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Competition and Intellectual Property Laws in the ASEAN 'Single Market'

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1. Introduction

The ASEAN Economic Community (AEC) Blueprint provides a roadmap for establishing a 'single market' by 2015. The intent is to create a single economic market and production base as well as to enhance the competitiveness of the region and improve its attractiveness as a host location for foreign direct investment. Relative to the European Union (EU), ASEAN's notion of a 'single market' represents loose integration. However, even this requires countries to move beyond trade liberalization. As a result, the AEC Blueprint has set goals in a number of policy areas. This chapter examines two areas: competition policy (here limited to competition law) and intellectual property policy.

The AEC Blueprint recognizes that both the notion of fair competition and sound intellectual property policy provide static and dynamic efficiency gains. Ultimately, they ensure that firms succeed not due to monopolization and collusion but because of efficiency and innovation. Fair competition and secure intellectual property rights are aimed at improving the business environment and impacting both foreign direct investment flows and the willingness of firms to share and transfer advanced technology. Since there is no multilateral or plurilateral competition regime, every ASEAN member state has agreed to enact a national competition statute prior to 2015, and most have already done so. In the area of intellectual property, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets the minimum standard, as all ASEAN countries except Lao People's Democratic Republic are signatories to TRIPS. In both areas, there is no intent to harmonize laws across the region or to have regional enforcement bodies; instead, countries rely on regional networks to build capacity and enhance cooperation and coordination.

This chapter provides an assessment of the achievements thus far on the path to 2015 and draws lessons from other regional trade agreements and case law to provide a sense of likely pitfalls that ASEAN may encounter. It also highlights some yet unaddressed issues and suggests some refinements that ASEAN may wish to consider as it prepares for 2015. The next section provides a general overview of competition and intellectual property (IP) and the goals of the AEC. Section 3 provides an overview of competitiveness and competition policy, drawing lessons from the other regional trade agreements such as the North American Free Trade Agreement (NAFTA), the Common Market of the Southern Cone (MERCOSUR) and the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). Section 4 provides a similar overview for Intellectual Property Rights (IPRs) and also draws on case law from the EU. Section 5 discusses the policy issues that arise at the intersection of competition and IP law and policy. Section 6 discusses the balance between competition and IP laws. Though they have similar goals, sometimes there can be conflicts if firms use their IP to exclude competition. In addition, countries need to strike a balance between static and dynamic efficiency goals, and this is likely to be influenced by their level of economic development. Section 7 concludes the chapter and provides an assessment and some suggestions for ASEAN to consider. In addition the chapter has an appendix, which provides a survey of existing competition laws and sector-specific competition regulations in ASEAN countries.[1]

2. Competition, Intellectual Property and the ASEAN Economic Community

In a closed economy, competition and intellectual property (IP) laws are generally recognized as sharing the same goals — enhancing consumer welfare and promoting competition as "[b]oth spur competition among rivals to be the first to enter the marketplace with a desirable technology, product, or service" (US Department of Justice 2007, p. 2). Intellectual property rights create property rights over new ideas and expressions that allow innovators to appropriate the rewards from new products, more efficient production processes and artistic works and so encourage their creation. Competition law tries to ensure that goods and services are sold at least cost and produced using the least resources.

Anti-competitive conduct can have effects across borders and reduce the benefits from trade liberalization. Competition law complements reductions in trade barriers and, according to Cernat (2005, p. 6), more so for developing countries, as these countries tend to have more public and private barriers to trade, more localized markets and a larger non-traded sector which cannot be disciplined by import competition.

Competition law chapters or provisions in regional trade agreements can regulate cross-border anti-competitive practices. This can involve, at one extreme, harmonization of competition laws together with a supranational competition regulator to deal with the effects of anti-competitive practices that cover more than one country to, at the other extreme, simply agreements to cooperate on competition law matters on the basis of principles of comity. Both positive and negative comity relate to the impact of a country's law enforcement on other countries. Negative comity involves conducting investigations and proceedings with a view to not harming other countries; whereas positive comity involves conducting them so as to assist another country or countries (OECD 1999 pp. 17–18).

ASEAN has opted to move mainly toward coordination of competition and intellectual property laws. The ASEAN Economic Community (AEC) Blueprint states that: "The main objective of the competition policy is to foster a culture of fair competition" but does not say what 'fair competition' means (ASEAN Secretariat 2009, p. 32). ASEAN has set fairly modest goals for itself in the area of competition law and policy (ASEAN Secretariat 2009, p. 32). First, not all ASEAN countries have competition laws but they have all committed to introducing them by 2015. Secondly, ASEAN sought to develop regional guidelines on competition policy by 2010 and did so (ASEAN Secretariat 2010). Thirdly, it seeks to enhance capacity building in the area of competition law. Lastly, it seeks to establish a network of national competition law enforcement bodies — the role of the network being to "discuss and coordinate" competition policies.[2] There is no commitment to harmonize competition law and policies across countries.

