settlement mechanism as a system based on the rule of law'.[141] This implies that solving disputes through political rather than legal measures is still possible.[142]

Although the ASEAN Charter aims to 'streamline ASEAN's cumbersome and uncoordinated organisational structure as well as its decision-making process',[143] it did not introduce sufficient institutional changes to enhance cooperation among the member states. The principles of sovereignty and non-interferences are still clearly enshrined in the ASEAN Charter. Moreover, the ASEAN's decision-making process is still mainly based on the traditional principles of consultation and consensus, which has been criticised by many scholars as actually preventing ASEAN from truly being a legal entity separate from its member states.[144] This is inconsistent with ASEAN's objective of in transforming ASEAN into a more rule-based organisation with its own legal personality. ASEAN members still adhere to the 'ASEAN Way'. Doing so places more emphasis on protecting their national sovereignty, and this obstructs a unified conducting of regional affairs. These traditional notions and practice are major impediments to ASEAN achieving its goal of increased regional integration.[145] It

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[141] Paolo R. Vergano, 'The ASEAN Dispute Settlement Mechanism and its Role in a Rules-Based Community: Overview and Critical Comparison' (Asian International Economic Law Network (AIELN) Inaugural Conference, June 2009) 8 <http://aieln1.web.fc2.com/Vergano_panel4.pdf> accessed 1 July 2015

[142] ibid.

[143] Tommy Koh and others, 'Charter Makes ASEAN Stronger, More United and Effective' *The Straits Times* (8 August 2007). <http://lkyspp.nus.edu.sg/wp-content/uploads/2013/04/pa_tk_ST_Charter-makes-ASEAN-stronger-more-united-and-effective_080807.pdf> accessed 17 March 2015.

[144] Hung (n 110) 828.

[145] ibid 836.

demonstrates a critical distinction between ASEAN and the EU, which considers the transfer of national sovereignty as essential to the promotion of integration.

As a rule-based organisation, there must be 'some means for making rules'.[146] The ASEAN Charter created new institutions to deal directly with regional affairs. However, unlike the EU, ASEAN has neither an institutional body that directly has rule-making authority or a judicial body that ensures consistent application and interpretation of legal instruments and decisions by the member states. In ASEAN, rules that bind ASEAN member states are largely made at the discretion of member states. [147] These rules can take various forms such as agreements, treaties, memorandum of understanding and protocols.[148] They are normally produced after the ASEAN Summit and Sectoral Meeting.[149] After the adoption of the ASEAN Charter, there has been an increasing number of agreements that have been ratified to deal with regional economic issues.[150] Although these agreements are legally binding, there is no institution to ensure compliance.[151] It appears that the rule-making and enforcement mechanisms of ASEAN are based in consultation and consensus rather than on formal procedure. Without proper institution to uphold compliance, it would be difficult to ensure proper implementation of these binding instruments by the all member states. This demonstrates ASEAN's failure in establishing an institutional body with direct authority to set and enforce rules.

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[146] Jean-Claude Piris and Walter Woon, *Towards a Rules-Based Community: An ASEAN Legal Service* (Cambridge University Press 2015) 66.
[147] ibid.
[148] ibid.
[149] ibid.
[150] Hung (n 110) 832.
[151] ibid.

ASEAN recognised that 'a culture of honouring and implementing its decision and agreements, and carrying them out on time' must be established.[152] Despite the lack of institutional body to uphold compliance, the Charter strengthened the role and capacity of the ASEAN Secretariat in compliance monitoring. To achieve more effective implementation of ASEAN's projects and activities, the Charter significantly strengthens the role of the ASEAN Secretariat in monitoring implementation of ASEAN's decisions and instruments. Immunities and privileges are granted to the ASEAN Secretariat and Secretary General to support the independent function of the Secretariat.[153] This demonstrates the importance of the the Secreatariat in the organisational structure. As former ASEAN Secretary-General Surin Pitsuwan pointed out in the 20th ASEAN Summit, 'if the ASEAN Summit is the brain, then the Secretariat is its heart'.[154] However, limited resources, particularly financial resource provided by member states has resulted in its continued ineffective functioning. It relies on equal budget contribution from members.[155] Prior to 2014, each member country was to contribute only US $1.7 million annually. Logically, requiring higher contributions would be more burdensome for the countries with more limited resources and capacities.[156] Nevertheless, financial and human resources of the ASEAN Secretariat were likely to be disproportionately low when compared to

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[152] ASEAN, 'A New ASEAN by ASEAN Secretariat' <http://www.asean.org/?static_post=a-new-asean-by-asean-secretariat-3> accessed 28 March 2016.
[153] Article 18 of the ASEAN Charter.
[154] ASEAN, 'Surin Pitsuwan: Strengthening the Secretariat – the Heart of ASEAN, Phnom Penh, 4 April, 2012' <http://www.asean.org/news/item/surin-pitsuwan-strengthening-the-secretariat-the-heart-of-asean-phnom-penh-4-april-2012> accessed 18 March 2015.
[155] Rizal Sukma, 'ASEAN Beyond 2015: The Imperatives for Further Institutional Changes' (2014) ERIA Policy Brief No. 2014-05, 2 <http://www.eria.org/ERIA-PB-2014-05.pdf> accessed 19 March 2015.
[156] Michael Ewing-Chow and Tan Hsien-Li, 'The Role of the Rule of Law in ASEAN Integration' (2013) EUI Working Paper RSCAS 2013/16, 16-17 <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Ewing-Chow-TanHsien-Li-The-Role-of-the-Rule-of-Law-in-ASEAN-Integration.pdf> accessed 20 March 2015.

the tasks is would have to perform.[157] Naturally, insufficient resources would adversely affect the function of the Secretariat, in spite of it being one of the most important organs of ASEAN. To deal with this issue, members have agreed to increase funding to the Secretariat to US $1.9 million annually for 2015. However, compared to the size of the organisation, the annual budget for the secretariat seems to be modest. ASEAN still requires equal contributions from the members. Different levels of development do not affect the amount of the required contribution. Consequently, though the 2015 budget has been increased, it is questionable whether such improvement will help the ASEAN Secretariat function as monitoring compliance authority more effectively.

However, it has been suggested that many regional groupings in the developing world have actually been destroyed by highly institutionalisation.[158] As such, ASEAN's loose institutionalisation and the 'ASEAN Way' could actually help it achieve effective regional economic integration.[159] Failing to implement overly ambitious goals and objectives within a timeframe that is too strict can adversely affect the entire process of regional economic integration.[160] In addition, inter-state conflicts can be avoided and good relations maintained by proceeding in the 'ASEAN Way.' However, strictly complying with the tradition of the 'ASEAN Way' can slow the progress of regional integration, and thereby impeding ASEAN from establishing a full-fledged AEC. The reluctance of ASEAN members to pool their sovereignty can

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[157] Pattharapong Rattanasevee, 'Towards institutionalised regionalism: the role of institutions and prospects for institutionalisation in ASEAN' (2014) SpringerPlus 3:556, 6; Giovanni Capannelli, 'Time to create an ASEAN Academy' <http://www.eastasiaforum.org/2013/11/22/time-to-create-an-asean-academy/> accessed 19 March 2015.
[158] Ernesto Vivares, *Exploring the New South American Regionalism (NSAR)* (Ashgate Publishing, Ltd. 2014) 85.
[159] ibid.
[160] ibid.

adversely affect the stability of the organisation. Dr. Norman Girvan has claimed that the preservation of the sanctity of national sovereignty was a major reason that the Community of Caribbean States and Common Market (CARICOM) could possibly collapse.[161] Therefore, incremental adjustments to the 'ASEAN Way' may be necessary to achieve regional strength and become a more integrated community.

In general, the ASEAN Charter has helped, but significant improvement is needed if ASEAN is to become a more rule-based institution. The adoption of the ASEAN Charter provided significant legal framework in pursuit of enhanced regional integration. However, the Charter fails to address some issues. Despite a commitment to greater institutionalisation, ASEAN member states still prioritise national sovereignty through an attitude of non-interference, pursuit of non-binding agreements and informality in dealing with other countries. This would circumscribe ASEAN from transforming into a more rule-based organisation. Consequently, deeper economic integration will be difficult to achieve with loose institutionalisation and a tendency to preserve national sovereignty. At the same time harmonising IP laws without establishing effective mechanisms to ensure compliance or sanction, non-compliance will also limit overall regional harmonisation and integration. Therefore, the 'ASEAN Way' should be modified and further institutional changes need to be implemented to increase the chances of success.

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[161] See Saeed Shabazz, 'Collapse of Caribbean regional group not a good sign' <http://www.finalcall.com/artman/publish/World_News_3/article_9718.shtml> accessed 20 March 2015.

5.1.2.3 Challenges and the Need for Further Changes

The ASEAN Charter was expected to transform ASEAN into a more rule based organisation. It was intended to create more effective institutions and provide ASEAN members with a new culture of taking obligations seriously.[162] Notwithstanding, ASEAN integration continues to progress slowly. Preservation of national sovereignty, the principle of non-interference and consensus based decision-making all have contributed to the lack of speedy progress. As a loose regional organisation, ASEAN still faces problem of non-implementation of its decision and policies. This negatively impacts regional affairs. ASEAN has been criticised for re-emphasising these traditional practices in the ASEAN Charter, which was supposed to provide a legal framework for ASEAN to achieve further institutionalisation.[163] The preservation of national sovereignty of the ASEAN members 'make ASEAN's goal for deeper integration a goal in name and form only'.[164] Consequently, despite the ASEAN Charter, ASEAN still remains an intergovernmental organisation.

It was opined that ASEAN should follow the EU path by establishing a supranational organisation that has a law-making institutional body and a judicial institution, which could help ensure the implementation and interpretation of rules and decisions.[165] Contrarily, it has been suggested that it is unlikely ASEAN will become a supranational organisation. Former Secretary-General of ASEAN Mr. Rodolfo Severino claimed in 2001 that 'ASEAN will never be like the EU' since ASEAN is different from the EU in many aspects. This is consistent with the notion that ASEAN

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[162] Koh and others (n 143).
[163] Hwee (n 130).
[164] Lay Hong Tan, 'Will ASEAN Economic Integration Progress beyond a Free Trade Area?' (2004), 53 ICLQ (2004), 935 – 967.
[165] Hung (n 110) 831.

have considered the EU as a reference and inspiration, not a role model.[166] Moreover, the enshrinement of the principles of national sovereignty and non-interference and other traditional ASEAN practices under the ASEAN Charter demonstrates that the ASEAN members have no intention to create the EU-style supranational institution.[167] If these two viewpoints are to be believed, then it is highly likely that ASEAN will not follow the EU's blueprint in building a supranational institution.

Since its establishment in 1967, the emphasis on national sovereignty and non-interference has been continuously enshrined in the ASEAN practices. Transferring part of their sovereignty to a regional institution for common gains seems to be an unattractive choice for ASEAN members, unlike the members of the EU. One reason that ASEAN member states are reluctant to surrender sovereignty is because of their colonial histories. All ASEAN members had been colonised, except for Thailand. Sovereignty is a more sensitive issue because of this history of colonisation.[168] Therefore, the establishment of a supranational organisation, which requires the transfer of national sovereignty, is not likely to happen in ASEAN in the near future.

Notwithstanding, despite the lack of supranational character, to effectively harmonising its IP laws and further developing regional IP system, ASEAN should improve its existing institutions and introduce further institutional change. However, given its divergent social and economic backgrounds, further insitutionalisation

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[166] Salazar and Basu (n 44) 10-11.
[167] Chien-Huei Wu, 'The ASEAN Ecoomic Community Under the ASEAN Charter; Its External Economic Relations and Dispute Settlement Mechanisms' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law 2010* (Springer Science & Business Media 2009) 337.
[168] Shaun Narine, 'Asia, ASEAN and the Question of Sovereignty: The Persistence of Non-intervention in the Asia-Pacific' in Mark Beeson and Richard Stubbs (eds), *Routledge Handbook of Asian Regionalism* (Routledge 2012) 157.

should be pursued gradually without significantly undermining its founding principles. To do so, ASEAN should consider the following factors.

(a) Strengthening the Capacity of the ASEAN Secretariat

The structure and characteristics of ASEAN lead to non-implementation of ASEAN policies. To ensure compliance, the ASEAN Charter gives the Secretariat authority to monitor member states' compliance with ASEAN's agreements and decisions. Though an important institutional body it has proven to be insufficient to resolve the problem of non-implementation. The ASEAN Secretariat is expected to play a major role in building the ASEAN community.[169] Nevertheless, it has insufficient financial and human resources to effectively handle all regional affairs. Despite the enhanced role of the ASEAN Secretariat, the lack of resources is one of the major factors that delayed the implementation of its activities and plans.[170]

The ASEAN Secretariat's function in ensuring effective implementation of ASEAN instruments is likely similar to the European Commission. However, the European Commission, who is the driving force in the institutionalisation in EU, has the right to implement EU legislation, budget and programme adopted by the European Parliament and Council.[171] In the EU, the total budget for the European Commission in 2012 was approximately $4.5 billion.[172] Meanwhile, the annual budget for the

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[169] ASEAN, 'ASEAN Continues to be an Important Pillar for Viet Nam's Foreign Policy' <http://www.asean.org/news/asean-secretariat-news/item/asean-continues-to-be-an-important-pillar-for-viet-nam-s-foreign-policy> accessed 20 March 2015.
[170] Asian Development Bank Institute (ADBI) (n 77) 200.
[171] Narongchai Akrasanee and Jutamas Arunanondchai, 'Institutional Reforms to Achieve ASEAN Economic Integration' in Denis Hew Wei-Yen, *Roadmap to ASEAN Economic Community* (ISEAS Publications 2005) 69.
[172] Ooi Kee Beng and others, *The 3rd ASEAN Reader* (Yusof Ishak Institute 2015) 187.

ASEAN Secretariat in 2012 was just $16 million.[173] Around 34,000 people are working for the European Commission.[174] Approximately 300 people are employed by the ASEAN Secretariat.[175] This demonstrates significant differences in the extent of financial and human resources made available to the European Commission and the ASEAN Secretariat. Although it would not be appropriate to compare these two institutional bodies, given the different scope and mandates of the two institutions, it seems that the ASEAN Secretariat's budget is disproportionately small compared to the magnitude of its responsibilities covering the region as a whole. ASEAN's 633 million population is more than 24% larger than the EU's 508 million. However, the ASEAN Secretariat's budget is approximately 280 times less than that of the European Commission.[176]

Scholars have recommended how to address these issues. It has been suggested that ASEAN should follow the EU's and legislatively create a supranational organisation.[177] It was opined that ASEAN should create a mechanism or an institutional body that has the authority to force implementation and compliance of ASEAN rules and decisions.[178] It has further been pointed out that the establishment of a supranational body is necessary to the community building process, particularly in economics.[179] It was also suggested that the ASEAN Economic Secretariat should be created separate from the ASEAN Secretariat to be responsible for the implementation of policies of the ASEAN economic integration framework.[180] On the

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[173] ibid.
[174] ibid.
[175] ibid.
[176] ibid.
[177] Hung (n 110) 831.
[178] ibid.
[179] Sukma (n 155) 15.
[180] Akrasanee and Arunanondchai (n 171) 69.

other hand, it was proposed that rather than establishing a new institutional body, ASEAN should strengthen its existing institutions, particularly the ASEAN Secretariat.[181] This view has been supported by many scholars. For instance, it was pointed out that ASEAN's priority is to focus on building up existing institutions by giving them more mandate and more resources.[182] The role of the ASEAN Secretariat should be strengthened in order to increase effectiveness in the implementation of the ASEAN policies.[183] Also, former Secretary-General of ASEAN Dr. Surin Pitsuwan stated that strong political will from the member states and sufficient resources are required to strengthen the ASEAN Secretariat, which is 'a central organ of ASEAN'.[184]

Focusing on existing institutions could be a feasible solution for ASEAN. ASEAN members value national sovereignty, which remains a sensitive issue in ASEAN. Immediately changing institutional structure or creating supranational organs that would significantly limit sovereignty might not be acceptable. Therefore, a priority of ASEAN should be to improve existing institutions and increasing their efficiencies. For instance, effectiveness of the Secretariat's role in monitoring compliance depends on having sufficient resources.[185] The ASEAN Secretariat should be provided more financial resources and better-trained staffs in order to help it function more effectively. Therefore, contributions to the ASEAN Secretariat budget should not

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[181] Termsak Chalermpalanupap, 'Institutional Reform: One Charter, Three Communities, Many Challenges' in Donald K. Emmerson (ed), *Hard Choices: security, democracy, and regionalism in Southeast Asia* (Institute of Southeast Asian Studies 2009) 121.
[182] Rattanasevee (n 157) 7.
[183] ibid.
[184] ASEAN, 'Speech by Outgoing Secretary-General (2008 – 2012) H.E. Surin Pitsuwan Ceremony for the Transfer of Office of the Secretary – General of ASEAN' <http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/speech-by-outgoing-secretary-general-2008-2012-he-surin-pitsuwan-ceremony-for-the-transfer-of-office-of-the-secretary-general-of-asean-3> accessed 25 March 2015.
[185] Chesterman (n 107) 83.

come from members equally. By using this measure, the amount to be contributed must take into account the capacity of the least developed countries. Limiting the contributions in consideration for the least developed countries means that the Secretariat's budget will be tight and its effectiveness also limited. Increasing contribution too much may impose a significant burden on the least developed countries. Thus, it is uncertain if giving the Secretariat more money will help or hinder its overall effectiveness.

