

The Role of Intellectual Property Law in Regional Commercial Unions in Europe and Asia

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ABSTRACT *The establishment of a global multilateral trading system moderated by the World Trade Organisation (WTO) is in apparent tension with the proliferation of regional trade arrangements. A significant feature of these regional arrangements is the proposal to establish harmonised regional intellectual property systems. This intellectual property harmonisation may well operate to reconcile the countervailing strains of globalisation and regionalisation of trade. This article examines the coordination of intellectual property in regional trade arrangements in Europe, Asia and North and South America. Specifically, the article examines the intellectual property regimes of the European Union, the Central European Free Trade Agreement, the Association of South East Asian Nations and the North American Free Trade Association.*

Keywords: ASEAN, Central European Free Trade Agreement, European Union, intellectual property, NAFTA, regional trade agreements.

Intellectual Property and Economic Development

At the end of the Second World War the road to economic development was conceived primarily by developing countries in three overlapping stages: first, the securing of political emancipation from their colonial overlords; secondly, the achievement of economic independence, through the nationalisation of foreign-owned businesses and thirdly, emancipation from cultural and technological dependence upon the western industrialised states. The latter aim was reflected in the 'Declaration on the Establishment of the New International Economic Order' (NIEO) which was adopted by the General Assembly of the United Nations in December 1974.¹ Among the central assumptions of proponents of the NIEO was that technological development was a precondition for economic development and that an intellectual property system was indispensable for the acquisition of technology. The perceived significance of the role of intellectual property in economic development probably explains the establishment of the World Intellectual Property Organisation (WIPO) in 1970 as a specialised agency of the United Nations Organisation. Thus the preamble to WIPO's Model Law for Developing Countries on Inventions affirms:

- (a) the importance of new technology for economic development and in particular the industrialisation of the country;
- (b) the necessity of creating new technology in the country and of adapting existing technology to the needs of the country;
- (c) the necessity of having access to foreign technology;²

Similarly WIPO's *Licensing Guide for Developing Countries* commences with the assertion that:

Industrialisation is a major objective of developing countries as a means to the attainment of high levels of the well-being of the peoples of such countries. The attainment of science and the development of a technological base are the essential conditions of industrial growth.

The development of a technological base in a developing country depends on the existence of indigenous technological capacities and the acquisition of selected technology from abroad. ...³

However, some 20 years on from the promulgation of the New International Economic Order, scepticism has begun to be expressed by some commentators about the role of intellectual property in attracting technology and foreign investment.⁴ First, it has been noted that the technological imbalance between North and South has not changed much in the last two decades, notwithstanding the widespread adoption of intellectual property rights in the South. Indeed, it is asserted that the international intellectual property system is not cost free for the countries of the South and that it is, in fact, a means for perpetuating the economic dominance of the North.⁵ The economic success, until recently, of the Asian 'Tiger' economies of Singapore, Hong Kong, South Korea and Taiwan, which was achieved in the absence of adequate enforcement of intellectual property laws, has also called into question the equation between intellectual property and economic development.⁶ Similarly, the lack of economic success of developing countries such as Nigeria, with fairly stringent intellectual property regimes, has also raised questions about the efficacy of intellectual property in promoting development.⁷

Despite perceptions of the failure of intellectual property to deliver economic development, intellectual property law has not been abandoned as a false god. The continuation of the orthodoxy can be seen, for example, in the first clause of the Joint Statement of the Tokyo APEC Industrial Property Rights Symposium of 28–29 August 1996, which confirmed 'the important role of industrial property systems in encouraging inventive activities as well as in facilitating transfer of technology among Member economies'.

As we will see below, in place of the assumption that economic development can be secured by a country's own efforts, is the realisation that economic development involves a cooperative effort and that regional cooperation is the more efficient modality for securing economic development. The new role for intellectual property laws in the 1990s and beyond is in strengthening and reinforcing regional economic coordination.