In the area of intellectual property, the AEC Blueprint recognizes that sound intellectual property policy helps the creation, adaptation and adoption of new technology and impacts foreign direct investment flows and the willingness of firms to share and transfer advanced technology. Ultimately, in addition to providing a predictable environment for investors and inventors, this contributes to higher productivity and competitiveness. In the realm of IP, ASEAN seeks to foster cooperation on copyrights, traditional knowledge, genetic resources and cultural traditional expressions. In addition, it seeks to establish an ASEAN filing system for design and to promote consultation and information exchange between national agencies responsible for the protection of IP rights (ASEAN Secretariat 2009, pp. 32–33).

The interest of countries in setting IP standards and levels of enforcement depends largely on their levels of development. The TRIPS agreement sets minimum standards for WTO members but still allows members some flexibility in setting those standards. Free trade agreements (FTAs) usually involve higher standards of IP protection. For FTAs involving the United States, the American standard is set (Abbot 2006). Countries should set IP standards to balance the *domestic* interests of IPR holders (dynamic efficiency) with the interests of consumers (static efficiency). The balance between dynamic efficiency and static efficiency in developed countries is unlikely to be the same balance for developing countries (which have little research and development and lack the legal and other institutional capacity to administer complex IPRs). So harmonizing IP laws and their enforcement within regional trade agreements should be approached with considerable caution.

Conflicts can occur between intellectual property law and competition law across borders. IPRs are national, so that a patent granted in Singapore does not stop a firm copying the idea in Indonesia. For example, in the 1960s, the European Union (EU) permitted an agreement between firms in different EU countries to limit trade by exercising national IP rights. So, an agreement within the EU stopped cross-border sale by the owners of the same trademark. It was soon seen that protecting IPRs on the basis of national boundaries was incompatible with the idea of a common market, so the European Court of Justice (ECJ) adopted a doctrine of Community IPR Exhaustion. This means that once a firm introduces a product protected by IPR in one Member State of the EU, the IPRs are 'exhausted' with respect to that product in the other Member States. So once a product has been put on the market in Germany by the owner of the trademark, the owner cannot prevent the importation of that product into another EU Member State, such as France, despite the fact that trademarks are held on a country basis.

While IPRs provide incentives for domestic research and development, they can also hinder growth by raising the costs of imitation through abuses of the IPR system itself (falsely claiming a wide scope for a patent, for example) and by limiting the dissemination of new products and processes through anti-competitive conduct (for example, members of a cartel setting an IP product standard that others cannot meet). These problems are magnified across countries where IP standards and competition laws may differ.

While both competition and intellectual property laws are national laws with national enforcement, both are increasingly subject to international agreements, which include 'national treatment' (i.e., non-discrimination) provisions. TRIPS sets minimum IP standards but does not require countries to have the same IP-specific enforcement system. Thus, IP enforcement is left to general procedural laws, which differ considerably between countries.

The signing at the thirteenth ASEAN Summit in Singapore in 2007 of both the ASEAN Charter and the Declaration of the AEC Blueprint was a significant step toward achieving the goal of a single economic market. Of particular importance was the commitment to move away from the 'soft-law' approach of political commitments dealing with trade and investment liberalization toward an "adherence to rules-based systems for effective compliance and implementation of economic commitments" (ASEAN Secretariat 2009, p. 21). It remains to be seen how much progress toward an ASEAN rules-based system occurs in the foreseeable future.

The AEC Blueprint provides a master plan toward establishing a 'single market' by 2015. The AEC comprises four key pillars: firstly, creating a single market and production base; secondly, enhancing a competitive economic environment; thirdly, promoting equitable economic development; and, fourthly, integrating ASEAN into the global economy. Until 2007 the main focus was on the first pillar dealing with trade and investment liberalization. Now more emphasis is being placed on the second pillar, that is, to develop a highly competitive region which involves examining domestic policies that may impinge on integration, such as competition policy, taxation, infrastructure development, e-commerce, and intellectual property rights.

For ASEAN to be competitive internationally as a region, goods and services within ASEAN should be produced at the lowest possible cost. This means lowering intra-region border restrictions and harmonizing business laws to some degree in order to allow resources to go where they are best employed within ASEAN. Some steps toward harmonization have already occurred. In 2010, the ASEAN Secretariat released regional guidelines on competition policy (dealing mainly with competition law) to provide "a general framework guide for the AMSs [ASEAN Member States]" (ASEAN Secretariat 2010, p. 1). The TRIPS agreement has set minimum intellectual property standards, including national treatment (that is, once the product or factor crosses the border, it is given the same treatment as domestic products and factors). National treatment seeks to ensure a degree of competitive equality between nationals and foreigners. ASEAN has also introduced intellectual property "Action Plans".