Consequently, member states should realise that the principle of equal contribution is outmoded. The method for calculation member states' contribution of the ASEAN Secretariat's budget should be based on the capacity to pay. For instance, in the EU, the member states' contribution to the EU budget is based on their respective gross income.[186] By using this measure, the member countries with high gross national income would provide greater contribution. Moreover, all member states should be allowed to make voluntary contribution in addition to mandatory contribution.[187] Consequently, devising a new way to calculate contributions to the ASEAN Secretariat's budget should be considered. A new principle used in funding the budget based on member state's capacity and willingness to pay might be appropriate. Furthermore, it has been suggested that rather than solely relying on contributions from member states, other sources of income should be pursued.[188]

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[186] European Commission, 'Revision of Member States' GNI Contribution – Q&A' <http://europa.eu/rapid/press-release_MEMO-14-601_en.htm> accessed 20 March 2015.
[187] Quratul-Ain Bandial, 'ASEAN Secretariat getting funds to raise staff salaries' *The Brunei Times* (Yangon, 29 November 2014) <http://m.bt.com.bn/news-national/2014/11/29/asean-secretariat-getting-funds-raise-staff-salaries> accessed 20 March 2015.
[188] Rattanasevee (n 157) 9.

(b) Strengthening the Rule of Law

The rule of law is a key driving force behind regional integration.[189] Nevertheless, the rule of law in ASEAN is still elusive despite the ASEAN Charter's attempt to transform it into a more rule-based organisation.[190] The rule of law in ASEAN is undermined by the 'ASEAN Way'.[191] Although ASEAN and the EU share similar goals in establishing a regional internal market, ASEAN's economic integration is much less.

The EU consists of supranational institutions involved in law making at the community level. Executive power, which refers to competence of proposing and implementing EU law, is carried out by the European Commission.[192] Meanwhile, legislative power, which relates to the competence in passing or approving the law, is in the hands of the European Parliament and the Council of the European Union.[193] These EU institutions can help facilitate a fully functioning of economic community. Over the years, various directives and regulations have been approved with the purpose of removing major obstacles to the establishment of a well-functioning internal market. In addition to the Commission, the Parliament, and the Council, the CJEU has used its judicial power in ensuring a uniform interpretation and application of the EU law in all the member states.[194] The CJEU struck down impediments to the

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[189] Imelda Deinla, 'Rule of law key to building an ASEAN Community by 2015' (East Asia Forum, 8 March 2013) <http://www.eastasiaforum.org/2013/03/08/rule-of-law-key-to-building-an-asean-community-by-2015/> accessed 22 March 2015.
[190] Barry Wain, 'Rule of Law still elusive in ASEAN' *The Straits Times* (Singapore, 28 February 2012) 1-2 <http://www.iseas.edu.sg/documents/publication/bw28feb12.pdf> accessed 25 March 2015.
[191] Ewing-Chow and Hsien-Li (n 156) 5.
[192] See Robert Schütze, *European Constitutional law* (2nd edn, Cambridge University Press 2016)185-198.
[193] ibid 154-168.
[194] Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015) 80; ibid 198-216; Eurofound, 'European Court of Justice (ECJ)'

formation of the internal market. In the CJEU's landmark decision of *Van Gend en Loos,*[195] the doctrine of direct effect of the EU law was firstly established. Direct effect was defined as a mechanism that individuals can rely on EU law in member states' courts.[196] To satisfy the criteria of the direct effect test, the provisions must be clear, unconditional, and precise.[197] Also, the doctrine of supremacy of EU law has been developed through the jurisprudence of the CJEU. In *Flaminio Costa v. ENEL*[198], the CJEU affirmed the supremacy of the EU law over national laws. It was held that the EU law is hierarchically supreme to national laws of the member states and takes precedence over national law in domestic courts.[199] The principle of state liability has also been developed by the CJEU in *Francovich and Bonifaci v Republic of Italy*.[200] By virtue of this principle, an individual is allowed to recover compensation from a member state for the loss incurred as a result of the member state's failure to fulfil its obligations under EU law.[201] Since the establishment of the CJEU in 1952, numerous cases relating to the issue of the internal market have been decided. Clearly, the CJEU has played an important role in the development of the EU.[202] It helps the EU achieve deeper economic integration.[203] This has been

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<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeancourtofjustice.htm> accessed 28 March 2015.

[195] *Van Gend en Loos* [1963] ECR 1.

[196] See Sophie Robin-Olivier, 'The evolution of direct effect in the EU: Stocktaking, problems, projections' (2014) 12 Int J Constitutional Law 165, 175

[197] See Schütze, *European Constitutional law* (n 192) 84-87.

[198] *Flaminio Costa v ENEL* [1964] ECR 585.

[199] For a more detailed analysis, see Schütze, *European Constitutional law* (n 192) 120-122; Nigel Foster, *Foster on EU Law* (4th edn, OUP 2013) 135.

[200] C-6/90 and C-9/90 *Francovich and Bonifaci v Republic of Italy* [1991] ECR I -5357.

[201] For a more detailed analysis, see Margot Horspool and Matthew Humphreys, *EU Law* (7th edn, OUP 2012) 207-2013; Matthew Homewood, *EU Law* (5th edn, OUP 2016) 36-38.

[202] Michael Zander, *The Law-Making Process* (Bloomsbury Publishing 2015) 412.

[203] Jean-Yves Pitarakis and George Tridimas, 'Joint Dynamics of Legal and Economic Integration in the European Union' (2003) 16 Eur J Law Econ 357, 365 (as cited in Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 304.

expressed through 'a large share of intra-EC trade in economic activity'.[204] Hence, it can be claimed that the establishment of the CJEU has a significant positive impact on the operation of the internal market.

ASEAN has pursued its goal of creating a common market without establishing a supranational organ such as ASEAN rule-making institutions and regional judicial institution for enforcing ASEAN laws and decisions. The preservation of the principles of national sovereignty and non-interference would make it difficult for ASEAN to develop an institutional structure like the EU. In the EU, community law can maintain its supremacy over national law because of a transfer of national sovereignty of member state to the union in agreed areas.[205] However, developing ASEAN community law might be necessary for ASEAN to achieve further integration.[206] Harmonisation of laws at regional level in the area that could directly affect the function of the common market, such as IP laws, would be necessary. In order to do so, adapting the ASEAN way and introducing further institutional changes would be required. Creating a community law-making institution and establishing an ASEAN Court of Justice should be considered. Doing so would help ASEAN move away from the process of rule-making that is based on consultation and consensus towards more formal procedures and ensure uniform application of community laws that have binding legal force throughout every member state.

There was a prospect of having an EU-style institution being present in ASEAN. The creation of rule-making mechanisms/organs and ASEAN Court of Justice has been

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[204] ibid.
[205] Foster (n 199) 135
[206] Lin 'EU-Style Integration? Future of Southeast Asian Countries After ASEAN Charter' (n 132) 7.

discussed and supported by many scholars.[207] During the pre ASEAN Charter period, it has been suggested that the establishment of these supranational institutions should be provided in the ASEAN Charter.[208] It was opined that the establishment of a supranational ASEAN court is crucial to ASEAN economic integration process.[209]Furthermore, it was emphasised that ASEAN economic integration could not effectively progress without a supranational ASEAN court.[210] Nevertheless, due to different characteristics of these two organisations, it should be strongly considered that ASEAN not merely copy the EU. Instead, ASEAN should learn from the EU's experience in establishing the CJEU.[211] It was pointed out that jurisdiction of the ASEAN Court of Justice may be different from that of the CJEU.[212] According to the ASEAN Institute of Strategic and International Studies (ASEAN ISIS) Memorandum on the ASEAN Charter, 18 April 2006, it was proposed that the ASEAN Court of Justice should be established as an independent body and have jurisdiction over ASEAN agreements, economic agreement, and disputes between the member states.[213] Jusuf Wanandi, the vice chairman of the Board of Trustees of the Centre for

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[207] ibid 15.
[208] Rodolfo Severino, 'Towards an ASEAN Charter: Some Thoughts from the Legal Perspective' in Rodolfo Severino (ed), *Framing the ASEAN Charter: An ISEAS Perspective* (Institute of Southeast Asian Studies 2005) 46.
[209] Akrasanee and Arunanondchai (n 171) 67.
[210] ibid; Sharon Siddique and Sree Kumar, *the 2nd ASEAN Reader* (Institute of Southeast Asian Studies 2003) 510.
[211] Akrasanee and Arunanondchai (n 171) 67.
[212] Pornchai Danvivathana, 'Role of ALA in the Current Legal Issues under the ASEAN Charter' (2010) 13 Thailand Journal of Law and Policy.
[213] Carolina G. Hernandez, 'Institution Building through an ASEAN Charter' (2007) Panorama: A Journal on Southeast Asian and European Affairs 9, 17 <http://www.kas.de/upload/auslandshomepages/singapore/Hernandez_AseanCharta.pdf> accessed 29 March 2016.

Strategic and International Studies also suggested that the ASEAN Court of Justice should consist of designated judges nominated by the member states.[214]

Notwithstanding, no law-making institution for legislating community law and regional judicial institution have been established. Despite various agreements that have been signed and ratified, it is unlikely that ASEAN is ready toward community law.[215] ASEAN agreements usually uses vague terms that clearly fail to define practical rules of cooperation.[216] However, in order to move towards deeper regional integration, acceptance of ASEAN community law should be recognised.[217] ASEAN also continues to adhere to its non-binding nature and has no appropriate or effective mechanism to obtain compliance with regional obligations. Using the ASEAN Summit as the highest decision making authority implies that ASEAN continues to rely on political measures.[218] Though Article 25 of the ASEAN Charter allows ASEAN to establish an ASEAN Court of Justice, it is not ready to do so due to the weak rule of law in some ASEAN member states.[219] It was argued that the absence of an ASEAN court does not cause significant problems to ASEAN in practice, particularly when the International Court of Justice (ICJ) can decide disputes between member states.[220] However, to firmly establish the AEC and a full-fledged common market, it would be necessary for ASEAN to have an ASEAN judicial institution that has authority to ensure compliance and enforcement of regional economic agreements

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[214] Jusuf Wanandi, 'The ASEAN charter: Its importance and content' *The Jakarta Post* (Jakarta, April 18 2006) <http://www.thejakartapost.com/news/2006/04/18/asean-charter-its-importance-and-content.html> accessed 29 March 2015.
[215] Lin 'EU-Style Integration? Future of Southeast Asian Countries After ASEAN Charter' (n 132) 17.
[216] Joseph Liow and Michael Leifer, *Dictionary of the Modern Politics of Southeast Asia* (Routledge 2014) 85.
[217] Lin 'EU-Style Integration? Future of Southeast Asian Countries After ASEAN Charter' (n 132) 17.
[218] Piris and Woon (n 146) 50.
[219] Walter Woon, 'Dispute Settlement the ASEAN Way' (2012) Working Paper 5.
[220] ibid 9.

and other ASEAN instruments. Moreover, when ASEAN starts to develop its own law, the creation of a regional court would be essential.

Nevertheless, the traditional 'ASEAN Way' will be an impediment to further institutionalisation. ASEAN should find a proper balance between the preservation of national sovereignty and the need for further regional integration. The traditional 'ASEAN Way' should be adjusted so that ASEAN members can conduct regional affairs in a more unified manner and obtain the utmost benefits from regional integration. Although ASEAN members have long been strict in preserving national sovereignty, this would be an appropriate time to modify their traditional practices and adapt to the necessities of integration. Regional economic cooperation is less sensitive than political or security cooperation and would be a good place to start. ASEAN has shown a greater willingness than in the past to accept more formal and stronger monitoring compliance mechanisms in activities related to economic integration than those related to political-security and socio-cultural areas.[221] This implies that ASEAN's attitude towards the traditional 'ASEAN Way' has gradually started to change. Therefore, adaptation of the 'ASEAN Way' in the area of economic integration would be possible. Furthermore, it is true that establishing supranational organ such as a regional judicial institution may weaken national sovereignty of the member states. However, if the court's jurisdiction is limited to particular areas, for example IP, it would have minimal effect on national sovereignty. The court would simply play a role in clarifying the law and ensuring that the law is consistently applied by the member states. It has been observed that sovereignty of member states

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[221] Chesterman (n 107) 10.

in the EU has been lent rather given away.[222]Moreover, only limited sovereignty has been transferred to the community.[223]

Consequently, in moving toward a more rule-based organisation, ASEAN should gradually dilute its commitment to the principles of national sovereignty and non-interference. Pooling parts of national sovereignty in particular areas only, such as economics, would be necessary for ASEAN to obtain the utmost benefits from economic integration. In order to do so, the political will and the resolve of the member states must be strengthened. In the EU, one of the most important principles behind the success of the regional integration was the political will to pool national sovereignty to build a strong community.[224] The interest of the community is put before the interest of individual member states thereby creating a sense ownership in the EU among its citizens.[225] Therefore, ASEAN members must know that deeper regional economic integration will not be possible without strong will and resolve to overcome all impediments. Thus, by gradually transferring national sovereignty to regional institutions, the 'ASEAN Way' would be modified in such a way that is appropriate for the establishment of the ASEAN community.

5.1.3 Disparity in IP Protection among ASEAN Members

A high level of harmonisation is not achievable so long as there is significant

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[222] Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2007) 61.
[223] ibid.
[224] Fraser Cameron, 'The European Union as a Model for Regional Integration' (Council on Foreign Relations Press, New York: Council on Foreign Relations 2010) <http://www.cfr.org/eu/european-union-model-regional-integration/p22935> accessed 5 March 2016.
[225] Surakiart Sathirathai, 'Eight Challenges Asean Must Overcome' *Bangkok Post* (Bangkok, 8 August 2015).

diversity in the domestic IP regimes of the member states. At the outset, ASEAN's members had different levels of development, which were manifested in disparities in the levels of IP protection and enforcement. Therefore, a task that should be prioritised in pursuing regional IP integration is to ensure that the proper standards of IP protection and enforcement are provided by all the member states. Although ASEAN has spent a lot of effort improving the IP standard of its member states, the IP systems of some members are still underdeveloped. To address this effectively, major factors should be taken into consideration as will be outlined below.

5.1.3.1 Ensuring Appropriate IP Protection among ASEAN Members

Strengthening the protection of IP rights in the CLMV would be key to decreasing the gaps in the IP standards and facilitate overall harmonisation in ASEAN. In order to help less developed members establish an appropriate IP system, the following should be considered.

(a) Compliance with TRIPs

It is widely accepted that TRIPs is the most important multilateral instrument in relation to IP protection and enforcement. It has been adopted to establish global IP rights standards. Doing so should reduce disparity of IP standards between WTO members and facilitate cross border trade. All 10 ASEAN countries are members of the WTO. They are obliged to comply with the TRIPs obligations. Yet, IP protection and enforcement in some ASEAN countries, particularly ASEAN 'least developed

countries' still falls below the TRIPs standard.[226] To decrease differences in IP protection in ASEAN, particularly between the ASEAN-6 and CLMV, the TRIPs standard should be consistently implemented in all member states.

However, compliance with the TRIPs standard may impose a significant burden on the least developed countries due to their lack of human and financial resources. In the less developed countries, complying with TRIPs may require more than just incorporating TRIPs provisions into their national laws. For instance, presently, there is no patent or trademark law in Myanmar. It would be quite costly for Myanmar to reform its IP system and require significant changes to its existing system. Large amounts of human and financial resources would be required. Internal and external cooperation would be necessary in order to help ASEAN's 'least developed countries' enhance their administrative capacity to provide adequate and effective IP protection and enforcement consistent with international standards. Therefore, to help the ASEAN least developed countries become TRIPs-compliant, closer collaboration between the member states and external assistance from developed countries and related international organisations would be necessary.

(b) Enhancing Administrative Capacity for IP

Over the past ten years, ASEAN members have cooperated with each other and with international partners to enhance IP regimes within ASEAN. This has provided a clearer framework for ASEAN's IP harmonisation. However, although cooperation between ASEAN members and with external partners has improved, current efforts are still not enough to achieve all the commitments. Due to capacity limitation, it is

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[226] ASEAN 'least developed countries' have until 2021 to comply with TRIPs, and until January 2033 to fully comply with provisions in TRIPS dealing with pharmaceutical patents.

more burdensome for member states with less administrative capacity and infrastructure to incorporate and accommodate high IP standards. Such disparity could impede the less developed countries from equally enjoying the benefits of implementing IP projects and initiatives. This is a major reason that implementation of ASEAN regional IP frameworks have fallen behind schedule.

