

# INTERNATIONAL REGULATORY COOPERATION: the case of intellectual property in ASEAN

## Executive summary

Cooperation within ASEAN on intellectual property (IP) is a story of an overly ambitious start in 1995 focused on top-down harmonisation and then steady progress following a more bottom-up approach. The ASEAN IP cooperation story starts with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which introduced intellectual property law into the international trading system for the first time when it came into force in 1995. ASEAN responded with an IP framework focused on TRIPS-mandated IP rights. The framework included the ambitious idea of exploring the possibility of moving to full IP harmonisation with a region-wide set of IP laws for patents and trademarks and one regional IP office. Implementing IP harmonisation faced many setbacks, and proved to be an overly ambitious initial goal.

Over time a more bottom-up approach emerged. IP harmonisation was put on the back burner and under the interoperability approach, cooperation on IP was intensified in a few selected areas. Significant emphasis was placed on accession to international IP treaties as well as the IP dialogue with the EU and the World Intellectual Property Organization (WIPO). Intra-ASEAN cooperation initiatives included focus on:

- Reducing patent processing times through the use of other ASEAN countries' patent search facilities (voluntary adoption of patent search)
- Creating an online repository of information of ASEAN countries' IP regimes
- Capability building of government IP offices, the judiciary and the private sector
- Convergence of IP practices around common guidelines and processes.

While every example of International Regulatory Cooperation (IRC) is unique, there are several lessons that can be learnt from IP cooperation across the ASEAN region that are relevant to other IRC initiatives:

- *Start small*: full harmonisation was an unachievable initial goal: select the least demanding forms of IRC, rather than the most ambitious and risk being unsuccessful
- *IRC can be selective*: cooperation on specific regulatory practices such as enforcement and unilateral adoption doesn't require moving to harmonising policy regimes
- *The importance of distributed leadership*: different country champions have taken the lead on the individual workstreams, but this was underpinned by the catalyst role of Singapore as thought leader keeping the flame alive
- *The role for mandated targets*: Demanding but achievable goals and targets provided commitment to achieving progress on a handful of narrowly focused activities
- *Mandate matters*: aspirational Leaders' Declarations that were regularly refreshed were useful attention focusing devices by providing a reference point for the engagement of the intellectual property offices of the different countries
- *IRC, like most good things, take time*: after 20 years of continued effort and steady progress harmonisation is back on the agenda
- *Context and capability matters*: IRC between countries of different levels of development can be particularly difficult (voluntary adoption is easier than harmonisation).

## **How it worked – shifting the initial focus from full harmonisation to interoperability and convergence**

Cooperation on IP in ASEAN occurred in two slightly overlapping phases with two distinctly different approaches. In the first harmonisation phase, a top-down IP framework focused on TRIPS-mandated IP rights. The framework included the ambitious idea of a top-down approach to harmonisation including exploring the possibility of moving to full IP harmonisation with a regional IP office administering regional IP laws for patents and trademarks. The second interoperability phase took a more bottom-up approach promoting cooperation in areas of mutual interest in the law and legal practices of ASEAN members. This approach “enabled its members to move forward collectively but at varying paces” (Ng, 2013 p130). Interoperability has led to greater convergence through the adoption of World Intellectual Property Organisation (WIPO) treaties and harmonisation of practices through common guidelines and approaches to enforcement.

The interoperability approach built upon ‘the ASEAN way’. This is based on working in an informal, non-adversarial, cooperative and consensus-based way which acknowledges and respects the extent of diversity across legal traditions, political systems, stages in development, size, administrative capacity and capability, and religious and cultural traditions. It was also based on ‘country champions’ and no one country playing a dominant leadership role.

Intellectual property poses fundamental challenges for ASEAN and the ASEAN way. IP refers to legal rights in the intangible creations of the human mind, such as designs, inventions, and artistic works. IP includes registered rights such as Patents, Trade Marks, Industrial Designs, Plant Variety Rights, and Geographical indication as well as rights in confidential information, and copyright or authors’ rights, which do not rely on registration.

ASEAN countries have inherited different IP regimes from their colonial era legal systems. In many cases, these have been overlaid over different customary law traditions. For example, cultural heritage in Indonesia (batik, shadow-play, weaving etc.) is seen as collectively rather than individually owned. To varying extents IP is protected by the law.