Full economic integration would necessarily mean the same IP and competition laws — similar to a single country. In this scenario, standards of IP protection would be the same; an IP registered in one country would be recognized throughout ASEAN. In addition, a single supranational competition regulator would regulate anti-competitive practices irrespective of where within the region the anti-competitive harm occurred. An alternative to full integration is harmonization, which is usually seen as a move toward a level playing field or fair trade. But harmonization across countries at different levels of development leads to distributional issues; harmonizing wages, for example, would create more unemployment and lower growth in the less developed countries. The same applies to business regulation, setting high product standards, for example, may discriminate not only against domestic consumers who want cheaper products but also against producers in less developed countries in the region which cannot meet those standards — either because of a lack of technological capacity or an inability to pay the necessary IP license fees for more sophisticated products.

Mutual recognition is another alternative. That is, if a product complies with the exporting country's laws in the region (this could be environmental, workplace or intellectual property standards), it can be sold within the trading party's borders. Manufacturers do not have to adapt products to satisfy different standards in the country of export. But if there are considerably different standards between countries, there could be a race to the lowest standard. Mutual recognition is only appropriate where there are minor differences in regulation between trading partners. ASEAN countries appear to be too far apart in their levels of economic development for any meaningful harmonization or mutual recognition; however, these can be long term goals. The experience of the European Union shows that creation of a single market takes many decades. ASEAN cannot reasonably expect to leapfrog this process just because it feels compelled to react to the growing economic importance of India and the PRC. Laws and regulations have to reflect local circumstances. Thus, ASEAN should focus on coordination and cooperation and the uniform and transparent application of the laws that do exist, to both domestic and foreign firms. Given the differences in the quality of governance even this may not be an easy task.

To set the context and to bring a sense of realism to the issues at hand, Tables 5.1–5.3 show the stark differences among ASEAN countries not just in per-capita gross domestic product, but in national competitiveness, the extent of intellectual property protection, the intensity of local competition, the costs of doing business; and governance indicators such as control of corruption, rule of law, judicial independence and regulatory quality. Both competition and IP policies are important for competitiveness, but they are less important than many of the factors mentioned above. Ultimately the competitiveness of ASEAN depends on the quality of the business environment. The exhibits clearly show that there is much work to be done in this area. The next section discusses competition law and integration in ASEAN, followed by a similar discussion of intellectual property laws in Section 4.

Table 5.1
ASEAN Selected Competitiveness Indicators 2011–12
(Rank out of 142 countries)

	Brunei Darussalam	Cambodia	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
Global Competitiveness Index Rank (/142)	28	97	46	21	75	2	39	65
1st pillar: Institutions								
1.02 Intellectual property protection	50	91	62	31	102	2	92	127
1.05 Irregular payments and bribes	32	117	103	43	119	3	79	104
1.06 Judicial independence	42	96	76	43	102	20	55	78
1.07 Favoritism in decisions of government officials	25	48	36	24	118	3	68	71
1.09 Burden of government regulation	31	34	44	8	126	1	45	113

1.11 Efficiency of legal framework in challenging regulations	52	48	61	14	118	8	54	73
1.21 Strength of investor protection	100	60	36	4	111	2	12	137
6th pillar: Goods Market Efficiency								
6.01 Intensity of local competition	63	88	89	26	47	33	52	62
6.02 Extent of market dominance	65	54	53	14	117	12	83	57
6.03 Effectiveness of anti-monopoly policy	74	70	53	25	98	11	77	85
6.11 Prevalence of foreign ownership	92	96	74	46	72	2	70	117
6.12 Business impact of rules on FDI	71	40	78	12	89	1	38	86

Note: Data are not available for Lao People's Democratic Republic and Myanmar.
Source: K. Schwab, ed., *The Global Competitiveness Report 2011–2012* (Geneva: World Economic Forum, 2011).

3. ASEAN Competition Laws and Integration

The economic goals of the AEC include the establishment of a single market and production base, which allows for the free flow of goods, services, capital, investment and skilled labor. The goal is not to establish a customs union as in MERCOSUR, but a region that is outward-looking and consistent with multilateral rules and commitments. Unlike the EU, ASEAN seeks to establish a single market without supranational institutions. Achieving this would, of course, require the elimination of both tariff and non-tariff barriers and other public barriers to trade. An additional goal is to be a market-driven "highly competitive region" (ASEAN Secretariat 2009, p. 2). Here, competitiveness could be interpreted to mean productivity; however, the (political) intent goes beyond the economic notion of productivity and represents ASEAN's aspiration to be perceived as an attractive 'single market' of about half a billion consumers. The AEC is ASEAN's response to the increasing economic and political importance of India and the PRC. A single ASEAN market could, in principle, provide an alternative to investors both as a host-location for foreign direct investment and a market for goods and services. In addition to these economic goals, the AEC incorporates political-security and social-cultural goals. It aims for example, to provide opportunities for small and medium-sized enterprises (SMEs), reduce poverty and income inequality within member states as well as between them. Table 5.3 shows the disparity in per-capita income across ASEAN member states.