To enhance capacities of less develop members, particularly the CLMV, in addition to regional programmes and initiatives, bilateral assistance programmes for the CLMV can be considered as critical tools in building IP capacities in these countries. It was opined that bilateral cooperation is likely to be easier to achieve than multilateral cooperation.[227] When more parties are involved, cooperation is harder to achieve.[228] Given different needs and capabilities, it is quite hard to create one-size capacity building programmes that fit all countries. In ASEAN, more developed members such as Singapore, is suited to provide assistance and capacity-building to less developed members because of the quality of its IP regime. This is consistent with the 'ASEAN-help-ASEAN' approach. It has been suggested that this principle should always be adopted and strengthened in order to help lesser developed member countries.[229] The IP Office of Singapore (IPOS) has signed several memorandum of understanding (MOU) with other ASEAN countries to enhance IP cooperation within the region. The MOU between IPOS and Cambodia's Ministry of Industry and Handicrafts (MIH) is a good example. This MOU was signed to facilitate access to IP rights in

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[227] Mahathir Mohamad and Abdullah Ahmad, *Dr. Mahathir's Selected Letters to World Leaders Volume 2* (Marshall Cavendish International Asia Pte Ltd 2015); Shlomi Dinar, 'International Water Treaties: Negotiation and Cooperation along Transboundary River' (2008) 72 Psychology Press.
[228] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965).
[229] Azmi Mat Akhir, 'Regional Cooperation in Education in ASEAN and East Asia: Past, Present and future' in Siriporn Wajjwalku, Kong Chong Ho and Osamu Yoshida (eds), *Advancing the Regional Commons in New East Asia*' (Routledge 2016) 115.

these two countries. Under this MOU, IPOS's patent search and examination reports would be recognised by the MIH. This collaboration makes it easier for applicants to seek IP protection in these two countries.[230] Less than two months after the signing of this MOU, the first ever Cambodian patent was granted, and it was from Singapore.[231] This patent was granted based on a positive IPOS search and examination.[232] Apart from creating a milestone in the development of the IP system in Cambodia, this clearly demonstrates the benefits of having closer cooperation between more developed and less developed countries and the embodiment of greater IP harmonisation in ASEAN .

The IPOS and Vietnam IP Office also reached an MOU to help enhance cooperation between them. It is expected to provide more effective IP administration and capacity building and have a positive impact on trade relations between these countries. Furthermore, a MOU on the Singapore-Myanmar Integrated Legal Exchange between Singapore's Law Ministry and the Union's Supreme Court was signed. This is expected to provide better understanding of legal matters, and improved systems and institutions in both countries through the exchange of scholars, legal materials and the provision of training and seminars for Myanmar officials.[233] This will allow Myanmar to have a closer look at Singapore's experience in building its capacity to protect and

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[230] BNG Legal, 'Cambodia and Singapore MOU: Patent and Industrial design' <https://bnglegal.com/sys-content/uploads/2015/08/Cambodia-and-Singapore-MOU-Patent-and-Industrial-Design-July-2015.pdf> accessed 15 October 2015.
[231] EPO, 'ASEAN: First Singapore patent recognised in Cambodia' <https://www.epo.org/searching/asian/asia-updates/2015/20150317.html> accessed 19 January 2016.
[232] ibid.
[233] Ministry of Law, 'Factsheet for the Memorandum of Understanding between The Ministry of Law of the Republic of Singapore and The Supreme Court of the Union of the Republic of Myanmar on theSingapore-Myanmar Integrated Legal Exchange' (9 October 2014) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Sg%20Myanmar%20MOU%20factsheet.pdf> accessed 5 April 2016; The Straits Time, 'Singapore and Myanmar Boost Legal Cooperation through New Agreements' <http://www.straitstimes.com/news/singapore/more-singapore-stories/story/singapore-and-myanmar-boost-legal-cooperation-through-ne> accessed 26 March 2015.

enforce IP laws.

Furthermore, there has been a lot of cooperation in the field of IP rights between ASEAN and its trading partners. The EU is the trading partner that has continuously provided assistance to ASEAN countries in strengthening the institutional capacity for IP administration and enforcement. To help promote effective IP systems in these countries, bilateral cooperation is more focused. The EU has had dialogues on IP issues with some ASEAN countries such as Thailand, Indonesia, Malaysia and Vietnam.[234] There are also some ongoing programmes involving the EU aimed at providing technical IP assistance to some ASEAN countries such as Indonesia, Philippines, Cambodia, and Vietnam.[235] Recently, there is also the cooperation between Japan Patent Office (JPO) and the Ministry of Science and Technology (MOST), Myanmar. The JPO has provided Myanmar with its know-how on management and sent experts to provide advice on the draft IP law.[236] Also, some government officials of Myanmar were invited to attend IP training programmes in Japan.[237] The results of the closer cooperation between these two countries have been helping Myanmar move toward passing its first comprehensive set of IP law.[238]

It could be seen that there is increased level of bilateral cooperation between developed and less developed countries in order to enhance ability to protect and

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[234] Commission, 'Report on the protection and enforcement of intellectual property rights in third countries' (2013) SWD 30 final <http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150789.pdf> accessed 29 March 2016.
[235] Ruben Schellingerhout, 'IP policies and implementation in ASEAN' (The ASEAN-EU Science, Technology and Innovation Days (STI Days), Hanoi, Vietnam, 10-12 May 2016) <http://www.stidays.net/wp-content/uploads/2015/06/ws1-ASEAN-economic-community-Ruben-Schellingerhout.pdf> accessed 30 Match 2016.
[236] Ministry of Economy, Trade and Industry, 'Intellectual Property Cooperation between Japan and Myanmar has Advanced' < http://www.meti.go.jp/english/press/2013/0228_07.html> accessed 27 March 2016.
[237] ibid.
[238] ibid.

enforce IP rights in less developed members. This could help increase human and institutional capacity of IP Offices in these countries. By using bilateral cooperation, it might be easier to formulate a framework that is appropriate for specific conditions of each party. Consequently, in order to narrow disparities in IP protection and prevent gap from widening further, special emphasis and assistance should be more given to less developed ASEAN countries. Closer cooperation on capacity building at a bilateral level would help ASEAN least developed members improve their administrative capacity to implement regional IP policy effectively.

(c) Awareness about TRIPs-Plus

IP systems can be enhanced through ratification of international agreements. It is widely acknowledged that most international trade agreements agreed to between more and less developed countries contain IP clauses requiring higher levels of IP protection. Most bilateral trade agreements, particularly FTAs between developed and developing countries, require the contracting parties to amend their domestic laws and accede to major international IP conventions. The result is an improvement in their IP regimes. However, it sometimes requires incorporating a much higher standard than TRIPs requires. This imposes a greater burden on less developed countries to implement TRIPs-Plus provisions while they are trying to comply with the TRIPs agreement. Imposing TRIPs-plus obligation on developing and least developed countries would increase their level of IP protection and thereby bridge the disparities in IP standards between them and developed countries. However, the lack of economic and social capacity could result in adverse effects on the public interest.

An IP standard that is too stringent would require the vast majority of ASEAN countries to make extensive changes to their IP systems. Moreover, it could have a

negative impact on access to essential medicine in those countries if the TRIPs plus standard in pharmaceutical patent is implemented. TRIPs plus provisions that inhibit access to affordable medicine usually result in limitations in a nation's ability to use the public health flexibility provided for in the TRIPs agreement. Therefore, the cost of dealing with public health problem and high and unaffordable medicine prices would outweigh the trade benefits of signing an agreement.

Many ASEAN countries have ratified bilateral trade agreements (BTAs) with IP provisions with developed countries. Doing so has resulted in increased IP standards. Some of the agreements promote TRIPs compliance by ASEAN members. For example, the US-Vietnam BTA and the US-Cambodia BTA. These BTAs required Vietnam and Cambodia to comply with the TRIPs standard although they had not yet become members of the WTO.[239] This could help enhance IP standards and decrease the disparity in these IP regimes. Notwithstanding, some FTAs require the implementation of more stringent standard than the ones provided in the TRIPS Agreement. For instance, Singapore adopted the TRIPs-Plus standard after signing FTA with the US. This resulted in a widening gap of the IP standard among the member states, which could impact harmonisation. Also, there are various ongoing trade negotiations between developed countries and ASEAN countries that include TRIPs-Plus obligations. Most of them are not ratified. The required IP standard, particularly in the area of medical patents, is too stringent and could severely affect the public health of less developed countries. For instance, the Thai government rejected a US demand because of concerns about the potential impact on the access

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[239] Sisule F. Musungu and others, *Utilizing TRIPS Flexibilities for Public Health Protection through South-South Regional Frameworks* (South Centre 2004) 30-31.

to affordable medicine.[240] Malaysia has expressed similar concerns. [241] It is uncertain if these FTAs will ever be ratified.

It is widely acknowledged that the US and the EU aggressively use FTAs which include TRIPs-plus provisions as a tool to obtain benefits beyond those that would be derived from TRIPs.[242] Compared to US FTAs, TRIPs-Plus obligations under EU's FTAs emphasis PVRs, GIs, and biotechnological inventions rather than public health issues.[243] Countries with less bargaining power have signed FTAs and accepted TRIPs-Plus provisions and yielded to the power of more developed countries in exchange for trade benefits and financial aid. [244] As a result, they have experienced problems accessing affordable medicine and public health concerns as a result. It appears that an IP standard that is too stringent has a negative impact on the public interest in 'developing' and 'least developed' countries. This is particularly true in public health matters, which can lead to a limitation of the flexibility provided by TRIPs. This could adversely affect development of these countries, particularly the development of health related matters. If people do not have long and healthy lives, the level of human development will not increase. [245] This could increase the development gap between the rich and poor countries.

Therefore, since most ASEAN members are 'developing' and 'least developed' countries, they should take the potential disadvantages of complying with TRIPs-Plus

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[240] Charles T. Collins-Chase, 'The Case Against Trips-Plus Protection in Developing Countries Facing Aids Epidemics' (2014) 29 U Pa J Int'l L 763, 801.
[241] Mohammed K El Said, *Public health related TRIPS-plus provisions in bilateral trade agreements* (World Health Organization (WHO) and the International Centre for Trade and Sustainable Development (ICTSD) 2010) 160.
[242] Gustavo Ghidini, Rudolph J.R. Peritz and Marco Ricolfi, *TRIPS and Developing Countries: Towards a New IP World Order?* (Edward Elgar Publishing 2014) 56-57.
[243] Pedro Roffe and Christoph Spennemann, 'The impact of FTAs on public health policies and TRIPS flexibilities' (2006) 1 Int J Intell Prop Mgmt 75, 78-79.
[244] Ghidini, Peritz and Ricolfi (n 242) 57.
[245] UNDP, 'Human Development Index (HDI)' (n 17).

obligations into account and find strategies to deal with them before signing any international agreements that include TRIPs-Plus provisions. Due to their insufficient capacity and resources to manufacture medicine and effectively support public health, ASEAN 'developing' and 'least developed' countries should not implement the TRIPs-Plus standard if it would limit TRIPs flexibilities and adversely affect access to affordable medicine. At the same time, developed countries should stop putting TRIPs-Plus obligations and other forms of pressure on 'developing' and 'least developed' countries in bilateral and regional trade agreements. It should be a concern to them that imposing TRIPs-Plus standard on countries that are unprepared to implement such a high standard could cause significant loss and harm to these countries. This could obstruct instead of foster the country's overall development. This notion has been widely supported by many scholars. According to a WHO briefing note, developing countries 'should not 'trade away' their people's right to have access to medicines' through international trade agreements that includes TRIPs-Plus requirements.[246] The Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) has recommended that 'Bilateral trade agreements should not seek to incorporate TRIPS-Plus protection in ways that may reduce access to medicines in developing countries'.[247] Some NGOs requested that the US and EU stop pressuring developing countries during BTA's negotiations to accept a demand for TRIPs-Plus.[248] However, despite numerous requests to stop imposing TRIPs-Plus obligations on 'developing' and 'least developed' countries, developed countries still

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[246] WHO, 'Briefing Note - Access to Medicine: Data Exclusivity and Other "TRIPS-Plus" Measures (2006) 3.
[247] El Said (n 241) 8.
[248] Carolyn Deere Birkbeck, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford: OUP 2008) 136.

insist that TRIPs-Plus commitments be included.[249] For instance, in the ongoing negotiations of the Trans-Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP) agreements, the US and Japan still pushed for TRIPs-Plus standards.[250] The RCEP includes all 10 ASEAN countries. If ratified, it will have a significant impact on IP protections in ASEAN countries. This could result in an improvement of their IP regimes and raise the IP standard to the level of developed countries. However, requiring rapid implementation of TRIPs-Plus provisions would not be appropriate for countries still trying to comply with TRIPs. Patent protection that is too strict could jeopardise access to medicine and adversely affect the public health of ASEAN countries.

Consequently, it should be concerned that stringent IP protection could provide differential effects on countries at different stages of development. In order to help ensure appropriate IP protection and to protect the public interest, ASEAN 'developing' and 'least developed' countries should not incorporate the TRIPs-Plus standard into their national laws. At the same time, developed countries should not encourage these countries to enter into trade agreements with TRIPs-Plus obligations, which may negatively affect their public health. The challenge for ASEAN would be to address the public health issue while maintaining IP system that can promote innovation.

(d) Strengthening IP Rights Enforcement

Inadequate IP rights enforcement can hinder ASEAN countries in ensuring appropriate IP protection. Despite having IP laws more in line with international

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[249] Ghidini, Peritz and Ricolfi (n 242) 57.
[250] Up to date, no ASEAN countries have ratified the TPP and RCEP.

standard, many ASEAN countries, particularly ASEAN developing and least developed members still have weak IP enforcement. Although Article 41-61 TRIPs sets forth provisions relating to the enforcement of IP rights, the scope of this section gives only general guidance.[251] It provides an overview of the WTO member states' commitments in ensuring minimum requirements for the enforcement of IP rights.[252] Member states are permitted, but are not obliged to implement stricter level of IP enforcement measures.[253] Consequently, member states are at liberty to adopt IP enforcement procedures depends on their national interests and capacities.[254]

Due to the lack of effective administrative and judicial mechanisms to ensure that IP rights are enforced, majority of ASEAN countries have been facing rampant IP infringement. For instance, according to 2016 USTR's Special 301 Report, Thailand and Indonesia were still maintained on the Priority Watch List, and thereby pressured by the US to urgently improve IP enforcement.[255] In this report, Vietnam is still on the Watch List. Online piracy and sales of counterfeit goods over the Internet continue to be widespread.[256] Furthermore, Malaysia is another ASEAN country that has been complained about weak enforcement of IP rights.[257] Malaysia is the country with a

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[251] OECD, *The Economic Impact of Counterfeiting and Piracy* (OECD Publishing 2008) 198; Christian H. Nguyen, 'A Unitary ASEAN Patent Law in the aftermath of TRIPs' (1999) 8 Pac Rim L & Pol'y J 453, 476.
[252] ibid.
[253] ibid.
[254] ibid.
[255] USTR, '2016 Special 301 Report' (2016) 36-38 <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf> accessed 2 May 2016.
[256] ibid 50.
[257] OECD, *OECD Investment Policy Reviews OECD Investment Policy Reviews: Malaysia 2013* (OECD Publishing 2013) 35.

long history of media piracy.[258] Despite the efforts for improvement of IP enforcement, online piracy in Malaysia is still growing.[259]

However, among the ASEAN countries, Philippines is a noteworthy example of making progress addressing the problem of IP infringement as it has been removed from Special 301 Watch List for 3 consecutive years. In 2016 report, it still remained out of the US government's list of countries tagged with the problems on IP protection and enforcement. Since 1994, Philippines has been continuously placed on the Watch List or Priority Watch List.[260] In recent years, Philippines has put much effort into enhancing its IP protection and enforcement through legislative reformation and other measures in order to improve the IP environment.[261] As a result of effective governance reforms, Philippines has successfully moved towards achieving a more effective civil and administrative enforcement.[262] Allan B. Gepty, deputy director general of IPOPHL, said that Philippines's success in strengthening IP protection and enforcement was due to the collective efforts to increase public awareness and build up capacity of enforcement agencies.[263] He further claimed that

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[258] Vivencio O. Ballano, *Sociological Perspectives on Media Piracy in the Philippines and Vietnam* (Springer 2015) 62.
[259] USTR, '2015 Special 301 Report' (2015) 13-14 <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf> accessed 12 February 2016.
[260] USTR, 'U.S. Removes the Philippines from the Special 301 Watch List' <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/April/US-Removes-the-Philippines-from-the-Special-301-Watch-List> accessed 15 April 2016.
[261] Intellectual Property Office of the Philippines (IPPHL), 'Reforms in the Philippines IP Regime Recognized in the 2016 USTR Special 301 Watch List Report' <http://www.ipophil.gov.ph/releases/2014-09-22-06-26-21/434-reforms-in-philippine-ip-regime-recognized-in-the-2016-ustr-special-301-watch-list-report> accessed 2 May 2016; IIP Digital, 'U.S. Removes the Philippines from Special 301 Watch List' <http://iipdigital.usembassy.gov/st/english/article/2014/04/20140429298467.html#ixzz3X0t86FG2> accessed 29 March 2014.
[262] Gilberto Llanto, 'Status of Philippine Commitments to AEC 2015 and Recommendations' (27 May 2014) 5 <http://www.pids.gov.ph/files/outreach/Llanto-ASEAN.pdf> accessed 15 April 2016.
[263] American Bar Association, 'The US Trade Representative Takes the Philippines off Its Special 301 Report's Watch List' <http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news_phil

strong IP enforcement would not be achieved without competent courts.[264] This demonstrates progress by a country in the developing world in improving its IP regime and effectively addressing the problem of IP infringement, which could inspire other ASEAN countries to follow Philippines' footsteps.