Regional Trade Arrangements and Economic Development

The regionalisation of trade had been a pronounced trend in recent years. A 1994 report refers to 34 regional trade arrangements in existence in 1992, with 17 in the pipeline.⁸ Regional trade arrangements take a variety of forms, ranging from a bilateral exchange of tariff preferences, through to the establishment of an economic union, where two or more countries agree to unify their fiscal monetary and social policies. Within this range are free trade areas, where two or more countries abolish all import duties on their mutual trade, but retain their existing tariffs against the rest of the world. The next stage in regionalisation is the establishment of a customs union where the abolition of mutual import duties is matched by the adoption of a common external tariff on imports from the rest of the world. A common market is established where the members of a customs union also agree to allow the free movement of all factors of production between member countries.

Probably the most compelling example of this evolution from preferential tariff arrangements to full economic union is provided by the European Union (EU). The EU developed from a cooperative arrangement in relation to coal and steel into a common market and with the Maastricht Treaty has been transformed into an economic union. The EU is committed to a unitary monetary and economic policy by 2000, although this latter step has not been embraced with full enthusiasm by all its members.

A feature of regional trading arrangements is that they attract reciprocal trading advantages with other regional trading groupings and that they may contain subregional trading arrangements. For example, at the periphery of the EU is the Central European Free Trade Association and the European Free Trade Association (EFTA) which have both indicated a desire to combine with the EU to establish the Espace European. The Espace European will be a European-wide free trade zone. Reciprocal trading arrangements have been negotiated with other regional trade groupings.

In Asia, the regional trade arrangement which has the closest resemblance to the European arrangements is the ASEAN Free Trade Area (AFTA), which is to be established by the Association of South East Asian Nations (ASEAN). Within ASEAN, similar intraregional trading arrangements are proposed for the countries of the Mekong Basin Group. A number of prominent ASEAN members are also members of the Asia Pacific Economic Cooperation Forum (APEC), which is an interregional trading arrangement.

Similar trade arrangements can be noted in the western hemisphere. The North American Free Trade Association (NAFTA) between Canada, Mexico and the USA is a free trade zone in which full economic integration is not yet contemplated. NAFTA is currently discussing an association with the Common Market of the Southern Cone countries (Mercosur). The latter association has recently been involved in negotiations for a formal union with the Andean group of countries. President Clinton has referred to the establishment of a free trade zone from Alaska to Tierra del Fuego by 2005.⁹

The current theory of regional trade arrangements is that a larger internal market creates opportunities for the exploitation of scale economies, by allowing for a higher degree of specialisation in production. This in turn may enhance the international competitiveness of the region and attract foreign investment. It should be noted that some regional trading arrangements, particularly those between developing countries, were established as barriers to encourage industrialisation behind protectionist walls. These included the Latin American Free Trade Association and the Andean Pact. As part of the legal structure of these defensive unions were strict controls on the transfer of technology. These south-south regional groupings were largely discredited as vehicles for economic development by the spectacular success in the 1960s and 1970s of the newly industrialising economies of East Asia. However, an important positive example for development was provided by the EU and even the East Asian NIEs saw the wisdom of regionalisation with the formation of ASEAN.

Additionally, regionalism in trade was encouraged by the General Agreement on Tariffs and Trade (GATT) system. Regional integration is explicitly endorsed in Article XXIV of the GATT which refers to 'the desirability of increasing freedom of trade by the development, through voluntary arrangements, of closer integration between the economies of such arrangements'.

Regional Trade Arrangements and Intellectual Property

At first blush, there would appear to be some inconsistency between the national exclusivity which is conferred upon intellectual property rights holders under national

intellectual property laws of the members of regional commercial unions and the elimination of barriers to the free movement of trade within the union. This apparent paradox is accommodated by two stratagems. First, it is sought to replace the multiplicity of national intellectual property systems with a unitary system within the commercial union. The first step towards this unitary system is the harmonisation of the national laws of member countries. A supplementary stratagem is to exonerate intellectual property laws from the free movement rules within the union. This exoneration is typically justified in terms of the important developmental role of intellectual property.

This article examines the role of intellectual property laws in facilitating the attainment of the objectives of the EU and the ASEAN.