3.1 Competitiveness, Competition Policy and Trade

The notion of a 'highly competitive *region*' alludes to geography and fits nicely into the competitiveness framework developed by Michael E. Porter who states that improving competitiveness is about raising productivity, as this ultimately determines the standard of living of a country (Porter 1990). Competition takes place between firms and not countries, but this does not imply that country or region characteristics have no impact on a firm's performance. Porter's work can be characterized as location-based competitive advantage. In other words, the proximate business environment at a location has a deep impact on location and other choices of firms. Location affects the segments firms may choose to compete in; it affects the choice of 'homebase' or the place where core product or process technology development takes

TABLE 5.2
ASEAN Governance 2010: Percentile Rank Among 213 Countries
(ranges from 0 (lowest) to 100 (highest) rank)

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam	Regional Average
Control of Corruption	78.5	7.7	27.3	13.9	61.2	0.5	22.5	98.6	46.9	33	45.8
Government Effectiveness	77.5	22.5	47.8	16.7	82.3	2.4	51.7	100	58.4	44	44.3
Regulatory Quality	82.3	35.4	39.7	17.7	71.3	1	44	98.6	56.5	31.1	41.1
Rule of Law	73.5	12.8	31.3	21.3	65.4	3.3	34.6	93.4	49.8	38.9	50.8

Source: World Bank — World Governance Indicators <http://info.worldbank.org/governance/wgi/index.asp> (accessed 10 December 2011).

Table 5.3
ASEAN Doing Business Rankings 2012

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Philippines	Singapore	Thailand	Viet Nam
Ease of Doing Business	83	138	129	165	18	136	1	17	98
Starting a Business	136	171	155	89	50	158	4	78	103
Protecting Investors	122	79	46	182	4	133	2	13	166
Enforcing Contracts	151	142	156	110	31	112	12	24	30
Trading Across Borders	35	120	39	168	29	51	1	17	68
Per Capita GDP 2011 Est.	49,518	2,286	4,668	2,659	15,579	4,111	59,937	9,693	3,355

Note: Doing Business ranks are from the IFC/World Bank and not available for Myanmar. Per capita GDP estimates are from IMF. These are PPP data expressed in US$ at current international prices. Myanmar: US$1,327.
Sources: IFC/World Bank — Doing Business <http://www.doingbusiness.org/> (accessed 10 December 2011). IMF World Economic Outlook Database, September 2011 <http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx> (accessed 11 December 2011).

place. Hence, (multi-national) firms choose where to locate different activities in the value chain and disperse them in a manner that provides some system based advantages. Where would Toyota locate its engine plant if it had a choice between Detroit and Vientiane? Or where would a biotechnology firm locate if it had a choice between Vientiane and Boston? The answers are obvious. Vientiane may not at this point be the best location for a biotech business perhaps because it lacks educated workers, research institutions and the appropriate intellectual property rights laws. Vientiane could however be the ideal location for some other industry for which these factors are not critical. Some locations allow firms in certain sectors or segments to make more productive use of the resources available in that locale — it is in this sense that locations (regions or nations) compete.

International trade and investment are intermediate indicators competitiveness. International trade allows countries to specialize in segments or sectors in which their firms are more productive and competing in international markets exerts more pressure on firms to upgrade their products to meet international standards. Exports play an important role in Porter's typology of industries and clusters. Porter makes a distinction between traded clusters and local service clusters. The market for traded clusters is not restricted by population and data for the United States show that traded clusters account for a higher proportion of national earnings than of national employment, in other words, traded clusters are relatively better at generating higher wages and therefore higher levels of prosperity. They also account for an overwhelming proportion of patents, so they are important for innovation.

Since the business environment in a particular location has an impact on firm performance, Porter devised the 'diamond' framework to assess the business environment. The diamond has four components: factor input conditions, demand conditions, related and supporting industries and the context of firm strategy and rivalry. Intellectual property protection and competition laws both belong in the 'context of firm strategy and rivalry' box in Porter's framework. Indeed any policies that promote rivalry, competition and innovation belong in the same box. However, it is important to note that these are just two of many factors that influence the business environment and therefore, the competitiveness of any location.

There are, of course, other economic rationales for competition policy. Healthy competition or rivalry leads to the provision of goods at the lowest possible cost. It also puts pressure on firms to upgrade via the adoption of new production techniques and to improve product quality. Freedom of entry and exit imposes discipline on incumbent firms. Since competition law and policy seek to prevent illegitimate business practices such as the abuse of dominant position and price-fixing cartels, aggressive enforcement ensures that consumers are able to buy products at the lowest possible prices, or at competitive prices. In this way, competition policy enhances welfare by maximizing both consumer and producer surplus. Of course, regardless of which argument one alludes to, before countries think of adopting competition policy, they have to be convinced that the market is the best institutional mechanism for organizing economic activity. The market and business are also central to Porter's approach. Competition policy then becomes another policy pillar — just like monetary and fiscal policy. Markets only work if participants play by the rules. Competition policy provides those rules.