Raising awareness on IP protection is considered an important element to combat counterfeiting and infringement of IP rights.[265] Given IP is a relatively new concept to developing and least developed countries, public awareness and understanding of IP in these countries is quite low. Although ASEAN has recognised the importance of IP rights to economic development and has steadily attempted to increase IP awareness at the national and regional levels, IP awareness in ASEAN has generally been low.[266] Various initiatives have been taken in order to raise IP awareness at all levels consistent with ASEAN IPR Action Plan 2011-2015. These initiatives have taken the form of issuing campaigns, and making IP resources available by establishing patent libraries, the ASEAN IP Portal and ASEAN TMview which provides relevant information about IP protection in ASEAN countries. These tools facilitate ASEAN stakeholders to access relevant information on patents, IP laws and trademarks, respectively.[267] Nevertheless, increasing IP awareness remains challenging and seems likely to be 'a never-ending task'.[268] According to the ASEAN IPR SME Helpdesk,

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ippines_the_ustr_takes_philippines_off_its_special301report_watch_list_0614.html> accessed 19 April 2016.

[264] ibid.

[265] OECD, *The Economic Impact of Counterfeiting and Piracy* (n 251) 188.

[266] ASEAN, 'ASEAN Intellectual Property Rights Action Plan 2011-2015' <http://www.asean.org/archive/documents/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf> 12 accessed 9 October 2015.

[267] OECD, *Economic Outlook for Southeast Asia, China and India 2016 Enhancing Regional Ties: Enhancing Regional Ties* (OECD Publishing 2016) 159.

[268] Leo Kasim, 'Poor IP awareness hampering ASEAN growth' *The Brunei Times* (Bandar Seri Begawan April 27 2013) <http://www.bt.com.bn/2013/04/27/poor-ip-awareness-hampering-asean-growth> accessed 29 March 2015.

the lack of awareness of importance of protecting IP is considered as the most common issue in ASEAN.[269] A representative from the WTO also pointed out that IP awareness in ASEAN is still low due to 'the lack of original creations in the region's business and industrial sectors'.[270] Rather than developing their own products, they tend to import finished products from other countries.[271] For instance, patent is likely to be a good indicator for innovation. The number of patent applications can indicate how seriously countries were engaged in innovation activities.[272] Also, the number of granted patents can measure technological capability of a country.[273] According to WIPO statistics database, between 2000 and 2014, the number of applications and grants of patent in the ASEAN-6 countries and Vietnam is largely dominated by non-residents.[274] To date, no domestic patent has been granted in Cambodia.[275] Moreover, no domestic patent applications have been filed in Lao PDR and Myanmar.[276] These statistics indicate the need to improve indigenous technology capacity in ASEAN countries. ASEAN members, particularly Cambodia, Lao PDR and Myanmar (CLM) are relatively lacking in innovation capacity. Consequently, the challenge of ASEAN would be to improve IP protection and innovative capacity of the member states to be able to develop IP products themselves. It should be ensured that ASEAN countries can move from product imitators to innovators. To this end, priority should be given

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[269] Sara Medina and Kai Zhang, 'Intellectual Property Rights in Southeast Asia' (Workshop on Intellectual Property Rights, ASEAN-EU STI days, Bangkok, 21-22 January 2014) 4 <https://sea-eu.net/object/document/130/attach/IPR_final24032014.pdf> accessed 16 April 2016.
[270] Kasim (n 268).
[271] ibid.
[272] Shahid Yusuf and I Nabeshima, *Changing the Industrial Geography in Asia: The Impact of China and India* (World Bank Publication 2010) 197-198.
[273] ibid 197.
[274] WIPO, 'Statistical Country Profiles'<http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=LA> accessed 5 April 2016.
[275] Asian Development Bank Institute (ADBI) (n 77) 236.
[276] ibid.

to building R&D infrastructure. More developed members such as Singapore, Brunei Darussalam, and Malaysia are encouraged to increase R&D spending to promote creativity and innovation.[277] Raising the quality of education is also seen as a crucial factor in promoting innovation.[278]

To spread awareness of the benefits of IP and stimulate its use as a tool to promote creativity and innovation, an educational approach should be pursued. An effective method to increase IP awareness is to include IP matters in the national education system, particularly at university level.[279] IP should be taught to students in all disciplines, not only to law students.[280] Recently, Director General Josephine Rima-Santiago of the Intellectual Property Office of Philippines (IPOPHL) also opined that to effectively deal with IP violations, education would be the key to change people's attitude towards IP.[281] She also added that teaching about IP should start in elementary schools to raise IP awareness among young people.[282] When people have a good understanding in IP rights, they would recognise its importance and benefits. It should be emphasised that IP protection is crucial to establish a knowledge-based driven economy. Developed countries that have strong economies have a strong knowledge based economy due to flourishing creativity and innovation. They have been using IP to add value to information, knowledge and ideas and to transform these intangibles into concrete economic assets. Consequently, it is necessary for nationals among the ASEAN members to have adequate knowledge and

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[277] Yusuf and Nabeshima (n 272) 197-198.
[278] ibid.
[279] Oxford Business Group, *The Report: Thailand 2012* (Oxford Business Group 2011) 258.
[280] ibid.
[281] Intellectual Property Office of the Philippines (IPPHL) (n 261).
[282] ibid.

understanding in IP right if ASEAN countries wish to be competitive in the global market.

Weak national judicial system is another major factor that leads to inadequate enforcement of IP rights in ASEAN countries.[283] Since legal IP trade is a new development to countries in developing world, the governments may not exert sufficient effort to reform their national judicial systems. For instance, according to 2015 Special 301 Report, despite the growing number of online piracy and sales of counterfeit goods in Vietnam, the government failed to implement guidelines for enforcement agencies and courts to levy deterrent criminal penalties against IP rights violators.[284] The situation was expected to be worsened, unless the government take sufficient action to deter counterfeiting and piracy.[285] Furthermore, it was claimed that although IP systems of the ASEAN developing countries have generally improved, the enforcement of IP rights, particularly in patent rights were still weak and inadequate.[286] Despite high rates of infringement, there was low prosecution rates of infringement.[287] This demonstrates urgent need for ASEAN countries to provide stronger enforcement systems, particularly strengthening national judicial system.

It has been suggested that establishing a specialised IP court is one of the measures to strengthen the IP enforcement system.[288] Adopting this approach will help improve the quality and efficiency of IP litigation. By having well-trained judges specialised in

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[283] Christian H. Nguyen, 'A Unitary ASEAN Patent Law in the aftermath of TRIPs' (1999) 8 Pac Rim L & Pol'y J 453, 477.
[284] USTR, '2015 Special 301 Report' (n 259) 59.
[285] ibid.
[286] Tuan Anh Vu, 'An insight into the patent systems of fast developing ASEAN countries'(2012) 34 World Patent Information 134, 141 <http://dx.doi.org/10.1016/j.wpi.2011.12.007> accessed 15 April 2016.
[287] ibid.
[288] OECD, *OECD Investment Policy Reviews OECD Investment Policy Reviews: Malaysia 2013* (OECD Publishing 2013) 35.

IP related matters, better quality of decision-making will be realised.[289] Presently, Thailand and Malaysia are the only two countries in the region that have successfully established specialised IP court. The existence of the Central Intellectual Property and International Trade Court (CIPITC) has helped the development of IP law in Thailand.[290] Establishing the IP court is also considered as a great success in Malaysia since it can handle IP cases quicker and more effective.[291] It was further claimed that establishing the specialised court can help accelerate the development of IP laws in countries that have not yet achieved a full-fledged of IP laws.[292] Given most of the ASEAN countries is still struggling to improve their IP systems, strengthening national judicial system through the establishment of IP court seems to be an appropriate measure.

It appears that despite the enactment of new IP laws that is consistent with international standard, weak IP enforcement can undermine the ASEAN countries' efforts in establishing appropriate IP protection. To foster effective enforcement of IP rights, raising IP awareness and strengthening national judicial system would be necessary. However, although IP rights enforcement in ASEAN countries is generally weak and still needs a lot of improvement, the situation has improved in some countries. Acknowledging and being concerned about the problem and by developing a clear framework to deal with it, can lead to success, as in Philippines.

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[289] Robert M. Sherwood, 'The TRIPs Agreement: Implications for Developing Countries'(1997) 37 IDEA 491, 539.
[290] Rohazar Wati Zuallcobley and others, 'Study on Specialized Intellectual Property Courts' (a joint project between the International Intellectual Property Institute (IIPI) and the United States Patent and Trademark Office (USPTO) 2012) 120 <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized- IPR-Courts.pdf> accessed 15 April 2016.
[291] The South-East Asia IPR SME Helpdesk, 'ASEAN IPR SME Helpdesk - IP Country Factsheet: Malaysia' (2014) 9 <http://www.southeastasia-iprhelpdesk.eu/sites/default/files/publications/Malaysia%20Factsheet.pdf> accessed 15 April 2016.
[292] Zuallcobley and others (n 290) 120.

5.1.3.2 Participating in the Global IP Community

Various international agreements on IP rights have been ratified in pursuit of a global IP standard. One of the strategic goals of ASEAN IPR Action Plan 2011-2015 is to stimulate its member states to participate in international IP agreements in order to strengthen their IP regimes and increase competitiveness of the region.[293] However, some members failed to accomplish the accession by the 2015 target date. According to the AEC Blueprint 2025, ASEAN clearly expressed intention to carry on its task of ensuring that ASEAN members play an active role in the international IP community. Accession to the PCT, the Madrid Protocol, and the Hague Agreement is one of the initiatives under the Blueprint and the upcoming ASEAN IP Rights Action Plan 2016-2025. Member states are also encouraged to accede to other WIPO-administered treaties. However, no exact time frame has been given. If this can be accomplished, it would help the IP regimes of the ASEAN members be more in line with international IP standards. By completing accession to international IP treaties, particularly the PCT, the Madrid Protocol, the Hague Agreement, the Paris convention, and the Berne Convention, at least ASEAN members would have their substantive and procedural IP laws meet the minimum standards provided under these treaties. IP laws and administrative procedures would therefore improve and ultimately provide a more friendly IP environment.

ASEAN members have made steady progress in acceding to international IP agreements.[294] Singapore has joined all of the major international IP treaties namely, TRIPs, the Paris Convention, the Berne Convention, PCT, the Madrid Protocol and

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[293] AWGIPC, 'ASEAN IPR Action Plan 2011-2015' (2011) 5 <http://119.252.161.170/ksp/wp-content/uploads/2013/03/asean.pdf> accessed 4 September 2014.

[294] Elizabeth Siew-Kuan Ng, 'ASEAN IP Harmonization: Striking the Delicate Balance' (2013) 25 Pace Int'l L Rev 129, 151.

the Hague Agreement. Also, ASEAN 'developing countries' have shown progress in preparing for accession to these treaties. Cambodia and Lao PDR have also made progress, whereas Myanmar has not and is still falling behind. However, Myanmar is currently reforming its IP regime and should be soon ready to participate in the international IP community.

Acceding to international IP treaties will impose a much greater burden on less developed countries. They will be required to make substantial changes to their substantive laws and administrative procedures. Consequently, internal assistance from more developed members would be necessary. It would decrease harmful diversity and allow the less developed countries to catch up to the more developed countries. This would be consistent with the spirit of 'ASEAN-help-ASEAN' approach, which aims to intensify cooperation between the member states, particular between more and less developed member countries. It is expected that sharing of experience and expertise between the members would help transfer knowledge and know-how to less developed countries in order to assist their developments.[295] Moreover, a strong resolve and political will to enhance the IP regimes would be essential. Strict compliance with the ASEAN IPR Action plan and other initiatives would help bring ASEAN closer to its goal of harmonisation.

5.1.3.3 Developing Appropriate Implementation and Monitoring Compliance Mechanisms

Sufficient administrative capacity of member states and effective compliance

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[295] Pushpanathan (n 69) 17.

mechanisms is key to the successful implementation of regional IP policies and initiatives. The problem that ASEAN has been facing is not a lack of vision or a plan of action. Instead, ASEAN's problem is 'ensuring compliance and effective implementation' of its instruments by the member states.[296] This obstructs ASEAN's progress in pursuing regional cooperation and integration, including weakening the credibility of ASEAN. [297] Therefore, in order for ASEAN to achieve deeper integration and establish a full-fledged AEC, it should ensure that all ASEAN members are in compliance with their obligations.[298]

After the adoption of the ASEAN Charter, mechanisms to ensure implementation and monitor compliance of ASEAN instruments improved. The ASEAN Coordinating Council , ASEAN Community Councils , and the ASEAN Sectoral Ministerial Bodies were authorised to ensure the implementation of the ASEAN instruments. Furthermore, the ASEAN Secretariat was given an active role in monitoring the implementation of ASEAN's policies. However, there are still many areas regarding roles in implementation and monitoring compliance that remain unclear in the ASEAN Charter.[299] For instance, although the ASEAN Charter made the ASEAN Secretary-General responsible for facilitating and monitoring the implementation of ASEAN's agreements and decisions, there are no clear rules or guidelines on how the Secretary-General can gather compliance information of the member states and evaluate their compliance.[300] Furthermore, in some areas such as the implementation of the AEC Blueprint, the ASEAN Economic Ministers and the ASEAN Secretary-

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[296] Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (Institute of Southeast Asian Studies 2008) 52.
[297] ASEAN 'Report of the Eminent Group on the ASEAN Charter' (n 88) 21.
[298] ibid 6.
[299] Hao Duy Phan, 'Promoting Compliance: An Assessment of Asean Instruments since the Asean Charter' (2013-2014) 41 Syracuse J Int'l L & Com 379.
[300] ibid 387.

General have been given the same function of monitoring the implementation of the AEC Blueprint.[301] Therefore, despite the adoption of the ASEAN Charter, in practice ASEAN still faces uncertainty in ensuring compliance because of the existence of unclear provisions in this area.

Furthermore, the 'ASEAN Way' has been criticised for fostering habits of non-implementation.[302] Lack of enforcement measures make the cost of non-compliance relatively low.[303] ASEAN has placed much emphasis on the principles of national sovereignty and non-interference. It has not been prepared to initiate punitive action for non-compliance. It is viewed that punitive action can create inter-state conflicts, which undermines the traditional 'ASEAN Way'.[304] However, the lack of punitive compliance mechanisms has caused some to opine that ASEAN is an 'imitation community'.[305] The primacy of state sovereignty and non-intervention would not allow ASEAN to develop a 'hard compliance mechanism' that would undermine the principles of the 'ASEAN Way'.[306] Instead, consultation through sharing of implementation experience, understanding, awareness and discussion among the member states are the most popular methods used to promote and ensure compliance.[307]

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[301] Phan (n 299) 389.
[302] Yuzawa (n 106) 82.
[303] ibid.
[304] Naparat Kranrattanasuit, *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand, and Vietnam* (Martinus Nijhoff Publishers 2014) 60.
[305] Jones and Smith, "ASEAN's Imitation Community", op. cit. Further discussion in David Martin Jones and Michael L.R. Smith, "Making Process, not Progress", International Security 32, No. 1 (Summer 2007): 148–84 (as cited in Mathew Davies, 'The Perils of Incoherence: ASEAN, Myanmar and the Avoidable Failures of Human Rights Socialization?' (2012) 34 Contemporary Southeast Asia: A Journal of International and Strategic Affairs 1, 3-4.
[306] Mathew Davies, 'The Perils of Incoherence: ASEAN, Myanmar and the Avoidable Failures of Human Rights Socialization?' (2012) 34 Contemporary Southeast Asia: A Journal of International and Strategic Affairs 1.
[307] Phan (n 299) 406.

The AEC Scorecard was developed by the ASEAN Secretariat to assess and monitor the implementation of AEC-related measures in accordance with the AEC Blueprint 2015. To become a highly competitive economic region, implementing measures relating to IP rights are included in Pillar II of the blueprint. The blueprint requires ASEAN members to fully implement the ASEAN IPR Action Plan, which sets out several goals and actions relating to IP rights. To date, only two AEC scorecards have been made available to the public, one in 2010 and the other in 2012. However, progress of the ASEAN members in implementing each pillar of the AEC can still be found in various ASEAN Secretariat publications.[308] The AEC scorecard 2012 graded compliance as 'fully implemented' and 'not-fully implemented'. A measure is categorised as 'fully implemented' when it has been implemented by all ten member states.[309] In the area of IP rights, five measures have been 'fully implemented'. Meanwhile, one measure has been considered as 'not-fully implemented'.[310] Also, Annex 2 of the AEC Scorecard 2012 rated the level of IP implementation of each ASEAN country during 2008-2011. Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam all implemented all targeted IP measures during 2008-2011.[311] Brunei Darussalam, Cambodia, Lao PDR and Myanmar implemented half of the targeted measure during that timeframe.[312] Compared to other areas, progress can be

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[308] Jayant Menon and Anna Cassandra Melendez, 'Realizing an ASEAN Economic Community: Progress and Remaining Challenges' (2015) ADB Economics Working Paper, 1 <http://www.adb.org/sites/default/files/publication/160067/ewp-432.pdf> accessed 31 may 2016.
[309] Pratiwi Kartika and Raymond Atje, 'Towards AEC 2015: Free Flow of Goods within ASEAN' in in Sanchita Basu Das (ed), *ASEAN Economic Community Scorecard: Performance and Perception* (Institute of Southeast Asian Studies 2013) 44.
[310] Basu Das S, 'Assessing the Progress and Impediments Towards an ASEAN Economic Community' in Sanchita Basu Das (ed), *ASEAN Economic Community Scorecard: Performance and Perception* (Institute of Southeast Asian Studies 2013) 10.
[311] ASEAN, *ASEAN Economic Community Scorecard* (ASEAN Secretariat 2012) 24.
[312] ibid.

seen in the area of IP rights.[313] However, although substantial achievements have been made in implementing IP initiatives, the remaining targets, particularly acceding to major international IP treaties are not expected to be achieved after 2015.[314]

The AEC Scorecard can track the progress of implementing IP policies. However, it has shortcomings. For instance, it fails to explain implementation delays and it has been criticised for its lack of usefulness in practice. The Scorecard only measures aggregate progress but fails to provide measures of how to improve and ensure implementation and compliance. Moreover, the AEC Scorecard relies on self-assessments. The member states report their own implementation progress, subjecting the process to possible overestimation and inaccurate reporting as the deadline in 2015 looms.[315] Also, information provided by Annex 2 of the 2012 AEC Scorecard does not clearly indicate a real stage of implementation or the challenges faced by each member state.[316] IP capacities vary among the ASEAN countries. Myanmar faces the greatest challenge and has made the least progress. The IP regime in Myanmar still falls well below the international standard. Yet, the 2012 AEC Scorecard rates Myanmar at the same level as Laos, Cambodia and Brunei Darussalam. More importantly, despite its role as a compliance tool, there is no mechanism to enforce sanctions on member states for failure to implement measures within the agreed time frame.[317] This seems to be the biggest shortcoming of the AEC

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[313] OECD, *Economic Outlook for Southeast Asia, China and India 2015: Strengthening Institutional Capacity* (OECD Publishing 2015) 64.
[314] Japan International Cooperation Agency (JICA), 'Data Collection Survey on ASEAN 2025 Final Report' (June 2004) 38 < http://open_jicareport.jica.go.jp/pdf/12152930.pdf> accessed 30 March 2016.
[315] Asian Development Bank, *Asian Economic Integration Monitor – October 2013* (Asian Development Bank 2013) 36.
[316] ibid.
[317] Menon and Melendez (n 308) 3.

scorecard.[318] Therefore, it is still questionable whether the AEC Scorecard accurately evaluates and monitors compliance.