The European Union

A central feature of the European Common Market is the prohibition by Article 30 of the Treaty of Rome of restrictions inhibiting the free movement of goods. Specifically exonerated, by Article 36, from this prohibition are restrictions for the protection of intellectual property rights, provided that they are not a means of arbitrary discrimination or a disguised restriction of trade between member states. The tension between the conferral of a statutory monopoly by intellectual property laws and the elimination of restrictive trade practices within a commercial union is accommodated by the insistence in Article 36 that the free movement of goods be inhibited only to the extent necessary to safeguard the rights which constitute the specific subject matter of the type of intellectual property right in question. In order to provide some degree of predictability and certainty, the European Commission has enacted regulations which grant clearance to certain types of intellectual property agreement. These block exemptions embrace: patent licensing agreements, know-how licensing agreements, research and development agreements and franchising.¹⁰

The different national patent laws of member countries of the then EEC were identified at an early stage as an obstacle to the free movement of goods within the Community.¹¹ From 1959 the possibility of a single EEC patent was canvassed. The successful conclusion of the Patent Cooperation Treaty in 1970 gave decisive impetus to this proposal. The resultant European Patent Convention (EPC), which was signed in Munich in 1973, introduced a unitary system for the administration of patents within Europe. This development has been particularly successful and membership of the EPC has become attractive also to non-EU states. In addition to the EU states, participants in the EPC include also Switzerland and Liechtenstein and the Czech Republic, Hungary, Poland and the Slovak Republic, the signatories of the Central European Free Trade Agreement (CEFTA). Additionally, the former Soviet States, which have combined in the Eurasian Patent Agreement have also manifested an interest in subscribing to the EPC. In this way, intellectual property laws may be seen not only as assisting the cohesion of the EC, but also in assisting the expansion of the EC through intraregional free trade agreements. In 1994 the European Economic Area (EEA) was constituted as a free trade association between the EU and certain former members of the European Free Trade Association (EFTA). In 1995 Austria, Finland and Sweden became fully fledged members of the EC, with the remaining EFTA states—Iceland, Liechtenstein and Norway—participating as members of the EEA¹². The first significant cooperation between EU and EFTA members was through the European Patent Convention.

The centralisation of EC trademark laws was sought to be achieved through a combination of a Regulation under the Treaty of Rome and a Directive to Approximate the Laws of Member States Relating to Trade Marks (the 'Harmonisation Directive').¹³

This centralisation process envisages the establishment of a unitary 'Community Trade Mark', together with a parallel harmonisation of the national trademark systems.

A successful feature of the EU intellectual property strategy been the establishment of single European patents and trademarks offices in Munich and Alicante, respectively. In addition to binding together the administration of intellectual property laws in the EU, this coordination has also facilitated the EU-wide observance of member nations' obligations under the Agreement on Trade-Related Intellectual Property Rights (TRIPs), compliance with which is a prerequisite for membership of the World Trade Organisation.¹⁴ Thus an incidental developmental role of intellectual property coordination within the EU, is facilitation of each member nation's capacity to subscribe to TRIPs. In this way the EU as a whole can take advantage of the trading advantages which are available on a reciprocal basis from interregional agreements. The European Patents and Trademarks Offices have also participated in the developmental mission of the EU, even outside Europe. For example, the European Commission's ASEAN Patents and Trademarks programme, which is located in the EPO, has conducted a vigorous programme of assistance within the ASEAN to assist the latter in its own regional programme of intellectual property coordination.¹⁵

Central European Free Trade Agreement

The Central European Free Trade Agreement (CEFTA) was signed on 21 December 1992 by the Czech Republic, Hungary, Poland and the Slovak Republic (the 'Visegrad four'). The CEFTA, which went into effect on 1 March 1993, includes six annexes and seven protocols.¹⁶ The main objective of the CEFTA is to create a free trade area within Central Europe by 2001. Article 25.4 provides for the cooperation of the parties in intellectual property matters. It provides for joint expert consultations on these matters, 'in particular on activities relating to the existing or to future international conventions on harmonisation, administration and enforcement of intellectual property' as well as on activities in international organisations, 'as well as relations of Parties with third countries on matters concerning intellectual property'.