The welfare enhancing goals of competition policy are domestic. The goal is to protect *domestic* consumers, not just from illegitimate business practices of domestic firms, but also perhaps of cartels formed in other countries by foreign or multinational firms located elsewhere that raise prices in the domestic market. It is domestic concerns that led countries such as Canada and the United States to adopt anti-cartel and anti-monopoly laws in 1889 and 1890 respectively. They were not 'rich' countries at the time. Most countries in ASEAN have competition laws or are considering adopting them, not due to domestic concerns but due to trade-related factors. In the case of Singapore, the push came from the bilateral FTA with the United States, which raised concerns about the dominant role of government-linked companies. Where does the state end and the market begin?[3] In the case of countries that presently do not have competition law, the push has come from the AEC. Of course this raises the question: why did these countries not feel compelled to protect domestic consumers prior to entering into bilateral or regional trade agreements? The answer clearly lies in the role of the state in most ASEAN countries. Indeed, the much-celebrated 'East-Asian Miracle' is more a narrative of state capitalism than of the primacy of markets. Market incentives aside, not too long ago, Singapore Telecommunications was not just a telecommunications firm, it was a 'valued national asset'. Indeed, during the partial privatization of the firm, every Singaporean got a share. Over time, of course, the company has become more like a regular telecommunications company and prices have declined dramatically since. National champions are built on the backs of *domestic* consumers. Malaysia has had its fair share of misadventures with government trying to 'marry' domestic banks, and more recently, to build a domestic automobile industry using all available instruments of protection along with subsidizing government officials to purchase the much-revered Proton. The Indonesia of the past was well known for the handing out of monopoly rights to dominant domestic businesses and business families with close connections to the political leaders at the time. In this type of environment, competition policy creates competition for government, government interests or individuals in power, as in the case of Myanmar, and who wants that? As both 'socialist' PRC and inward-looking India have discovered, the market is a superior mechanism for generating economic growth and prosperity.

Even though the need or pressure to adopt competition laws may have come from trade related considerations for most ASEAN countries, trade and competition make good bedfellows. Trade barriers, regulatory barriers, state-owned or state-sanctioned monopolies all represent public barriers to trade and commerce. When public barriers are removed through trade liberalization, deregulation and privatization, competition policy is essential to preventing private restraints from taking the place of public restraints. To take a simple example, zero tariffs do not ensure market access to foreign goods if domestic distribution channels are monopolized. Competition policy keeps the latter in check to ensure market access and the resultant benefits from tariff reduction. Competition policy contributes to growth and development, as the basis of competition is efficiency, and incumbent firms can no longer be supported by monopoly rents. As mentioned earlier, developing countries may be more susceptible to anti-competitive practices because they have smaller markets with less depth. This may be due to poor infrastructure, ineffective legal systems, large informal and non-traded sectors, more state intervention, or poor governance.

In developed countries, competition policy may serve efficiency goals, but, in developing countries, it also serves distributional goals. Fox (2007) provides numerous examples from Africa where cartels have fixed prices of basic necessities such as milk, sugar, fish and chicken. Fox contends that the anti-competitive practices of Mexican telecommunications firm Telmex raised the prices of incoming calls for migrant Mexican workers in the United States. Clearly the benefits of competition policy go beyond the economic objectives of AEC and have broader social impacts insofar as they contribute to reducing prices for staples and facilitating entry of SMEs. Fox argues that certain conditions must be met in order for competition policy to be effective in developing countries. Firstly, exemptions must not be overly broad. For example, firms that are favored by the state should not be immune, as this may restrict the domain of anti-trust and also encourage cronyism. Secondly, competition agencies should be free from political interference. Thirdly, they should be well funded and staffed by an adequate number of well-educated and well-trained individuals. Lastly, competition agencies should engage in active advocacy. Clearly, the ability to independently and effectively implement laws is critical for the desired results. In most instances, the costs imposed by cartels substantially outweigh the costs of funding a competition agency.

3.2 Competition Laws in ASEAN Countries

Cambodia is the only country without any competition law or laws with competition provisions. Indonesia, Malaysia, Singapore, Thailand and Viet Nam have general competition laws. In Lao People's Democratic Republic, competition law takes the form of a decree issued by the Prime Minister's Office in 2004, but it has not been implemented as yet. The constitutions of Myanmar and the Philippines contain anti-monopoly and fair competition provisions. Brunei Darussalam does not have a statute as yet. However, there are various competition provisions in sector-specific regulations on telecommunications. As would be expected, countries that do have general competition laws have taken a variety of approaches and some are more comprehensive than others. It is important to emphasize, however, that the differences between statutes are stark and in many instances countries have competition statutes, even though they appear not to acknowledge the primacy of markets in allocating resources, instead, priority is accorded to the State and the (economic) interests of the State. In these countries, investors and the domestic private sector will have to contend with both public and private restraints to trade.