ASEAN IPR Action Plan 2011-2015 also provides implementation and monitoring mechanisms. ASEAN members and the ASEAN Secretariat are separately appointed to act as leaders of each initiative.[319] A leader is responsible for fully implementing initiatives in accordance with the action plan.[320] For instance, Singapore was the leader in the implementation of the ASEAN Patent Search and Examination Cooperation (ASPEC). Meanwhile, the ASEAN Secretariat acted as the lead in the accession to the Patent Cooperation Treaty (PCT). Each initiative would also have a country champion or champions that would work closely with the leader to ensure that each initiative would have a desirable outcome.[321] Moreover, implementation would be guided by documents developed by the lead country/ies.[322] However, despite the fact that ASEAN members and the ASEAN Secretariat play roles in implementing and monitoring implementation, guidelines and procedures to evaluate and monitor implementation are not clearly provided. No specific instructions are provided explaining how to monitor implementation by other member states. This lack of clarity can obstruct the fulfilment of these responsibilities and negatively impact the overall effectiveness of the process. Furthermore, there is no guarantee that all of the initiatives will be implemented by all the member states within the timeframe.

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[318] ibid.
[319] AWGIPC, 'ASEAN Intellectual Property Rights 2011-2015' (2012) 25.
[320] ibid.
[321] ibid.
[322] AWGIPC (n 319) 26.

Despite having provided the tools for monitoring the implementation of and compliance with regional IP obligations, cooperation in this area has proceeded slowly and fall behind schedule. The problem of non-compliance by member states is a major impediment. ASEAN tends to use ineffective consultative mechanisms rather than hard compliance mechanisms. To deal with this issue, some recommendations have been made to ASEAN. It was suggested that ASEAN should adopt punitive sanction-based compliance mechanisms.[323] The Economic Research Institute for ASEAN and East Asia opined that 'commitment and agreements without any punitive actions in case of breaches are meaningless'.[324] The lack of sanctions makes complying with ASEAN's 'binding' commitments voluntary rather than mandatory, naturally causing delays in overall implementation. However, imposing sanctions is a sensitive issue in ASEAN.[325] Adopting a sanction regime can be seen as an undermining ASEAN's fundamental principles of the 'ASEAN Way'. The adoption of sanctions may be contrary to ASEAN's nature. It may require reforms of the traditional 'ASEAN Way' and more profound institutional changes, such as infringements on national sovereignty.

Moreover, to ensure that a law or policy is effectively implemented by all member states, enhancing their administrative capacity is a precondition.[326] Capacity for effective implementation of regional IP policy can be ability to fully achieved its objectives or targets within set timeframe. To this end, sufficient knowledge,

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[323] Sukma (n 155) 3.
[324] ibid.
[325] ibid.
[326] See Phedon Nicolaids, 'Administrative Capacity for Effective Implementation of EU Law' (2012) EIPASCOPE: bulletin, 5.

resources, and motivation to reach objectives are required.[327] This underlies the importance of intense cooperation on administrative capacity building of ASEAN's less developed members, particularly the CLMV. In the EU, effective implementation is considered as 'collaborative project'.[328] Apart from ensuring that all members states are consistently applied policy and law, learning from experiences of other member states is necessary. Since there may be many different ways to achieve one objective, comparing policy performance of member states can help assess effectiveness of implementation of policy and law.[329] Consequently, to help ASEAN ensure effective implementation of regional IP policy, collaboration through sharing expertise and experience between member states under the spirit of 'ASEAN-help-ASEAN' approach should be adopted. This would assist less developed members to effectively implement ASEAN's IP policies.

Therefore, in order for ASEAN to integrate its community, it should prioritise enhancing administrative capacity of less developed members and carefully consider the ramifications of both a soft compliance mechanism and hard compliance tools. It has been suggested that ASEAN should adopt sanctions as part of its working principles and mechanisms. Doing so would allow ASEAN to use sanctions to complement the 'ASEAN Way'.[330] Moreover, to enhance adherence to the rule of law, sanctions should be introduced to support the existing dispute settlement mechanism.[331] This would help ensure that all the ASEAN's commitments are

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[327] ibid 8.
[328] ibid 5.
[329] ibid 6.
[330] Asian Development Bank Institute (ADBI) (n 77) 272.
[331] ibid.

properly enforced and disputes are resolved.[332] However, ASEAN should carefully consider which forms of actions would be appropriate and in what areas it should focus to make this notion more acceptable to the members. Since sanctions can take a number of form, member states should discuss which approach is compatible and appropriate for helping ASEAN move towards more effective and efficient institution.[333] ASEAN should start to apply hard compliance mechanisms in areas that impact the operation of the common market, such as IP rights. The ASEAN Framework Agreement, ASEAN IPR Action plan, and other related binding instruments all aim to improve and harmonise IP regimes. Ensuring that ASEAN members take their obligations seriously and consistently implement the IP policies in accordance with these instruments is required in order to assist the AEC to function effectively. Thus, hard compliance mechanisms should be employed to ensure that ASEAN's commitments are properly enforced. Acceptance of using this approach would help the ASEAN's member achieve deeper integration. However, this should be developed carefully while taking into consideration the various capacities of each member state.

5.1.3.4 Standardising IP Regimes among the ASEAN Members

ASEAN fully realised that harmonisation of IP laws is one of the key elements fostering deeper economic integration. Consequently, establishing a regional IP system has long been one of the ASEAN's goals. Notwithstanding, due to the diversity in IP regimes and the varying levels of development of the member states,

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[332] ibid.
[333] ibid.

these goal has never been achieved. Therefore, ASEAN IPR Action Plan 2011-2015 adopted a more flexible approach by changing its goal from establishing a harmonised regional IP system to 'a more flexible IP cooperation model'.[334]

However, harmonising the regional IP regimes is still necessary for ASEAN to efficiently facilitate the common market. As previously discussed in Chapter 3, the EU has steadily sought harmonisation through the issuance of directives and regulations and the ratification of IP international agreements. It has successfully established a unitary system of IP rights in many areas. The establishment of an EU-wide IP systems is considered 'a logical part of the process of consolidating the single market'.[335] Therefore, to ensure that goods can move freely within an ASEAN common market, further harmonisation of IP laws at regional level would be required. Two primary ways to accomplish this are discussed below.

(a) Approximating IP Laws of the Member States

An approximation of laws differs from a complete harmonisation.[336] Approximation can be realised by various methods. One of the most common way can be found in international agreements that provide minimum standards, such as the TRIPs Agreement.[337] TRIPs obliges adopting countries to provide a minimal standard, which would help homogenise the IP protection of the member states. Member states would still be free to adopt protection that goes beyond the TRIPs minimum standard.

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[334] Siew-Kuan Ng (n 294) 146.
[335] David Bainbridge, *Intellectual Property* (Pearson Education 2009) 16.
[336] Christopher Heath, 'Intellectual Property Harmonisation in Europe' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 46.
[337] ibid.

However, this could result in different IP standards from country to country. Therefore, approximation of national IP laws would not cause the IP standards of the member states to be exactly the same. The tendency is to standardise the IP laws only in certain substantive areas and to certain degrees.

An approximation of national laws relating to IP rights between the member states can be also conducted through the creation of regional legislative instrument. The EU, has majorly relied on this measure to harmonise IP laws of its members. The EU has approved substantial harmonisation directives in various areas to approximate the IP laws of its members. However, unlike the EU, ASEAN remains an intergovernmental organisation. It lacks institutional bodies that function like the European Parliament, European Council, European Commission and the CJEU, which are directly involved in the EU legislative process. ASEAN provides a much looser framework for agreement and cooperation when compared with the EU's legislative measures. The ASEAN Framework Agreement on IP Rights (The Framework Agreement) is the only regional agreement in this field that ASEAN has enacted. However, it is considered merely 'a statement of intention of the ASEAN countries' to enhance cooperation on IP rights.[338] The agreement provides a flexible framework to bring members' IP protection in conformity with international standards through the adoption of TRIPs obligations. The most ambitious goals under this agreement seems to be ASEAN's commitment to explore the possibility of an ASEAN patent and trademark system, including ASEAN patent and trademark office. To implement these goals, various cooperation and action plans were initiated. However, no specific timeframe is

[338] Lawan Thanadsillapakul, 'Open regionalism and deeper integration: The implementation of ASEAN investment area (AIA) and ASEAN free trade area (AFTA)' (2000) Thailand Law Journal 3.

given.[339] The implementation of the Framework Agreement is still an on going process. Some objectives, particularly those relating to developing regional IP regime can still not be achieved. It was opined that due to substantial differences in economic development between the member states, harmonising regional IP rules and enforcement in ASEAN could be considered as a long-term goal.[340] Therefore, ASEAN departed from its ambitious goal in creating a regional IP system. Instead, the approximation of IP laws in ASEAN relies primarily on the accession to international IP treaties and the adoption of international standards rather than using regional legislative instruments to develop their own standard.

Acceding to international IP treaties such as the Berne Convention, the Paris Convention and the TRIPs agreement can help standardise substantive IP laws of the member states to meet the minimum requirements as provided under these treaties. These treaties provide a minimum standard that the member states are required to incorporate into their national legislations, which would also lead to the approximation of IP laws of the contracting states. However, it does not provide a uniform of set of rules that cover all aspects of IP rights. Some flexibilities as to substantive standard of protection and mechanism of enforcement are provided in order to enable developing and least developed countries to accommodate their particular interests.[341]

Additionally, some international treaties such as the PCT, Madrid Protocol and Hague Agreement provide mechanisms for registering IP rights in several countries

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[339] ibid.
[340] Lall and McEwin (n 9) 245.
[341] WIPO, 'Advice on Flexibilities under the TRIPS Agreement' <http://www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html> accessed 5 June 2016.

simultaneously through the filing of a single application. Acceding to these treaties would not result in harmonisation of substantive IP laws. It could only harmonise certain levels of administrative procedures in granting IP rights in multiple countries. These systems still rely on the national law of the member countries that are designated in the application to determine whether to grant protection or not. This demonstrates that although the creation of these international registration systems could harmonise certain levels of procedures and facilitate the process of granting IP protections in multiple countries, substantive laws relating to the granting of IP rights are still left unharmonised. However, if ASEAN members can successfully acceding to these treaties, part of their IP systems relating to procedures for granting patents, trademarks, and industrial designs would be approximated. Though participating in these international registration systems cannot be considered complete harmonisation, various benefits could still be obtained. All ASEAN members would be integrated into the global IP community. Also, IP administrative capacity and infrastructures would be enhanced. Such improvement would facilitate further harmonisation of IP regimes at the regional level.

Thus, to approximate IP laws of the ASEAN countries ASEAN's priority should be to ensure that ASEAN members accede to all major IP agreements and implement the obligations under those agreements within the required timeframes. In order to do so, ASEAN needs to have effective compliance mechanisms, strong cooperation between the member states and external assistance from developed countries and related international organisations. Effectively participating in multilateral IP agreements would help decrease diversity and thereby increase the level of harmonisation of the IP system. This would be a good start to ASEAN's pursuit of a higher level of IP harmonisation at some point in the future. Since one of the AEC's key objectives is to

create the common market, it would be necessary for ASEAN to pursue a higher level of harmonisation and develop its own regional IP system to ensure that disparity in IP laws and the territorial nature of IP rights would not obstruct the free movement of goods within the common market.

(b) Creating Regional IP System

Creating a regional IP system in the area of trademarks, patents and designs is used to be one of ASEAN's priorities. According to 2011-2015 IPR Action Plan, ASEAN departed from its ambitious goal. ASEAN had no plan to introduce a regional IP regime to the AEC. Instead, ASEAN adopted a more flexible IP cooperation policy. It recognised that due to different levels of development of ASEAN members, some flexibility is needed in order to move towards a more integrated future. However, according to the upcoming ASEAN IPR Action Plan (2016-2025 ASEAN IPR Action Plan), some indication of harmonising IP systems among the ASEAN members such as developing online filing system for trademark and creating an inclusive IP ecosystem is included as ASEAN's strategic goals in order to strengthen IP cooperation in the region. If this action plan can be finally approved, various initiatives that could help ASEAN move towards a higher degree of IP harmonisation through the establishment of regional IP system would be carried out.

Over the past 15 years, the development of the regional IP system in ASEAN has started with the harmonisation of IP administrative procedures with the particular focus on the areas of trademark and patent. When ASEAN was eager to pursue the establishment of a regional filing system, the significant achievement was the completion of ASEAN Filing Form for Trademark. Although the common form for domestic and regional trademark filing have been developed, legal measures to establish a complete system are lacking. Due to high diversity of the ASEAN

members, particularly in economics and IP, this work is still in progress. If this form is adopted, certain filing procedures between member states would be harmonised. Recently, despite deviating from this ambitious goal, the ASEAN Common Guidelines on Trademark Substantive Examination was also adopted. This would help reduce discrepancies in administrative practices between ASEAN IP offices. Moreover, to provide access to trademark information from the participating ASEAN member states, ASEAN TMview was successfully launched. In the area of Patent, the ASPEC programme, already come into operation to provide for the sharing of search and examination results. This helps reduce burden on the national IP offices of the ASEAN members. Although these achievements do not result in a full harmonisation of IP administrative procedures, they represent significant steps forward in building regional cooperation in IP. This could be further developed into a regional IP system.

In order for ASEAN to move towards establishing an ASEAN-wide IP system, including a centralised regional IP office, deeper level of harmonisation, focused cooperation and strong political will and resolve from all the member states would be required. Legal measures need to be introduced. In the EU, substantive and procedural laws in some IP areas have been harmonised through the issuance of regulations. Unlike the approximation of national IP laws of the member states through the directives, the regulations governing EU-wide IP systems directly apply across the EU without the need for national legislation. In other words, unification of IP rights can be achieved through regulations. Currently, the EU has nearly achieved a complete unitary system of IP rights. The new unitary patent system and the Unified Patent Court will come into operation in 2017. The area not yet unified is copyright.

One of the major factors that has helped the EU successfully establish these EU-wide IP systems is the approximation of IP laws between the member states through

harmonisation directives. Just harmonising IP laws through the directives would not in and of itself result in unitary systems of IP rights. However, doing so, could significantly decrease the disparity in the national IP laws of the member states, particularly the laws in areas that adversely affect the operation of the internal market, for instance, in the field of trademark. Trademark is an area conducive to rapid development of a uniform system of protections.[342] There are two primary contributors to the development of a uniform trademark system, trademark harmonisation directives and the regulation establishing the EU trademark system. A harmonisation directive was first approved to harmonise substantive issues that help approximate national trademark laws. However, since the harmonisation directive did not provide harmonised rules governing trademark registration procedures, establishing an EU-wide trademark system needed additional action. Therefore, the regulation governing an EU trademark system was enacted. This regulation provided uniform rules governing both substantive and procedural issues, which could eliminate disparities in national trademark regimes and challenge the territorial of IP rights. Barriers to the functioning of an internal market can therefore be eliminated.

Nevertheless, the creation of the EUTM system could be regarded as the consequence of the approximation of national trademark laws through the harmonisation directives. The substantive provisions in the regulation are almost the same as those provided in the harmonisation directive.[343] Harmonisation directives were 'a necessary step to

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[342] Herbert Hovenkamp and Mark A. Lemley, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (Aspen Publishers Online 2009) 45-5.
[343] Elizabeta Zirnstein, 'Harmonization and Unification of Intellectual Property in the EU' (2005) Intellectual Capital and Knowledge Management 293, 300.

pave the way for the Regulation'.[344] Similarly, after the approximation of design laws by the harmonisation directive, the regulation establishing the community design system was enacted. This regulation contains substantive provisions that were the same as those provided in the design directive.