Article 25.1 of the Agreement provides that the parties 'shall grant and ensure protection of intellectual property rights on a non-discriminatory basis, including measures for the grant and enforcement of such rights'. Article 25.1 envisages that intellectual property protection shall be improved within 5 years to 'a level corresponding to the substantive standards of the multilateral agreements which are specified in Annex VI'. Annex VI lists the Paris, Berne and Rome intellectual property conventions, as well as the European Patent Convention.¹⁷

Association of South East Asian Nations (ASEAN)

The ASEAN was established in 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand. The original objectives of the Association were to promote the cultural, economic and social well-being of the region through cooperative programmes; to safeguard the political and economic stability of the region against big-power rivalries; and to serve as a forum for the resolution of interregional differences. An ASEAN Preferential Trading Agreement was introduced in 1977, under which member nations exchanged tariff preferences. This agreement was superseded by the decision of the Fourth ASEAN Summit in 1992 to establish the ASEAN Free Trade Area (AFTA) by 2008. A supplementary declaration of September 1994 accelerated to foundation of the AFTA to 2003.

On 15 December 1995 ASEAN member countries¹⁸ adopted a Framework Agreement on Intellectual Property Cooperation ('Framework Agreement').¹⁹ Emulating the European model, the Framework Agreement envisages the establishment of an ASEAN patents and trademarks system, including ASEAN Patent and Trademarks Offices.²⁰ Intellectual property cooperation is envisaged for the fields of 'copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information and layout designs of integrated circuits'.²¹ The Framework Agreement recited the obligations of member states to implement intra-ASEAN intellectual property arrangements in line with their international intellectual property obligations, in particular, their obligations under the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS).²²

Among the cooperative measures to enhance the enforcement of intellectual property rights, the Framework Agreement proposes cooperation in cross-border protection and the networking of ASEAN judicial authorities and enforcement agencies.²³ Additionally, the Framework Agreement proposes the networking of training facilities and the exchange of personnel.²⁴

Prior to the 1995 Bangkok Summit, ASEAN had hesitated to involve itself in intellectual property matters, taking the view that intellectual property rights tended to the perpetuation of trade imbalances between developed and developing countries.²⁵ The Bangkok Declaration was accompanied by expressions of the importance of the interrelationship between trade, investment and intellectual property. The first proposal for cooperation on intellectual property was made to the ASEAN Senior Economic Officers Meeting (SEOM) in Jakarta in August 1994. Thailand chaired the first meeting of ASEAN's Working Group on Intellectual Property, which met at Chiang Mai in September 1994. Thailand as Chair, proposed the first draft of the Framework Agreement. The Framework Agreement was proposed in the context of the establishment of an Asian Free Trade Area (AFTA). The Bangkok Summit Declaration, which accompanied the Framework Agreement, acknowledged 'the importance of intellectual property in intra-ASEAN and world trade'.²⁶ European advisors have been assisting ASEAN in its planning for an ASEAN patent and trademark system through the EC-ASEAN Patents and Trademarks Programme (ECAP). ECAP provided consultative assistance for the drafting of the Framework Agreement and has provided regional and national intellectual property training programmes for government officials and lawyers in ASEAN. This explains the essentially European appearance of the cooperative intellectual property arrangements within ASEAN.

In the Special Meeting of ASEAN in July 1997, which welcomed the admission of Laos and Myanmar into ASEAN, the intention of members to establish an ASEAN intellectual property union, as part of a commercial union, was reiterated. The First Informal Leaders' Summit, held in Jakarta on 30 November 1996, endorsed the Basic Framework of the ASEAN Mekong Basin Development Cooperation, to promote the economic integration of economies of the ASEAN and non-ASEAN riparian states.