The State-owned Economic Enterprises Law (SLORC Law 9/89) in Myanmar gives the government exclusive right to carry out pretty much all major economic activities; in extractive and natural resource industries, fisheries, transportation, finance, post and telecommunications, defence, broadcasting and electricity generation. What then is left to the private sector? Viet Nam allows firms to compete so long as they do not infringe the interests of the State. For *all* restrictive agreements, Malaysian law relieves infringing parties of liability if there are technological, efficiency or *social benefits*, which could not have been provided in the absence of the agreement and if the agreement does not result in a monopoly or in the elimination of all competition. A detailed survey of competition laws in ASEAN countries is provided in Appendix 5.1.

3.3 Lessons from Other Regional Agreements

There are hundreds of Regional Trade Agreements (RTAs) and a little less than half contain competition policy chapters or provisions. Cernat (2005) indicates that in 2004–05 there were between 250 and 300 RTAs in force and approximately 140 contained competition provisions. They were becoming particularly fashionable after the 1990s but recently have become less so, because of the post-Cancun hurdles in the WTO in relation to trade and competition.

This section reviews three agreements and the growing literature on the ineffectiveness of competition provisions in RTAs involving developing and emerging market economies. The EU is not included in the review primarily because AEC does not call for the establishment of a supranational competition authority. The three agreements reviewed here are NAFTA, MERCOSUR and ANZCERTA.

ANZCERTA provides an example of an ideal agreement, but one that also has unique cultural and other underpinnings. Its stated goal has always been policy coordination, but over the years there has been considerable harmonization in the area of competition law. MERCOSUR is a customs union, unlike ASEAN, the latter being an example of open regionalism. Nonetheless, MECOSUR is discussed here, as it provides an instructive example of a failed attempt at harmonization. Over time, the objectives have been watered down to strengthening cooperation, but some scholars suggest that even this minimal cooperation has not been successful.[4] NAFTA has its share of critics, but appears to be most relevant to ASEAN. Like AEC, it requires members to have competition laws, but does not require harmonization. Although the AEC Blueprint calls for "adherence to rules-based systems for effective compliance and implementation of economic commitments", it does not include any formal dispute settlement mechanism in the context of competition law (ASEAN Secretariat 2009, p. 21).[5] This attribute is also similar to NAFTA as the competition law provisions of Chapter 15 of NAFTA are not subject to formal dispute resolution. The following discussion illustrates that this creates its own set of problems, not so much in disputes between private firms, but in disputes involving private firms and state-sanctioned monopolies, whether publicly or privately owned. Given the dominant role of the state and state-owned enterprises in ASEAN, such disputes could very easily arise in ASEAN at some point in the future.

3.3.1 NAFTA

NAFTA does not prescribe a common or uniform set of competition rules for parties. There are five articles in Chapter 15 pertaining to competition policy and state-owned enterprises. Article 1501 (1) of the treaty only requires countries to have competition laws and to enforce and apply them in a non-discriminatory manner.[6] Article 1501 (2) requires parties to cooperate and consult on competition policy matters through means such as "mutual legal assistance, notification, consultation and exchange of information" so as to fulfill the objectives of the free trade area.[7] Further, Articles 1502 and 1503 allow the establishment of state enterprises including state-owned monopolies or private companies designated as monopolies by government so long as their actions are not inconsistent with Chapters 11 (Investment) and 14 (Financial Services). In addition parties are required, through regulation or administrative supervision to ensure that state-owned or state-designated monopolies do not use their monopoly position to (Article 1502 (d)):

> … engage, either directly or indirectly, … in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross subsidization or predatory conduct.

The problem is that, according to Article 1501 (3), parties do not have recourse to a dispute-settlement process for Chapter 15 disputes. As a result, both corporations and governments have sought other means of relief. Two examples are considered here. The first was a dispute between United Parcel Service of America (UPS) and the Government of Canada (Canada) and the second between the United States and the Mexican telecommunications monopoly Telefonos de Mexico (Telmex).

UPS vs. Government of Canada

UPS Canada provides courier and small parcel delivery services in Canada and, at the time, competed with Canadian companies such as Purolator, which was owned by Canada Post Corporation (Canada Post), a Federal Crown Corporation and regulated by the Postal Services Review Committee.[8] The Canada Post Corporation Act of 1981 provides Canada Post the exclusive privilege (or monopoly) to collect and deliver domestic letters otherwise known as first-class mail.[9] The statute also requires Canada Post to operate on a commercial basis and, at the very least, on a breakeven financial basis. Canada Post, of course, provides other (competitive) services such the delivery of parcels and courier services, areas in which it has competitors.