This two-stage approach has been used to pursue a higher degree of IP harmonisation in the EU. At first, harmonisation directives were adopted followed by the issuance of regulations. Part of the EU's success in creating the community IP system, would be from the success in harmonising substantive laws through use of harmonisation directives. They bridged the disparity in trademark and design laws between its members. Directives and regulations are the tools of this two-level legislation which led to more harmonised IP laws in the EU.

Consequently, in order for ASEAN to establish a unified IP system, the divergence in IP laws between the member states should be addressed. Extreme disparity in national IP legislation would be major obstacle impeding ASEAN from establishing a region-wide IP system. Lessons can be learned from the EU's success. ASEAN should start the harmonisation process with the approximation of IP laws of its members, particularly on substantive issues. Although it is not necessary for the process of harmonisation to start with substantive rules, doing so could make this objective easier to achieve.[345] Harmonising administrative procedures for IP registration without harmonising substantive rules would be 'meaningless and ineffective'.[346] Since IP laws between the ASEAN members are highly diverse, it would be more

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[344] Graeme Dinwoodie, 'The Europeanization of Trade Mark Law' in Ansgar Ohly and Justine Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 86.
[345] Endeshaw (n 11) 146.
[346] ibid.

effective for ASEAN to start developing a regional IP system by beginning with the harmonisation of substantive laws of the member states. Decreasing the disparity on substantive issues in IP laws could facilitate the development of a unitary system with uniform substantive and procedural rules. Furthermore, ASEAN has steadily made efforts to create a trademark and patent registration system, including regional trademark and patent offices. There has been some progress in the creation of formalities and administrative procedures for registration of rights in those areas. Consequently, it would be appropriate for ASEAN to continue to harmonise laws and start to develop an ASEAN-wide IP system in the areas of trademarks and patents.

In the EU, the creation of the community-wide IP system proceeded through a supranational legal framework. EU members give consent to pool part of their sovereignty through the use of courts and political institutions, which have authority to enforce the laws against member states. Unlike the EU, ASEAN is not a supranational organisation and lacks regional institutions and court to enforce and interpret supranational law.[347] Therefore, there is no guarantee that ASEAN legal instruments would be applied and enforced in all the ASEAN states.[348] The ASEAN Charter was issued in 2008 and provides a new legal and institutional framework and mechanisms to enhance ASEAN's function. However, it did not establish any institution with supranational law making power or a regional court that could ensure that the ASEAN legal instrument is consistently applied. However, this does not mean that decisions from ASEAN would not have binding effect. Some legally binding

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[347] Tushar Kanti Saha, *Textbook on Legal Methods, Legal Systems & Research* (Universal Law Publishing 2010) 55.

[348] Rodríguez Yong and Camilo Andrés, 'ASEAN, Foreign Investment and Legal Certainty: They Can Work Together' (2010) *Umbral Científico* 84, 85 <http://www.redalyc.org/pdf/304/30421294011.pdf> accessed 23 March 2015.

agreements have been adopted by ASEAN. The ASEAN Charter, which is perceived to be the constitution of ASEAN, is the most significant example. The ASEAN Charter is a significant development in creating ASEAN law. Nevertheless, the lack of regulatory institutions could lead to problems of non-compliance.

Therefore, to establish a regional IP system that grants supranational rights, legally binding instruments is required. Even without having law-making institutions, ASEAN could still issue legal instruments that are legally binding to all the member states. ASEAN could adopt regional agreements to establish an ASEAN-wide IP system with harmonised substantive and procedural rules. Like the EU, a unified IP regime should operate in parallel with national systems, and thereby provide alternatives to the applicants who would like to obtain protection in all the ASEAN states through the filing of a single application. However, without effective mechanisms for enforcement, it could still lead to the problem of non-compliance, and thereby obstruct ASEAN from achieving its goal of establishing a unitary system of IP rights. Strict enforcement mechanisms are therefore necessary, without them harmonising IP systems at the regional level would be significantly undermined. However, creating effective compliance mechanism would require ASEAN to adapt the 'ASEAN Way. ASEAN's traditional practices are counterproductive to enforcing obligations by implementing strict enforcement mechanisms. Moreover, a strong political will and resolve to give a greater role to regional institutions and to follow the rule of law is needed to help ASEAN move toward greater economic integration.

5.2 Proposed Solutions for ASEAN

The different level of development between the member states, ASEAN's current

institutional structures and its practices are major impediments to ASEAN achieving a high level of IP harmonisation. Despite concrete action plans, ASEAN's progress in developing a regional IP system has still fallen behind schedule. However, to establish a well-functioning common market, harmonisation of IP laws should be urgently and seriously addressed. Creating an ASEAN-wide IP regime could be considered as one of the prerequisites of the free movement of goods. Consequently, taking into consideration the capacities and interests of its members and ASEAN's practices and institutional structure, the following should be considered as feasible solutions to the pending problems.

5.2.1 Adapting the 'ASEAN Way'

By sticking to the traditional 'ASEAN Way', a higher level of IP harmonisation would be difficult to achieve. ASEAN members are reluctant to conduct regional affairs that would undermine their national sovereignty. They tend to use informal and non-binding instruments in order to preserve their sovereignty. This is contrary to the EU practice. In the EU, all EU members give consent to limit some part of their sovereignty and transfer it to regional institutions. EU members adapt their view toward sovereignty by embracing the notion that pooling and limiting sovereignty will lead to more sustainable cooperation between them. This attitude has helped the EU achieve a greater level of institutionalisation than other regional institutions.

In view of the EU's success, ASEAN members should reconsider their attitudes towards national sovereignty, as well as other principles embodied in the 'ASEAN Way' if it wants to successfully establish a full-fledged AEC and achieve deeper regional integration. They should have a common view to give priority to the overall

benefits of ASEAN over domestic interests. Being too protective of their national sovereignty is counter-productive to regional growth. Limiting member states' sovereignty and moving away from consultation and consensus based decision-making is necessary to build more sustainable regional cooperation. Generally, limiting sovereignty is still a sensitive issue in ASEAN. However, sovereignty in regional economic cooperation is possibly less so. Embracing a limitation of sovereignty in this area may be more feasible and palatable than reducing political or security sovereignty. A strong, unwavering political will and resolve from all ASEAN members would be crucial. It should be emphasised that a changing perspective toward sovereignty is not only a prerequisite to achieving deep and stable regional economic integration, but will also yield substantial benefits to all the member states.

Additionally, since the current ASEAN's institutional structure cannot allow ASEAN to achieve deeper regional economic integration, adapting the mindset of the 'ASEAN Way' may also lead to further institutional changes. Various suggestions regarding the institutional structure have been made and not acted upon due primarily to strict adherence to the traditional 'ASEAN Way'. Constructing regional institutions that could undermine national sovereignty is not desirable for ASEAN members. However, in order to move forward, ASEAN must acknowledge that modifying its strict adherence to the 'ASEAN Way' in the economic integration context is necessary. If successful, it would enable ASEAN to strengthen regional institutions and introduce further institutional changes. This would help ASEAN members gradually transfer their national sovereignty to the regional level, and thereby strengthen the role of regional institutions in regional affairs. Nevertheless, since the issue of sovereignty is still sensitive in ASEAN, this new attitude should be gradually and carefully developed. With strong political will power and cooperation from all

ASEAN members, ASEAN could soon achieve its desired economic integration.

5.2.2 Bridging the Development Gap between the ASEAN Members

Different levels of development lead to different levels of interest in creating or enhancing IP standards. A major factor impeding harmonisation of IP rights is a large gap in development between ASEAN members and narrowing this gap as soon as possible should be a priority. Although not achievable quickly, decreasing the development gap will facilitate harmonisation. To reduce the ASEAN development gap, helping the the CLMV countries to catch up with other members must be prioritised. Instead of issuing policy that aims to provide equal benefits to all members, special focus should be given to the CLMV members, allowing them to obtain more benefits. Moreover, all initiatives must be strictly implemented within proposed timeframes. The Initiative for ASEAN Integration (IAI), for instance, focused on the development of infrastructure, human resources, access to information, and communication technology in the member states. Fully implementing initiatives such as this will help the CLMV countries make progress in catching up to the more developed countries in the region. To this end, effective compliance mechanism is needed. The ASEAN Secretariat plays a major role in ensuring compliance; this role should be strengthened. Sufficient human and financial resources should be allocated to ensure the effective performance of these duties. Furthermore, core financial resources of ASEAN such as the ASEAN Development Fund (ADF) and ASEAN Infrastructure fund (AIF), should be sufficiently allocated to the member states, particularly the CLMV countries, to fuel their development and prevent a widening of development gap.

However, this is not an easy task. Strong political will and intense and steady cooperation in the spirit of 'ASEAN-help-ASEAN', will help accomplish this task. To move forward in a more unified manner, adapting the 'ASEAN Way' of thinking is essentially required. In the best interest of ASEAN as a whole, partially transferring national sovereignty to enhance the roles of regional institutions in implementing regional policies would be necessary. This would help ASEAN move steadily forward and ensure that the benefits of creating a deeply integrated community are equitably shared among member states.

5.2.3 Approximating National IP Legislation of the Member States through Accession to International IP Treaties

The level of development of each country has a direct correlation with the level of IP protection and enforcement. IP harmonisation in ASEAN should be approached with a consideration for the readiness and capacity of the members while also pursuing policies to narrow the development gaps. Harmonisation should begin by approximating national IP legislation of the member states to standardise IP protection. An analysis of ASEAN's institutional structure indicates that ASEAN lacks institutions that have law making and enforcement powers. The most appropriate way to approximate the national IP laws of the member states would be to make accession to major international IP treaties. This would be consistent with the ASEAN the AEC Blueprint 2025 and the upcoming ASEAN IPR Action Plan 2016-2025. Instead of providing a uniform set of IP laws, ASEAN adopted more flexible approach by requiring member states to participate in the international IP community through accession to major international IP treaties such as the Hague Agreement, the Madrid Protocol and the PCT. Acceding to these treaties would help the ASEAN

countries enter the global IP community and enhance their level of design, trademark and patent protections to conform to international standard.

Thus, the first priority should be to ensure that these commitments are effectively implemented by all member states. Special assistance should be given to ASEAN least developed countries to ensure that all ASEAN members can effectively participate timely in the global IP community. Myanmar is a primary example of a country that requires special assistance. Myanmar became a member of the WIPO in 2001. It has not yet acceded to the WIPO-administered treaties, the Paris Convention, Berne Convention, Madrid Protocol, Hague Agreement and PCT. Moreover, despite the fact that Myanmar is one of the founding members of the WTO, it is still in the process of bringing its legislation in line with the TRIPs provisions. Consequently, assistance from both inside and outside the ASEAN region should be intensified, especially for the 'least developed' members. Enhancement of administrative capacity of these members can help them actively participate in the global IP community. It should be emphasised that to effectively implement regional IP commitment, IP administrative capacity and infrastructure of the member states should be improved to a level that could effectively accommodate strong IP standards. This will contribute to a considerable level of harmonisation and ultimately, result in benefits to all members. Decreasing the development gap among member states will also improve the IP capacities of the lesser-developed countries. It would help ensure that every country share a common interest in standardising IP protection. Eventually, all countries will equally obtain benefit from this process. Furthermore, to promote compliance with regional IP policies and instruments, the role role of ASEAN's dispute settlement and monitoring compliance mechanisms should be strengthened.

Consequently, when IP protection in all the ASEAN members meets the international

standard, it will be easier for ASEAN to develop a region-wide IP system. It is likely that IP harmonisation in ASEAN cannot happen in a short period of time. It took several years for the EU to bring more consistency to national IP systems of its members and develop a community IP system operating alongside the national systems. However, success in narrowing the development gaps and approximating national IP legislation to meet international standards can facilitate ASEAN's pursuit of a higher level of harmonisation in the future. This also underlines the importance of establishing effective compliance mechanisms to monitor implementation. It is recognised that the philosophy of the 'ASEAN Way' fosters non-implementation. Naturally, non-implementation undermines ASEAN's harmonisation efforts. The Framework Agreement and various IPR action plans have been created, but have not been universally implemented by the member states. The 'ASEAN Way's' preference for non-binding commitment results in compliance on a voluntary with no punishment for non-compliance. Consequently, the philosophies and beliefs, which characterise the 'ASEAN Way', must be modified to establish effective enforcement mechanisms.

5.2.4 Developing an ASEAN IP System through the Combined Use of Soft and Hard Law

Creating unified registration systems in trademark and patent have been areas of priority for ASEAN. The creation of patent and trademark regional registration systems, including the regional patent and trademark offices have long been included as a priority in the ASEAN IPR Action Plans. Nevertheless, achieving these goals has been impeded by development gaps and resulting diversity in IP protection and enforcement. To ensure that all member states can accommodate a unitary system, the national IP regimes in the ASEAN members must comply with international

standards. A decrease in the disparity of IP protection and enforcement would facilitate the establishment of a region-wide IP system.

As previously discusses, ASEAN should start to develop an ASEAN-wide IP regime in the area of trademark and patent. The ASEAN trademark and patent systems would be different from the PCT and the Madrid Protocol systems. The ASEAN trademark and patent systems would not merely be a regional version of these international registration systems. Rights granted under such a regional registration system would not be a bundle of national rights. A successful application would be granted rights that are recognised throughout ASEAN. Moreover, a uniform registration system would not replace the national registration systems or the multi-national registration systems of the Madrid Protocol or the PCT. It would merely provide alternatives to obtaining protection in one or more member countries by utilising a national or an international registration system. However, creating an ASEAN patent system might be more challenging than creating a trademark system due to complexity of its content and the huge difference in patent regimes between the member states.[349] The different capacities of the member states in providing protection for innovation caused the progress in creating an integrated system in patent registration in ASEAN fall behind that of regional trademark registration system.[350] Compared to trademark process, patent prosecution is more complex and takes longer time to grant protection.[351] Examiners with technical educational background are required in order to examining

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[349] Weerawit Weeraworawit, 'The Harmonisation of Intellectual Property Rights in ASEAN' in Christoph Antons and others (eds), *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International 2004) 214.
[350] ibid.
[351] Kenan Institute Asia, *Comparative Assessment Study of Patent and Trademark Offices in Southeast Asia* (Bangkok, Kenan Institute Asia 2012) 9.

patents.[352] Given these factors, it would be easier to harmonise trademark law than patent law. ASEAN members should therefore consider preparing to draft the ASEAN agreement on regional trademark system.

Also, possibility in establishing a regional IP system in the area of geographical indications (GIs) should be explored. As a region with abundant natural resources, a regional GIs system would help ASEAN countries receive the utmost benefits from GIs. Most ASEAN members are classified as a 'developing' or 'least developed' country. Strengthening GIs protection would facilitate development of the rural areas in these countries. GI has been adopted by various countries as a tool for economic development and trade strategy.[353] GIs can transform cultural value into economic value and thus can be regarded as a marketing tool.[354] Effective GIs protection is valuable to agricultural based economies.[355] Success in protecting local products though GI is considered an element fundamental to the development of a grass roots economy.[356] Therefore, strengthening GIs protection in ASEAN countries would help enhance economic development, and thereby bridging the development gaps between ASEAN members. To achieve this task, the benefits of GIs need to be recognised. Expanded GI protection should be provided. Also, a concrete GIs-specific plan emphasising intense cooperation between the member states should be established. This would enable ASEAN countries to reap the benefits of strengthening GIs. Having an effective regional GIs system would add economic value to local products

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[352] ibid 16.
[353] Miguel de la Guardia and Ana Gonzalvez Illueca (eds), *Food Protected Designation of Origin, Volume 60: Methodologies and Applications (Comprehensive Analytical Chemistry)* (Elsevier 2013) 519.
[354] ibid.
[355] ibid.
[356] Malobika Banerji, 'Geographical Indications: Which Way Should ASEAN Go?' (2012) B C Intell Prop & Tech F 1, 10.

and open international markets to them.

In order to provide a unified system of IP protection throughout the region, there are major issues that need to be addressed. Firstly, ASEAN should create an ASEAN Regional IP Office, a central registration system of IP rights by establishing centralised organisations to process and examine applications for regional IP protection. Rights granted through ASEAN Regional IP Office should have unitary character and are valid throughout the ASEAN countries. The AWGPIC, comprised IP offices of the 10 ASEAN Member States, would be able to play an important role in setting up the ASEAN Regional IP Office. Secondly, ASEAN speaks many languages. An official language for consistency should be established. The ASEAN Charter designates English as the working language of ASEAN. English is also widely perceived to be the language of global commerce. The adoption of English as the official language of ASEAN regional IP system could attract more applications from all over the world. Thus, English should be selected as the official language of the registration system. Lastly, all members must comply with the terms of binding commitments, even if it means modifying existing laws. There should be effective mechanisms to monitor and ensure compliance. Furthermore, a transition period should be adopted to allow those heavily burdened by compliance enough time to do so.

ASEAN IP system should harmonise both substantive and procedural components. If only certain filing procedures are harmonised, it would not provide benefits to right holders more than they can receive from filing application via international system such as the Madrid Protocol and the PCT. The ASEAN regional IP system would merely be a regional version of the multilateral system. Consequently, ASEAN should

enact binding agreements that provide harmonised substantive and procedural provisions. In other words, harmonisation by hard law approach should be adopted.