Intellectual Property Cooperation between Mekong River Basin Countries

Paralleling the Thai intellectual property initiatives within ASEAN, have been comparable initiatives by Thailand among the countries of the Mekong Valley Basin: Cambodia, Laos, Myanmar and Vietnam. This initiative commenced with a Memorandum of Understanding on Bilateral Cooperation in the Field of Industrial Property, which was signed by Thailand and Vietnam on 22 April 1994. This Memorandum of Understanding (MOU), which predated Vietnamese membership of ASEAN,²⁷ contained many of

the ingredients of the Framework Agreement. It proposed bilateral cooperation in the exchange of information and staff, comparative studies of procedures and practices, use of automation and dissemination of information on industrial property.²⁸ The MOU was followed by a Cooperation Programme, which was promulgated on 17 February 1995 and which was initiated with a joint working group to determine common criteria on well-known marks. On 7 December 1996 Thailand and Vietnam signed an MOU on Copyright and Neighbouring rights, which proposed a plan of cooperation, similar to that proposed for industrial property.

Similar bilateral arrangements in relation to industrial property were made between Thailand and Laos by memorandum on December 14 August 1994. A Plan of Actions on Industrial Property was agreed between Laos and Thailand on 30 January 1996 proposing information exchanges and linkages between the Thai Department of Intellectual Property and the Lao Science, Technology and Environment Organisation. Preliminary consultative meetings have also been held between Thailand and Myanmar and between Thailand and Cambodia to establish arrangements for intellectual property cooperation.

Thailand has also been conducting negotiations on intellectual property cooperation with the Peoples Republic of China. Memoranda of Understanding were signed between Thailand and China in the fields of trademarks (6 April 1995) patents (7 April 1995) and copyright (1 December 1995). A major objective of these MOUs was the promotion of regional cooperation in intellectual property.

The Thai architect of these bilateral intellectual property arrangement identified as 'the most significant development' the 'clear determination to cooperate closely and endeavour to reach common positions in both bilateral and ASEAN contexts'.²⁹ The various bilateral arrangements which Thailand has negotiated with the Mekong Basin group of countries will no doubt strengthen its position as the leader in this field in ASEAN. For example, in the 1996 meetings of the Paris and Berne Unions, Thailand was elected Chair of the Asia group of developing countries. A regional consultative meeting convened by Thailand in Chiang Mai formulated an Asian position for the WIPO Diplomatic Conference on copyright in December 1996. The leadership which Thailand has assumed in regional intellectual property arrangements will, inevitably enhance its position in the negotiations which will ensue concerning the location of the ASEAN patent and trademark offices.

Asia Pacific Economic Cooperation Forum (APEC)

The origins of APEC are traced back to the informal consultation between the heads of Asia Pacific States and senior ministers and department heads which commenced in 1989 on the initiative of the then Australian Prime Minister Bob Hawke.³⁰ A successful example of regional consultation had been provided by the Pacific Economic Cooperation Council (PECC), a non-governmental organisation comprising academic, business and government representatives from some 20 Pacific Rim countries. The PECC had operated as an informal advisory body, with a number of committees which disseminated information on trade, technology and investment.³¹

In anticipation of the conclusion of the Uruguay Round of GATT, the APEC Trade Ministers, meeting in Seattle in November 1993, agreed that they would 'review the results of the Uruguay Round and implications for the region and provide assistance within APEC on implementation'. As part of this review process, the APEC Trade Ministers agreed in October 1994 to 'undertake a series of seminars designed to encourage the full and effective implementation of Uruguay Round outcomes'.³² To this

end, seminars were held in Taipei, 13–15 March 1995; Seoul, 17–21 April 1995; and Sydney, 17–19 May 1995.