In the mid-1990s UPS alleged that Canada Post was competing unfairly, as it was using its first-class mail or monopoly product infrastructure such as sorting facilities and collection and delivery system not just for first-class mail, but also for its competitive products, such as parcels and courier services. In other words, the regulated monopoly product was used to cross-subsidize the provision of competitive services. Canada did nothing to stop this practice, so in the year 2000 UPS filed a NAFTA claim against Canada before an international arbitration panel under Chapter 11 of NAFTA (Jones 2006).[10] Chapter 11 deals not with competition issues, but with national treatment for investors. Article 1102 requires parties to accord national treatment or “treatment no less favorable, in like circumstances” than it accords to its own investors, to “investors” and to “investments of investors” of another party, with respect to “… the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”[11]

After 7 years, in May 2007, the arbitration panel rejected all claims by UPS and ruled in favor of Canada, suggesting that Canada Post’s decisions were commercial decisions in accordance with Chapter 15. In order to violate Chapter 15, they would have to have been government decisions. The Tribunal also compared the first-class mail services of Canada Post with the courier services of UPS and found that they were not in “like circumstances”, which is a requirement of Chapter 11.[12]

United States vs. Telmex

The Mexican telecommunications market was an important market for US companies. In 1999 Americans spent over US$1 billion on long-distance calls to Mexico. Despite attempts by the Mexican government to increase competition in the Mexican telecommunications market, US companies had a market share of less than 30%. Telmex controlled the local telecommunications market and more than 80% of the long-distance market. It was one of the most profitable carriers in the world in 1999, with profits of close to US$4 billion on revenues of about US$10 billion, a return on sales in excess of 40% (Rosenthal 2002). American telecommunications companies (WorldCom and AT&T) and industry associations (Competitive Telecommunications Association) expressed concerns about anti-competitive practices and lack of effective regulation of Telmex as early as 1998, as part of the annual review of trade agreements by the office of the United States Trade Representative (USTR).[13]

International Long Distance Rules governed telecommunications regulations in Mexico, including the accounting rates (for call termination) regime, which allowed accounting rates negotiated by the carrier with the largest market share (of international calls with a particular country) to be applicable to all carriers. At the time of the dispute, due to the dominance of Telmex in the Mexican market, rates negotiated by Telmex were applicable to *all* calls originating from *all* foreign countries (Kill 2011).

The American concerns regarding the Telmex monopoly would likely fall under Chapter 15 of NAFTA, but the United States chose to raise them in the WTO. While there are no multilateral competition rules in the WTO agreement, the telecommunications reference paper under the General Agreement on Trade in Services (GATS) contains anti-competitive safeguards. In July 2000, the United States requested WTO consultations with Mexico and, despite consultations in both 2000 and 2001, the parties did not reach a resolution. Eventually, the dispute settlement body established a panel in April 2002, which issued an opinion in favor of the United States in April 2004.[14] The US alleged that Mexico had violated Article XVII of GATS, which relates to national treatment, and Articles 5(a) and (b) of the Annex on Telecommunications, which require:

> … any service supplier of any other Member country is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions …

This includes purchase and lease of terminal equipment, private leased circuits, operating protocols and interconnection.[15] In addition the US asserted that Mexico had violated Articles 1.1 and 1.2 of the GATS Telecommunications Reference Paper, which contains principles of independent regulation, timely interconnection on non-discriminatory terms and competitive safeguards that seek to prevent anti-competitive practices in telecommunications, particularly by "major suppliers".[16] The United States presented three claims:[17]

> Mexico's failure to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis on cost-oriented, reasonable rates, terms and conditions …
>
> Mexico's failure to maintain measures to prevent Telmex from engaging in anticompetitive practices and in particular, that Mexico's ILD Rules … empower Telmex to operate a cartel dominated by itself to fix rates for international interconnection and restrict the supply of scheduled basic telecommunications services …
>
> Mexico's failure to ensure United States basic telecom suppliers reasonable and non-discriminatory access to, and use of, public telecom networks and services …

The panel ruled in favor of the United States and indicated that Mexico's measures did not conform to its obligations under GATS.

3.3.2 MERCOSUR

In March 1991, Argentina, Brazil, Paraguay and Uruguay, signed the Treaty of Asunción, which sought to establish MERCOSUR by 31 December 1994.[18] Like any common market, countries agreed to eliminate trade barriers among themselves while maintaining a common external tariff and trade policy with respect to third countries. In addition, Article 1 of the Treaty called for policy coordination in various areas and harmonization of relevant laws:

> … coordination of macroeconomic and sectoral policies … in the areas of foreign trade, agriculture, trade, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communication …
>
> The commitment … to harmonise their legislation in the relevant areas in order to strengthen the integration process.

Progress was slow, as Article 18 of the Treaty of Asunción called for the establishment of an institutional structure and administrative bodies prior to 31 December 1994. This was finally done on 17 December 1994, via the additional Protocol of OuroPreto, which set up various bodies such as the Council of the Common Market (CMC), the Common Market Group (CMG) and the MERCOSUR Trade Commission (MTC), which is essentially supposed to monitor and review the application of the common trading rules and regulations agreed upon by parties.[19] The decision of these various organs are supposed to be binding upon parties. Competition policy had to wait until December 1996, when countries signed the Fortaleza Protocol.[20] The goal of the Protocol (Article 2) was to prevent anti-competitive practices, which had a detrimental impact on trade between parties. Substantive provisions included price-fixing, bid-rigging, refusal to deal, predation, tied sales etc. However, there were no merger provisions. Instead, Article 7 called for the incorporation of common rules relating to regional economic concentration and dominance of the regional market within 2 years of the signing of the Protocol.