The term 'hard law instruments' was defined by Kenneth Abbott and Duncan Snidalas as 'legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law'.[357] Monitoring and ensuring compliance with laws and initiatives has long been a problem in ASEAN. Using hard law would make member states' commitment to create regional IP regime more credible. A breach of a hard law would generate higher sanctions because it adversely affects the state's reputation.[358] Furthermore, using 'hard law instruments' allows member states to monitor and enforce their commitments through dispute resolution bodies such as courts.[359] Hard laws tend to be used by states when the 'benefits of cooperation are great'.[360] For ASEAN members, one of the greatest benefits of becoming the AEC is making ASEAN a unified common market. The combined economy of 10 ASEAN members is the 7th largest economy in the world.[361] Consequently, using hard laws in creating a regional IP system could help ASEAN move closer to its ambitious goal of becoming a more integrated economic region.

However, the establishment of a regional IP system with a unitary effect is not easy. In the EU, harmonisation is still an ongoing process in spite of its decades long effort. Though it has long been one of the ASEAN's goals, it has not made much progress.

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[357] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421, 421.
[358] Gregory Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2009) 94 Minn L Rev 706, 717-718.
[359] ibid.
[360] ibid.
[361] Asian Development Bank (ADB), 'ASEAN Economic Community: 12 Things to Know' <http://www.adb.org/features/asean-economic-community-12-things-know> accessed 2 April 2016.

Due to the high diversity between the member states and traditional practices that place great emphasis on national sovereignty, IP harmonisation in ASEAN has followed a soft law approach.[362] It is often voluntary and non-binding. This allows the member states to implement rules when they are ready to do so.[363] An example is the ASEAN IPR Action plan 2011-2015. Instead of trying to establish a fully harmonised regional IP system with one set of IP laws, this plan states that regional IP cooperation shall be strengthened between members and through the participation in the global IP community. The capacity and readiness of each member state to comply are taken into consideration. Each member state would be permitted to implement these projects and initiatives when they feel they are ready and when they feel they have the capacity to do so. Members that have lesser IP capacities could benefit from this inherent flexibility. Nevertheless, the lack of legally binding or enforceable obligations resulted in non-compliance and delay IP harmonisation.

Consequently, it is necessary to use hard law with precise, legally binding obligations that can be enforced by a delegated authority. Hard law instruments create strong and clear binding commitments between ASEAN members. However, the development gap between countries can mean that imposing obligations that are too strict and without some flexibility could also be problematic. The use of a hard law approach could impose a much greater burden on less developed countries to comply. Consequently, less developed members might be reluctant to adopt a hard law instrument because it does not take into consideration their capacity and readiness. Moreover, colonial history makes national sovereignty a sensitive issue. An adjustment in the attitude toward sovereignty cannot occur quickly. However, a

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[362] Lall and McEwin (n 9) 244.
[363] ibid.

gradual modification of ASEAN's attitude to national sovereignty is necessary. Immediately imposing hard law obligations that are contrary to the nature of ASEAN may not be acceptable to some member states. Therefore, solely relying on the use of hard law would not be appropriate. As a consequence, the use of other approaches in combination with hard law should be considered as an alternative.

Soft law has some advantages over hard law. The use of soft law, which provides more flexibility, could lessen sovereignty costs of the member states.[364] Soft law obligations would not significantly affect their national sovereignty making it easier to participate. Weak obligations would not be characterised by strong compliance mechanisms or sanctions, which could result in the limitation of state sovereignty.[365] Additionally, it was suggested that soft law could deal with diversity better than hard law.[366] In the EU, soft law has been increasingly adopted by EU institutions in order to protect national diversities of member states.[367] Flexible implementation of soft law give the member states leeway to adapt European policies to their social and economic circumstances.[368] Since hard and soft laws offer particular advantages and disadvantages, these two instruments could interact as alternatives and complements.[369] The use of hard law in combination with soft law can be used as a tool for international problem solving. Similar provisions in the form of soft and hard

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[364] Gráinne Kirwan and Andrew Power, *Cybercrime: The Psychology of Online Offenders* (Cambridge University Press 2013) 37.
[365] Jonas Tallberg and others, *The Opening Up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press 2013) 49.
[366] Shaffer and Pollack (n 358) 719.
[367] For a more detailed analysis, see Emilia Korkea-Aho, 'EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed' (2009) 16 Maastricht J Eur & Comp L 271.
[368] ibid.
[369] Shaffer and Pollack (n 358) 719.

law can exist parallel to each other.[370] Moreover, due to the flexibility inherent in soft law, it can be adopted to elaborate on hard law in order to articulate and give meaning to provisions of hard law.[371] Although soft law contains more flexibility, which results in less binding obligations, it can turn into hard law once the level of uncertainty decreases.[372] Soft law could help pave the way to the adoption of hard law when state practices gives rise to a high degree of consensus. Soft law could be hardened at the national level once an instrument is incorporated in national legislation.[373] Consequently, soft law can be seen as a step towards further unification of the law.[374]

Taking the different levels of development and IP standards of members and ASEANs practices into account, it would be more appropriate for ASEAN to use a combination of soft and hard law approaches in developing the beginning stages of a regional IP system. Doing so would provide alternatives for the member states that may not be ready to accede to an agreement governing the establishment of a regional IP system that would oblige them to significantly amend their IP laws. Adopting soft law gives these member states leeway to adapt regional IP norms to their national social and economic backgrounds. Although this could result in partial harmonisation

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[370] Christine Chinkin, 'Normative Development in the International Legal System' in Dinah Shelton (ed) *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP 2000) 21, 30–31.
[371] ibid.
[372] David M. Trubek, Patrick Cottrell and Mark Nance David, '"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity' (November 2015) U of Wisconsin Legal Studies Research Paper No. 1002, 29.
[373] George (Rock) Pring and Linda Siegele, 'The Law of Public participation in Global Mining' in Elizabeth Bastida and Thomas W. Waelde and Janeth Warden-Fernández (eds), *International and Comparative Mineral Law and Policy: Trends and Prospects* (Kluwer Law International 2005) 278.
[374] See José Angelo Estrella Faria, 'Legal Harmonization through Model Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)' 30 <http://www.justice.gov.za/alraesa/conferences/papers/s5_faria2.pdf> accessed 1 May 2016.

and not create a consistent community-wide IP system, it could cope better with the diversity between the ASEAN members. When uncertainties in the areas that lead to greater disparity in IP standards between the member states decrease, a higher degree of consensus would help facilitate the harmonisation process and bring ASEAN closer to its goal in creating a harmonised regional IP regime.

Soft law instruments have been used in the area of IP right in order to help developing countries implement new IP standards. For instance, the Tunis Model Law was adopted by the WIPO in 1976 in order to assist developing countries in drafting their national copyright laws.[375] This model law was drafted by experts and provided provisions consistent with the Berne Convention.[376] Developing countries can use the Tunis Model Law as a reference in drafting their own copyright laws, and thereby help them to provide copyright protections that are in the conformity with international standard. Moreover, in 1982, the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action, was issued by the WIPO.[377] This model provides a *sui generis* model that each country can adopt as a guideline in protecting folklore and cultural property. The use of a soft law approach can be also used as a tool in setting and approximating IP standards. It would allow states 'to be more ambitious and engage in deeper cooperation'.[378] Therefore, in parallel with ratifying regional agreements, ASEAN should issue soft law instruments such as a code of conduct or a model law that contain similar provisions as those contained in the agreements.

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[375] Paul Torremans, *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2009) 209.
[376] Kuek Chee Ying, 'Protection of Expressions of Folklore/Traditional Cultural Expressions:To What Extent is Copyright Law the Solution' (2005) 2 JMCL <http://www.commonlii.org/my/journals/JMCL/2005/2.html> accessed 3 April 2015.
[377] Torremans (n 375) 209-210.
[378] Shaffer and Pollack (n 358) 719.

Furthermore, these soft law instruments should provide additional provisions to elaborate on the hard law in order to give meaning to the rules under the agreement. Doing so would provide comprehensive knowledge to the member states that could help them accommodate new IP development. As a result, the adoption of soft law could help make changes to the national IP law of the member states. Since soft laws create non-binding actions, member states would be given flexibility to comply with the guidelines without being concerned about enforcement. Once these new standards are incorporated into their national IP systems, the soft law would then be hardened into hard law that provides precise legally binding obligations. When uncertainties and disparities between member states are reduced, all ASEAN members would be able to participate in the agreement, and thus establish an ASEAN-wide IP system.

Combining the flexibility of soft law and the effectiveness of hard law in ensuring credible commitments seems to be a feasible solution. This would assist ASEAN establish an integrated IP system with unitary character that could provide utmost benefits to all the ASEAN members. Since ASEAN is still in its transition period to a more ruled-based organisation, this measure would be an appropriate solution for ASEAN. Moreover, strong political will from all the member states in harmonising the IP regime would be another key factor that would help ASEAN move closer to this goal. Success in establishing a single regional IP system would ensure the proper function of the common market, and thus help ASEAN move towards deeper regional economic integration.

5.2.5 Creating a Regional Judicial Institution on IP Matters

Sovereignty is a sensitive issue in ASEAN. As such, constructing supranational

regional institutions as the EU has done would not be appropriate for ASEAN. Modifying the traditional way of thinking and thereby undermining founding principles will be unacceptable to some members. It should be emphasised, however, that ASEAN must establish a regional judicial institution in order to move forward to become a more rule-based organisation. In the EU, the CJEU plays an important role in the process of harmonisation of laws. It is true to say that that the CJEU has done much to assist IP harmonisation in the EU.[379] The existence of the CJEU ensures that EU laws are consistently applied. This has a significant positive effect on IP harmonisation. Therefore, to pursue a higher level of harmonisation, ASEAN should establish a regional judicial institution. This institution should have authority to solve disputes that arise when a member state fails to fulfill its obligations, providing harmonisation and consistency. However, having a regional judicial institution that has jurisdiction over a specific area would be more feasible than establishing an ASEAN Court of Justice that has jurisdiction over questions of ASEAN legal instruments in wide range of areas. Establishing an ASEAN IP Court could be seen as stepping stone towards the creation of ASEAN Court of Justice.

Harmonised IP rules are not enough without consistent interpretation and application of those rules. A regional IP court would provide consistency and have a positive impact on the overall effectiveness of a regional IP system. ASEAN legal instruments would be subject to different interpretations by the national courts of the member state. By having an ASEAN IP Court, a national court could refer a question concerning the interpretation of the ASEAN legal instruments relating to IP to the Court. Therefore, to make sure that these instruments are applied consistently in all

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[379] Heath (n 336) 52.

ASEAN countries, a regional IP court with jurisdiction over all ASEAN IP legal instruments should be established. Although this might be inconsistent with the traditional 'ASEAN Way', discussion on the establishment of ASEAN IP Court should be initiated. However, a concrete action plan should be adopted that incrementally establishes an ASEAN IP court and takes into consideration the wide development gap in outline appropriate implementation timeframes. Mutual understanding and cooperation would help ASEAN move forward toward deeper regional integration.

Additionally, strengthening the rule of law in the ASEAN members would be necessary to establishing an ASEAN IP court. Weak rule of law in some ASEAN countries is a major impediment to ASEAN having a regional judicial institution.[380] In the less developed ASEAN countries, there are weak judicial systems and an urgent need to reform their legal systems in order to ensure the rule of law. Among the ASEAN countries, Myanmar and Cambodia score relatively low on the World Bank's rule of law indicator.[381] Furthermore, judicial systems in IP law in the ASEAN members have developed diversely. Although the WIPO-administered IP treaties and the TRIPS Agreement do not require the contracting parities to create specialised courts in the area of IP, some ASEAN countries have established an IP court to give proper attention to IP cases. Presently, only Thailand and Malaysia have specialised IP courts. In 2002, Singapore planned to establish an IP branch of its Supreme Court

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[380] Piris and Woon (n 146) 49-50.
[381] See World Bank, 'Worldwide Governance Indicators' <http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators> accessed 8 April 2016.

in response to the growth in commercial disputes relating to IP rights.[382] However, as of now, there is no specialised IP court in Singapore.[383] In Indonesia and Philippines, IP cases can be brought to the commercial courts[384] since most IP rights disputes are related to trade. Despite such positive developments, some IP judicial systems need improvement. Myanmar is currently reforming its entire IP regime. IP judicial systems in Laos, Cambodia and Vietnam still need further development. Cambodia is considering creating a commercial court as a specialised organ to hear IP disputes.[385] Vietnam has a poor judicial system in solving IP disputes.[386] Also, the commercial court system in Laos was claimed to be less transparent.[387] Consequently, strengthening national judicial systems in ASEAN countries is necessary and seems to be ASEAN's priority task. Effective national judicial systems can be considered a prerequisite for upholding the rule of law.

In order to move forward towards this goal, assistance from more developed members is required. Countries such as Singapore and Philippines should help. Singapore was categorised as a top ten country where 'justice prevails' in the World Justice Project (WJP) rule of law index 2015.[388] Philippines is also a 'rule of law success story' due to its significant improvement in judicial and political reformation.[389] These countries

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[382] Supreme Court of Singapore, 'Establishment of the Intellectual Property Court' <https://www.supremecourt.gov.sg/default.aspx?pgid=427> accessed 1 July 2015.
[383] Zuallcobley and others (n 290) 17.
[384] ibid 15-16.
[385] ibid 14.
[386] IPO, 'Intellectual Property Rights in Vietnam' (April 2013) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306015/ipvietnam.pdf > accessed 1 July 2015.
[387] Laos Customs, *Trade Regulations and Procedures Handbook: Volume 1 Practical Information and Regultions* (Int'l Business Publications, Inc 2009) 138.
[388] World Justice project 'Rule of Law Index 2015' <http://data.worldjusticeproject.org/> accessed 1 July 2015.
[389] Rose-An Jessica Dioquino, 'Most improved in ASEAN: PHL now 51st in Rule of Law index' *GMA News Online* (5 June 2015) <http://www.gmanetwork.com/news/story/499198/news/nation/most-improved-in-asean-phl-now-51st-in-rule-of-law-index> accessed 1 July 2015.

should support the less developed members in enhancing the effectiveness of their judicial systems. Additionally, since laws governing IP rights are complicated, highly experienced judges with specialised knowledge are required. Countries that have established a specialised IP court should play a role in assisting other members. Thailand and Malaysia should play a lead role in improving the judicial expertise and court efficiency of other members to promote greater understanding of IP issues. This would help the other members' judicial system to deal with IP issues and strengthen the enforcement of IP rights within the region.

Improving the rule of law in ASEAN members will facilitate ASEAN's efforts to establish an ASEAN IP Court. The ASEAN IP Court can be located in Singapore, which has high ratings for rule of law and sufficient IP administrative capacity and infrastructures. Having a regional court with authority to effectively and consistently apply IP rights will foster IP harmonisation and the proper functioning of a regional IP regime. This would surely have a positive impact on the operation of the ASEAN common market and result in deeper regional economic integration. Consequently, ASEAN should strongly prioritise the establishment of an ASEAN IP court. This is a good starting point for ASEAN to develop a supra-national ASEAN Court, which is essential to regional economic integration. Doing so will clearly transform ASEAN into a rule-based organisation and enhance ASEAN's overall credibility.

5.3 Concluding Remarks

It is possible way for ASEAN to achieve greater harmonisation of IP laws and develop a single regional IP regime. However, more intense cooperation is required. To move forward as a highly competitive regional economic integration, a modification of the traditional 'ASEAN Way' is necessary. Member states should start to take their obligations more seriously and move forward in a more unified manner in pursuit of its goal of harmonising the IP regimes. It should be emphasised that strictly preserving national sovereignty could undermine the ASEAN's goal in this area, and thus obstruct the establishment of a well-functioning ASEAN common market. Additionally, due to the high disparity in the level of development between the member states, the IP harmonisation process in ASEAN should proceed parallel to a narrowing of the development gaps between its member states. It must be ensured that all action plans and initiatives issued to address these disparities are consistently implemented by all the member states. The creation of regional funding that provides financials resource to support the implementation of the ASEAN's initiatives would help improve capacity and infrastructure development of the ASEAN developing and least developed countries. This would enable the less developed members to catch up with more developed countries. The member states should be ensured sufficient resources from regional funds to enhance their human, institutional and infrastructure capacities. This will bridge the development gaps among the ASEAN members. Since the level of development is interrelated with the standard of IP protection, decreasing the development gap will help shape interest in setting up consistent IP policies in ASEAN and facilitate harmonisation.

To help ASEAN move towards its goals in establishing a regional IP system, the process should start with an approximation of the national IP laws of the member

states through an accession to major international IP treaties. The participation in international IP community would help enhance the level of IP protection and enforcement of the ASEAN members to be more in line with international standards, and thus facilitate ASEAN to pursue a higher level of harmonisation at a later stage. A major factor causing the delay in harmonising IP laws is non-implementation. Non-implementation is the result of using a soft law approach and ASEAN's reliance on loose cooperation. Introducing hard law instruments governing the establishment of a regional IP system combined with a modification of the 'ASEAN Way' attitude would help ASEAN move closer to its goal of having a single regional IP regime. Nevertheless, merely using hard law instruments might not be appropriate for ASEAN because of the high disparity in the member states and long historical roots within the concept of the 'ASEAN Way'. Using a combination of soft and hard law instruments would be a more practical alternative for ASEAN. Moreover, to ensure consistent and effective application of the law, a regional IP court should be established. It should be emphasised that for ASEAN to truly move on as a more rule-based organisation, strengthening the rule of law in all the member states should be also highly prioritised.