The overall objectives of these seminars were identified at the Sydney seminar to be to:

- (i) develop a collaborative approach to implementation of the TRIPs Agreement;
- (ii) identify scope for an APEC program of cooperation and assistance to enhance regional cooperation and assistance to enhance regional intellectual property infrastructure, including consideration of an action agenda for APEC;
- (iii) provide a forum in which APEC members can exchange ideas and experiences on the approach being taken to implementation of the TRIPs Agreement;
- (iv) involve all APEC members in discussion of intellectual property issues.³³

Mr M. J. Costello, Secretary to the Australian Department of Foreign Affairs and Trade, noted at the Sydney APEC Seminar, that regional cooperation on intellectual property matters had only latterly been addressed by APEC members.³⁴ He attributed this to the difficulty of the issue and to the fact that there are different levels of development of the various APEC economies. To attempt to develop the intellectual property agenda of APEC in harmony with the Bogor Declaration committing members to free trade and investment by 2010, for developed economies, and 2020, for developing economies, Mr Costello proposed the establishment of a group of experts and the formulation of a set of recommendations for the development of a programme of technical cooperation on intellectual property issues.

In 1995 the 18 APEC Trade Ministers adopted the Osaka Action Agenda, which included the liberalisation of intellectual property rights as one of the 15 areas where members would seek the liberalisation and facilitation of trade and investment. In relation to intellectual property, the Osaka Action Agenda proposed the exchange of information and expertise on intellectual property matters, including the exchange of information 'on well known trademarks as a first step in examining the possibility of establishing an APEC-wide trademark system'.³⁵ The implementation of the Osaka Action Agenda was elaborated in a meeting at Cebu in May 1996 which proposed an Industrial Property Rights Symposium at Tokyo in August 1996 for senior officials of the industrial property authorities of all 18 APEC Member economies. At this meeting members pledged their 'closer cooperation in developing industrial property systems in order to provide a firm basis for further economic growth towards the 21st Century'.³⁶ The signatories to the Joint Statement issued by the Tokyo meeting recommended that APEC-wide cooperation should be promoted among member economies with a view to:

1. Implementing the TRIPs Agreement in the case of WTO Members, or further improving industrial property rights protection in other cases, in order to ensure adequate and effective protection as well as enforcement of industrial property rights;
 2. maintaining a fair balance of interest between the rights holders and the public interest;
 3. developing human resources to cope with rapid increase in the number and complexity of patent, trademark and related applications according to growing domestic and regional economies;
 4. promoting the simplification and standardisation of administrative, examination and registration procedures in order to enable applicants to acquire rights in a more expeditious and effective way;
- ...

5. periodically discussing appropriate industrial property protection systems to ensure that they remain effective for new and emerging technologies;
6. considering further improvements to industrial property systems following the implementation of TRIPS; and
7. in implementing these initiatives, taking into account the difficulties and limitations which each member economy is or will be confronting.³⁷

Intellectual Property Coordination as an Infrastructure for Development

A key feature of the intellectual property agenda, particularly of regional commercial unions in Asia, is the coordination of efforts to implement the TRIPs Agreement.³⁸ The activities of the United States Trade Representative (USTR) under section 301 of the US Trade Law, in placing nations with deficient intellectual property regimes on watch lists, prefatory to the imposition of trade sanctions, made intellectual property an international trade issue.³⁹ Not only were sanctions a consequence of inadequacies in intellectual property laws and the enforcement of those laws, but the adequacy of intellectual property arrangements became regarded as a prerequisite for western foreign investment. In the absence of the effective protection of proprietary technologies, transfers of technology would be unlikely. Given the perceived primacy of technology transfer in economic development, nations and regional commercial unions reliant on the acquisition of foreign technologies were obliged to provide effective demonstrations of respect for intellectual property rights. Compliance with the TRIPs Agreement is a convenient, and for US investors, an authoritative way of demonstrating respect for intellectual property rights. It is for this reason that TRIPs compliance is repeatedly affirmed as a minimum standard for intellectual property protection in countries which hitherto expressed the view that intellectual property rights were a means of perpetuating colonial overlords.

Because of the importance of regional commercial unions as participants in global trading arrangements and as means of aggregating the economic power of individual nations which would otherwise be insignificant actors, ensuring TRIPs compliance has become part of the discipline of regional commercial associations. In this way intellectual property laws continue to play a key role in the process of economic development at least at the symbolic level. If the equation between intellectual property protection, technology acquisition and economic development is more than symbolic then the regional coordination of intellectual property compliance will effectively promote regional economic development.

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