The challenge for the design of an IP regime is how to draw the right balance between the opposing interests of IP rights’ holders and IP users. Giving rights to IP holders to encourage inventions and cultural creation needs to be balanced against the wider interest of consumers in having access to the widest possible range of goods and services at the lowest competitive price. Moreover, the balance of advantage between protection of IP users and IP rights’ holders differs markedly depending upon the level of economic development. Intellectual property rights are not an arcane piece of technical regulation, they are at the forefront of international economic policy debates across the globe.

## **Understanding the context for cooperation**

The genesis of IP cooperation across the ASEAN region was with the TRIPS agreement which introduced IP law into the international trading system for the first time when it took effect in 1995. The 1990s saw the emergence of the new economy and this was the heyday for IP which was seen as a major source of wealth generation. Delays in IP registrations, weak enforcement, the quality of investigations, confidence in the internal working of IP offices all undermined confidence in the IP regimes in ASEAN countries. Coordination of IP regimes was an important issue if ASEAN was to benefit from the increasing levels of connectivity and international trade.

# How ASEAN intellectual property interoperability has developed

Box 1 highlights the key events relating to IP since the formation of ASEAN.

## BOX 1 The journey to date

1967: Bangkok Declaration agreed by five founding member countries: Indonesia, Malaysia, Philippines, Singapore and Thailand. Subsequently joined by Brunei Darussalam (1994), Viet Nam (1995), Laos PDR (1997), Myanmar (1997) and Cambodia (1999).

1994: The Agreement on Trade-Related Aspects of Intellectual Property Rights, negotiated as part of the Uruguay Round, ratified and comes into force on 1 January 1995 for the 162 members of the World Trade Organization (WTO). TRIPS set down minimum standards for how many forms of IP should be regulated when dealing with nationals from other WTO member nations.

1995: ASEAN Framework Agreement on Intellectual Property Co-operation, the first ASEAN IP framework, dealt with all the TRIPS-mandated IP rights. It also included the ambitious goal of an ASEAN regional trademark and patent system.

1996: Establishment of the ASEAN Working Group on Intellectual Property Cooperation made up of the intellectual property offices of the ASEAN members states.

1998: Hanoi Plan of Action 1999-2004 provided for enhanced cooperation, based on the principles in the TRIPS agreement's focus on enhancing protection, facilitation and cooperation.

2004: ASEAN Intellectual Property Rights Action Plan 2004-2010 included a focus on fostering IP creation and increasing capability building and business development for ASEAN National IP offices. It also signalled a move away from establishing one set of regional IP laws and one regional IP office.

2005: Work Plan on Copyright focused on policy, legislation and enforcement as well as capacity building and promoting public awareness.

2007: Target date for the introduction of the ASEAN Economic Community brought forward from 2020 to 2015.

2011: ASEAN Intellectual Property Action Plan 2011-2015 had two intra-ASEAN IP cooperation and inter-ASEAN IP cooperation programs with international organisations and key partners. The goal of one ASEAN regional trademark and patent system was put on the back burner. Instead it set out a more flexible cooperation model which emphasised intensified cooperation in selected areas with a number of different countries taking the lead on specific initiatives with defined performance measures.

2016: ASEAN Intellectual Property Rights Action Plan 2016-2025 with four strategic goals (strengthening IP offices, developing IP platforms and infrastructures, expanding the IP ecosystem, and fostering IP creation by geographic indications) supported by 19 separate initiatives led by a range of different countries. This includes agreement to study the feasibility of harmonisation through creating a unitary IP title.

Ng (2013) provides a detailed description of the individual contents of each ASEAN IP Plan.

There were two imperatives that shaped ASEAN responses:

- The political imperative for cooperation on IP to contribute to the ASEAN regional cooperation modernisation agenda focused on wealth generation for the region
- The technical imperative to reshape IP laws, which were a neo-colonial legacy, into a regime better suited to the challenges faced by the countries in the region.

The most notable feature in the timeline in Box 1 was the ambitious agenda in 1995 aimed at exploring full harmonisation which proved overly ambitious. Lack of sustained progress and external events including the impacts of the Global Financial Crisis and accession of new less developed member countries to ASEAN, led ASEAN leaders to conclude that 'ASEAN countries can't go at the same pace at the same time on IP'. Over time, proposals to establish one set of regional IP laws for patents and trademarks and a regional IP office were put on the back burner, and greater emphasis was placed on greater convergence through the adoption of WIPO treaties.