CHAPTER 6 CONCLUSION

This thesis has discussed major aspects of IP harmonisation at various levels and provided an analysis of the ASEAN member states' IP regimes with a view to the implementation of an overarching harmonised IP system. A comparison has been made herein of the regional harmonisation of IP laws in the EU and in ASEAN. The objectives were to investigate whether there is a need to harmonise IP laws among the ASEAN members, and secondly what would be effective and appropriate measures for ASEAN to implement to achieve greater IP harmonisation and develop a regional IP regime.

6.1 The Need for the Harmonisation of IP Laws in Regional Economic Integration

The analysis contained in this thesis has shown that the rationale behind the harmonisation of IP law in ASEAN is to promote a deeper regional economic integration. IP is considered a major factor that would help enhance ASEAN's competitiveness in the global economy. Thus, a commitment to enhance IP cooperation within the region is one of ASEAN's priorities. This will foster the establishment of the full-fledged AEC, in which all 10 member states combined are treated as a single entity. To help ASEAN successfully establish a well-functioning common market, which refers to ASEAN as one territory, ASEAN members committed to work towards removing tariff and non-tariff barriers (NTBs). Disparities in national IP law among member states have equivalent effect to NTBs. It has been recognised that to ensure that goods can freely move around the community, and

thereby promote inter-community trade, the disparities in national IP laws of the member states should be eliminated. Moreover, it has to be ensured that IP rights, which are essentially territorial, do not constitute barriers to trade and obstruct the proper functioning of the common market. IP harmonisation has therefore become one of the essential tasks of ASEAN in moving towards establishing deeper regional economic integration.

Due to the increased significance of IP rights in international trade, IP is not only a national concern, but also a regional and international one. To facilitate cross border trade, IP harmonisation has become increasingly relevant and necessary. There have been steady efforts to harmonise IP rights at various levels in order to approximate IP laws of different countries to be consistent. However, IP harmonisation is not an easy task. Seeking full harmonisation is much more difficult. The movement of harmonising IP standards has been from more developed to less developed countries. The direction is upwards to implement higher levels of IP protection prevailing in developed countries. This decreases flexibility for developing and least developed countries to adjust their IP laws to suit their national interests. Therefore, benefits of strong IP protection in developed countries in both legal and economic aspects are quite obvious. That said, strong IP standard introduced by them can help foster economic growth and development. However, it is still controversial whether countries in the developing world can benefit from strengthening IP protection.

Stronger IP law can have both positive and negative effects on less developed countries. On the one side, strong IP protection can provide a positive impact on inflow of FDI, technology transfer and investment in R&D. By having harmonised rules governing IP protection and enforcement, more legal certainty is provided to both national and foreign investors. On the other side, a negative outcome may result

due to stringent IP standards that are inappropriate to their levels of development and administration capacity. Adopting stronger IP laws can lead to IP protection and enforcement standards in less developed countries that are overly burdensome to implement. Too stringent IP regimes in some areas, particularly patents, can adversely affect public interest. This implies that the positive impact of strengthening IP laws in less developed countries is not automatic, but conditional on a level of development, which is different from one country to another.

Hence, in order to enable ASEAN, a community of largely developing economies, to reap benefits of stronger IP rights, IP harmonisation should be developed incrementally and should take into account the divergent interests and capacity of each country. External assistance from relevant international organisations such as the WIPO and WTO and also from developed countries is necessary to enhance administrative capacity and infrastructure and guide those less prepared through harmonisation.

6.2 The Correlation between the Harmonisation of IP Laws and a Well-Functioning ASEAN Common Market

It is inevitable that harmonisation of IP laws is essential to facilitate the free movement of goods, one of the fundamental principles of the AEC. A high degree of IP harmonisation is clearly linked to the EU's success in creating a properly functioning internal market. It has been seen that the territorial nature of IP rights is incompatible with the concept of the internal market. Similarly, ASEAN has recognised the importance of streamlining and harmonising regional IP system and considers it essential to the free movement of goods across national borders.

However, unlike the EU, a minimal degree of harmonisation has been achieved. Due to wide disparities in IP laws and administrative capacity in ASEAN countries, ASEAN departed from its ambitious goal in seeking full harmonisation. Instead, closer cooperation between member states themselves, as well as cooperation with other external partners, and participation in international IP community are considered as stepping stones towards long term goal in establishing a regional IP system. It is quite clear that ASEAN members strongly committed to harmonise IP laws to reap the benefits of the AEC and global market. It would not be possible to unify the national markets into a single market if IP rights are treated differently from country to country. Consequently, it is no longer a question of whether ASEAN should harmonise IP laws. Instead, major consideration should be identifying which measure is most appropriate to develop regional harmonised IP system.

The EU is the only regional grouping that has achieved a considerable level of IP harmonisation. Learning from the experience of the EU can therefore help ASEAN move forward and help ASEAN find feasible means of achieving a higher level of IP harmonisation. The most important lesson to be drawn from the EU experience is that the passage of secondary legislation, directives and regulations and judicial interpretations by the CJEU have all contributed to the EU's harmonisation of IP laws. The EU started the harmonisation by approximating the national IP laws of its members through the issuance of various harmonisation directives, particularly in the substantive areas that could directly obstruct and negatively affect the proper function of an internal market. Nevertheless, these directives only broadly approximated IP laws. Some areas remained unharmonised along with disparity in the IP standards.

Since the approximation of IP laws through directives could not eliminate the

territorial nature of IP rights, a well-functioning internal market could not be guaranteed. The nature of IP rights, which are generally limited to the territory of a member state granting it, can still partition the common market, which is contrary to the principle of free movement of goods. Consequently, in order to resolve the conflict between IP rights and the principle of free movement of goods, unifying IP rights is essential. To this end, various regulations governing EU-wide IP regimes have been approved to create a harmonised regional IP system with a unitary effect. By providing uniform protection in the internal market, differences between national IP laws and the territorial nature of IP rights can be eliminated, and thus these rights can be granted the same protection in all the EU member states. EU-wide IP systems have been created in the areas of trademarks, designs, GIs and PVRs, and operate alongside member states' national IP systems. In the near future, the unitary patent system will soon be in place. The EU is therefore getting closer to its goal of complete harmonisation in all major areas of IP rights. Only copyright law remains fragmented. By achieving a higher degree of IP harmonisation, IP rights has truly become an important tool in helping to promote economic growth, competitiveness and innovation in the EU. Furthermore, from a non-EU perspective, harmonised IP protection and enforcement can increase legal certainty and create a business-friendly environment. This has helped attract a greater influx of FDI, and thereby impacted on the economic development of the EU.

It can thus be concluded that the acquisition of IP rights on a region-wide basis is seen as suitable method of ensuring the free movement of goods within the common market. The creation of EU-wide IP regimes is why the EU successfully established a well-functioning internal market. However, it is undeniable that this success comes from harmonisation directives. The resulting decrease in the disparity in national IP

law facilitated the EU's development of a unitary system of IP rights. Since ASEAN is strongly committed to establishing a common market, IP rights disparity among member states should be seriously addressed. Minimising the differences in IP laws among the 10 members would help facilitate ASEAN's development of a regional IP system. Successfully establishing an ASEAN-wide IP system would be a stepping stone on the journey towards deeper regional economic integration and a highly competitive region.

6.3 Strategic Plan for ASEAN in Developing a Regional IP Regime

Another important aspect of this thesis is an analysis of the development of IP harmonisation in the EU and ASEAN in order to propose a feasible method for the latter to devise a single regional IP system. IP harmonisation in ASEAN has been lagging behind schedule due to major obstacles it faces. Diversity in social and economic development, ASEAN's preference for loose cooperation, adherence to traditional 'ASEAN Way' and the current level of institutionalisation have all inhibited progress.

To enable ASEAN to reap the benefits from having a regional IP system, in addition to harmonising IP laws, ASEAN must modify its approach and deviate from the traditional 'ASEAN Way' of thinking. Placing less emphasis on national sovereignty and deviating more from the principle of non-interference will facilitate institutional change and finding effective and appropriate measures to bridge the development gaps between the member states. Decreasing the disparities in the levels of development will help approximate the interests of ASEAN members in setting IP standards and fostering IP harmonisation. Taking into account the divergent interests

of the ASEAN members and ASEAN's general practices, strategies that would help ASEAN achieve harmonisation of IP laws and the creation of a regional IP regime are as follows;

Firstly, the 'ASEAN Way' of thinking should be modified. Deep regional economic integration is not possible by strictly adhering to it. ASEAN members are quite reluctant to conduct regional affairs that would undermine their national sovereignty. To reserve national sovereignty, they prefer non-binding instruments on regional IP policy rather than binding agreements. The 'ASEAN Way' is therefore considered as impediment rather than facilitator of regional cooperation. This way of thinking is contrary to the EU's practice. In the EU, members give consent to partial transfer of their sovereignty to regional institutions for the benefit of the whole. This approach helped the EU achieve deep regional economic integration and successfully establish a genuine internal market. To do likewise and build an ASEAN common market through the AEC, the 'ASEAN Way' of thinking should be modified and adherence to it lessened. More power should be given to regional institutions. This is an appropriate time for ASEAN to move away from operating relationship-based organisations to more ruled-based organisations. However, sovereignty remains a quite sensitive issue in ASEAN. The attitude toward preserving sovereignty is borne out of, and deeply rooted in, historical backgrounds and relatively short lifespans as independent countries. Historically, preservation of sovereignty has been less sensitive in economic areas as opposed to political sovereignty. Taking this into consideration, it is reasonable and practical to deviate slowly and gradually away from the traditional 'ASEAN Way' of thinking by first applying it in economics.

Secondly, the development gaps between the ASEAN members should be narrowed as much as possible. Reducing the development gap is a cornerstone of ASEAN's pursuit of harmonisation. The level of social and economic development is interrelated with interest of individual countries in setting up IP policies and standards. Countries with a high level of development tend to provide strong IP protection and enforcement, whereas less developed countries usually have weak IP regimes. Therefore, bridging the gap between the ASEAN members would align their interests in setting consistent IP standards. There used to be wide disparity between the older and the newer members of the EU, however, the EU overcame this problem, using regional funds to reduce the disparity. Better-off countries contributed more than poorer countries and the funds were used to assist those countries more in need. This proved to be an effective measure. ASEAN created the ASEAN development fund (ADF), is a core framework used to address development gaps between its members. However, in spite of the ADF, there are still insufficient funds to achieve this goal. Special attention and assistance should be given to help less developed members, particularly the CLMV catch up with the more developed countries in the region. In order to prevent the gaps from widening, ASEAN should ensure that the less developed receive more support, and the more developed contribute more to the fund. It would not be possible for member states to become less inward looking and give priority to region-wide interests while they are still engaged in a struggle against poverty and inequality. Thus, in order for ASEAN to move forward in a more unified manner, it needs to ensure that less developed members have the capacity to fully participate in regional economic integration and be able to reap benefits from this process equally.

Thirdly, national IP laws of the ASEAN members should be approximated to be in line with international standards. It should ensure that all the members could accede to all major international IP treaties and comply with all the obligations within the set time frames. To help ASEAN move steadily toward its goal, enhancing the administrative capacity of ASEAN's less developed members, particularly the CLMV, is indispensable. More intense internal cooperation between member states and external cooperation with significant trading partners on administrative capacity building would help less developed members effectively implement all regional IP policies. Moreover, different levels of implementation of regional IP policies and instruments in ASEAN countries is another obstacle. To promote implementation and compliance, it would be essential for ASEAN to strengthen the role of dispute settlement and monitoring compliance mechanisms. Due to the 'ASEAN Way', strengthening existing institutional bodies, particularly the ASEAN Secretariat in order to improve its capacity to monitor compliance with ASEAN IP policies and initiatives would be appropriate. Sufficient fund and adequate numbers of well-trained staffs should be allocated to support the Secretariat to foster IP development in the region. To deal more effectively with a case of non-compliance by member states in ASEAN economic agreements, including the ASEAN Framework Agreement on IP Cooperation, ASEAN EDSM should be strengthened to provide more legal certainty and reliability. Sanctions should be introduced to support EDSM. Like the WTO dispute settlement mechanism, punitive actions like trade sanctions can be used to deter non-compliance to TRIPs obligations. This would help ensure that all the ASEAN's commitments are properly enforced and disputes are resolved. By successfully acceding to all major IP treaties, a certain level of substantive and procedural IP law would be harmonised. This would help decrease disparity in IP

laws among the ASEAN countries, and thus facilitate a higher level of IP harmonisation. The EU has supranational institutions, namely the EU Commission, the Council of the EU, the EU Parliament and the CJEU that play an important role in harmonising IP laws. These institutions are involved in proposing, passing and ensuring a uniform interpretation and application of EU legislation, which has supremacy over national laws of the member states. These characteristics and institutional legal system allow the EU to develop the EU law IP regime. Nevertheless, ASEAN lacks equivalent characteristics and institutions and is not ready to move toward community law. Thus, approximating IP laws of ASEAN members through the adoption of international IP treaties would be more appropriate and practical. Part of the EU's success in creating an EU-wide system of IP rights is the approximation of IP laws through the issuance of directives. These directives paved the way for the use of regulations and eventually to the EU's establishment of a unitary IP system. Therefore, participating in international IP communities would be a good start for ASEAN to develop a well-articulated regional IP regime. Although some regional IP commitments in acceding to major international IP treaties cannot be kept to the target of 2015, the progress can be considered a milestone in the development of an ASEAN IP regime. Intense and continuous cooperation between Member States themselves and between Member States and trading partners can therefore lead to further harmonisation.

Fourthly, a region-wide IP regime should be developed through the combined use of hard and soft laws. Taking into account the high divergence among the member states and ASEAN's practices, this approach would be the best route for ASEAN to achieve the desired level of IP harmonisation. In conjunction with hard law instruments such as binding agreements, ASEAN should also issue soft law instruments such as model

laws or codes of conduct. Using them in combination advances the creation of a regional IP system as well as a higher level of harmonisation. Soft law instruments should mirror the binding agreements and additional provisions to elaborate on the terms of the hard law. Merely using hard law would be contrary to the nature of ASEAN and the 'ASEAN Way' and certainly not acceptable to some members. Moreover, since the level of development and IP standards in ASEAN are quite diverse, some countries might not be prepared or able to join an agreement or immediately comply with the obligations. Soft law instruments would provide more acceptable alternatives to those countries. While the flexibility of soft law could better accommodate the different levels of development, the use of hard law could impose strict obligations, compliance with which is overly burdensome to less developed members. Consequently, the use of hard law in combination with soft law at the early stages of the development of a regional IP system would be appropriate. Removing the uncertainties that obstruct harmonisation could lead to the eventual hardening of soft law. Additionally, ASEAN should begin to create an ASEAN-wide IP regime in the area of trademarks, since certain a level of harmonisation has been achieved. Compared with patents, harmonising trademark law would be easier. Given the benefits that GIs may generate for ASEAN countries, the establishment of regional GIs system should also be considered. This would help promote the commercialisation of GIs in both regional and international markets. Due to the wide development gap among ASEAN members, ASEAN minus-x formula should be adopted at the early stage in developing a region-wide IP system to allow flexible participation. Member states that are not ready can be granted option to delay their participation to the agreement. Meanwhile, other members can proceed ahead. This

would allow decision to be made without full consensus from all member states, and thereby avoid decision paralysis.

Finally, having binding harmonised rules is not enough without consistent application and enforcement of those rules. A regional judicial institution that has jurisdiction over regional IP disputes should be established to ensure consistency and enhance certainty in legal instruments throughout the region. The court can be located in Singapore, which has a strong rule of law and sufficient IP administrative capacity and infrastructure. Without an IP court with region-wide authority, different interpretations in different countries of the same legal instruments are possible. In spite of having harmonised rules, this would still lead to fragmentation. Case law from regional IP court's ruling could ensure the uniform application of ASEAN legal instruments on IP and thereby increase legal certainty. Introducing institutional change to ASEAN might be a challenging and burdensome process. However, the creation of an ASEAN IP Court is a good starting point for ASEAN to develop a supranational ASEAN court, which would help ASEAN achieve deeper regional integration and truly become a rule-based community. The EU's experience has shown that both legislation and institutions are significant to IP harmonisation. Part of the EU's success in harmonising laws is the existence of the CJEU. It has the authority to ensure effective and consistent application of the law throughout the EU. Hence, ASEAN should establish a regional judicial institution to ensure homogeneous interpretation and application of ASEAN legal instruments. To achieve this goal, improvement on the rule of law is essential. The establishment of the regional judicial institution would not be possible as long as the rule of law is weak in some member states.

Developing an ASEAN-wide IP regime can be considered one of the prerequisites for ensuring the free movement of goods in the common market. This could therefore help ASEAN obtain deeper regional economic integration. These changes, however, are not possible without strong political will from the leaders. Priority should be given to ASEAN-wide interests. The leaders must resolve to push ASEAN forward towards IP harmonisation. They must provide the people of the ASEAN countries with an understanding of IP rights and the potential benefits of becoming the AEC. Knowledge and understanding can only help the ASEAN people prepare themselves and move towards a more integrated community. To help achieve these goals, strong, steady and unwavering cooperation is required. Public and private sectors within ASEAN, countries within ASEAN, international organisations and trading partners must all cooperate and provide development aid to ASEAN if it is to achieve its lofty goals. Without this, the establishment of a single regional IP system in ASEAN and a well-functioning common market may be unattainable.

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