Another feature of the timeline is the announcement by ASEAN leaders of a series of Intellectual Property Rights Action Plans. These aspirational declarations were useful attention-focusing devices which provided a reference point for the engagement of the intellectual property offices of the different countries. This was particularly important since intellectual property falls under a variety of different ministries (Law, Commerce, Science) in different countries so there was no obvious ASEAN Ministers group to report to. While some workstreams made good progress some of the time, others did not progress as well. The declarations provided the umbrella under which the workstreams were developed providing legitimacy and a political mandate.

The third feature is distributed leadership, with different countries taking the lead on different activities. The ASEAN IP plans "emphasised teamwork and collective responsibility by appointing specific ASEAN country champions to lead the specific initiative with defined deliverables and detailed performance indicators" (Ng and Austin, 2017 p19-20). The overall programme was underpinned by the catalyst role of Singapore as a thought leader keeping the flame alive.

The way of working that has evolved has involved a five-year work plan that set demanding but achievable goals for a handful of narrowly focused activities and then actively monitoring progress. Work plan projects were led by countries with a particular interest in seeing progress on that issue – a one-stop shop repository of ASEAN IP policies and practices (hosted by Singapore) reduction in backlogs (led by the Philippines and Cambodia), patent search and examination (led by Singapore), and cooperation on capacity building. More recently attention has now shifted to increased cooperation on enforcement.

Another interesting feature was 'ASEAN helps with ASEAN' on accelerated accession to international IP treaties such as The Hague Agreement on Industrial Designs, the Patent Cooperation Treaty, and the Madrid Protocol on Trademarks. There was a strong outward looking multilateral component to the ASEAN IP cooperation programmes as well as more intra-ASEAN focused activities.

The fifth feature was the model of change. Rather than an overarching grand design, what was developed instead was an emergent strategy based on organic change. This evolving plan was described by one person interviewed 'like trying to create DNA for a useful organism when not entirely sure what it looks like'.

The sixth feature was that IP coordination highlighted the difficulty of IRC between countries of different levels of economic development and national capability. Mutual recognition between countries at different levels of development is particularly difficult because of the extent of regulatory trust required in other countries regimes and systems. For patent search recognition, ASEAN used a

form of non-binding mutual recognition based on voluntary adoption. Under this programme the patent search and examination results of one office may be used as a reference in the search and examination process of other national IP offices. However, this is non-binding as the other IP offices are not obliged to adopt the findings and conclusions. Cambodia, however, has moved a step further with the automatic recognition of patents registered in Singapore as well as in Japan, the EU and China.

The seventh feature is how IRC takes time. This is a story of 20 years of steady but sustained effort. IRC is a long game as it requires investment of time and effort to build up trust and networks. In 2015 there was a move beyond interoperability toward harmonisation with the agreement to study the feasibility of a unitary IP title.

## **Conclusion – implications for IRC generally**

Cooperation within ASEAN on IP is a story of an overly ambitious start in 1995 and then steady progress following a more bottom-up approach to interoperability. This case highlights the difficulty of harmonisation as an initial goal and the difficulty of attempting this in an area as vexed as IP for a group as diverse as the ASEAN countries. Full harmonisation is not the only destination however. The ASEAN bottom-up approach focused on interoperability, with gradual policy convergence through ratification of international treaties.

ASEAN IP coordination is still ‘work in progress’. After 20 years of cooperation, the ASEAN region is still basically ten countries with varying levels of IP protection and with different regimes and procedures for filing and examination to obtain IP protection. While improvements have been made through bilateral, regional and multilateral arrangements, the complexity and variety of IP regimes remains.

So, what are the lessons emerging from this case study that are relevant for IRC initiatives in other jurisdictions?

While every example of IRC is unique, there are several lessons that can be learnt from ASEAN’s cooperation on IP that are relevant to other IRC initiatives:

- *Start small*: full harmonisation was an unachievable initial goal: select the least demanding forms of IRC, rather than the most ambitious and risk being unsuccessful
- *IRC can be selective*: cooperation on specific regulatory practices such as sharing practices and unilateral adoption doesn’t require moving to harmonising policy regimes
- *The importance of distributed leadership*: different countries have taken the lead on the individual workstreams, but this was underpinned by the catalyst role of Singapore as thought leader keeping the flame alive
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- *Context and capability matters*: IRC between countries of different levels of development can be particularly difficult (voluntary adoption is easier than harmonisation or mutual recognition of conformity assessments or rules and standards).

## Key references

Ng, ESK. 2013. ASEAN IP Harmonization: Striking the Delicate Balance *Pace International Law Review* Volume 25 Issue 1 Spring 2013.

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