Although enforcement was the responsibility of national competition agencies, the two regional institutions that played a part included the MTC and Committee for Protection/Defense of Competition (CDC), the latter being composed of representatives of national competition authorities and/or ministries (Azavedo 2005). Any competition proceedings were to be initiated by national competition authorities, which must make an initial determination as to whether there were any regional or bloc-wide implications. If there were bloc-wide implications, then the case was referred to the CDC, which could either terminate the inquiry or, using a rule-of-reason approach, establish guidelines for the relevant antitrust market, and the evidence and analytical criteria to be employed.[21] The problem, however, was that regional bodies such as the CDC worked on the basis of consensus, and any party could block a decision.

Interestingly, the Fortaleza Protocol was ratified only by Brazil and Paraguay and the latter still does not have a competition law. MERCOSUR has now moved to the other end of the spectrum — from harmonization and regional competition bodies to agreements of cooperation, exchange of information and consultation between national competition agencies. Botta (2010) indicates that not only was the Fortaleza Protocol "de facto unenforced", it has been "abrogated" by a 2010 Decision by the CMC (Botta 2011, pp. 10–11). The 2010 Decision or Agreement for the Protection of Competition in MERCUSOR did not need to be ratified by parties and just sought to strengthen cooperation. Surprisingly, Botta (2011) indicates that even this minimal level of cooperation has not been successful because of:

> … the lack of mutual trust among these national institutions [National Competition Authorities], mainly due to the different level of development of competition law enforcement in the different MS [Member States]. (Botta 2011, p. 13)

Botta (2011, p. 15) concludes:

> A regional enforcement system based on a mechanism of cooperation among different NCAs [National Competition Authorities] can be successful only if the NCAs have achieved a comparable level of development in competition law enforcement.

3.3.3 ANZCERTA

ANZCERTA came into force in 1983 and is an excellent example of a WTO-consistent trade agreement and of harmonization of competition laws, even though the initial commitments and obligations were quite limited.[22] The treaty sought to eliminate barriers to trade between Australia and New Zealand "in a gradual and progressive manner under an agreed timetable and with minimum disruption; and to develop trade … under conditions of fair competition".[23] With regard to harmonization, member states undertook to:[24]

> … examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labeling and restrictive trade practices; and
>
> … where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements.

Despite this somewhat limited commitment, over the years there has been harmonization in various areas of Business Law via a Memorandum of Understanding (MOU) signed in 1988, which was replaced by a 2000 MOU on coordination of business law. The 2000 MOU was most recently replaced by one signed in 2006.[25] Both more recent documents recognize that coordination is multifaceted and need not involve adoption of identical laws and statutes:[26]

> An array of approaches exists to achieve the goal of increased coordination in business law. Both Governments recognise that one single approach would not be suitable for every area, that coordination is

> multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. In working towards greater coordination, the efforts of both Governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.

In the area of competition law, some degree of similarity existed prior to the signing of these MOUs. The 1986 Commerce Act of New Zealand was based to a considerable extent on the 1974 Trade Practices Act of Australia (Round et al. 2005 p. 50). Over time, close cooperation between competition agencies of the two countries has resulted in similar approaches and interpretations. Of course, the MOUs also led to legislative changes in both countries. For example, in the early 1990s, legislation abolished anti-dumping controls and both countries modified their respective competition legislations to allow competition agencies in either country to investigate misuse of market power, predation and other anti-competitive behavior regardless of national boundaries. The "trans-Tasman impact market" could be any market within Australasia; national borders were effectively eliminated (Round et al. 2005, p. 41). Further, either the Federal Court of Australia or the High Court of New Zealand could sit in the other country and the two competition agencies could act on each other's behalf (Round et al. 2005, p. 26). The move toward greater cooperation in all areas, including competition law, continues and most recently, in August 2006, the Australian Competition and Consumer Commission and the New Zealand Commerce Commission signed a cooperation protocol for the review of mergers.

ANZCERTA is a unique model and its success has been attributed to similarities in the level of economic development, history, institutions, language, and culture; geographic proximity; a shared economic approach, and a belief in market-oriented economies and competition. In addition there appears to be the political will and patience to work through an iterative process toward greater coordination and harmonization without a supranational or a dispute-settlement body.

3.4 RTAs and Competition Provisions

Many RTAs contain competition provisions particularly since the 1990s. As Cernat (2005) indicates, the application of competition law in a regional trade context can have trade creation or trade diversion effects. If members apply competition laws in a non-discriminatory manner across the board, then there will be trade creation, whereas if they are only applied in a discriminatory manner to tackle anti-competitive practices insofar as they affect trade between members this may have a trade diverting effect. Cernat finds that though developing and emerging market countries have been eager to sign RTAs with competition policy provisions, "little action has been recorded in the implementation phase of such CRPs [competition related provisions]" and concludes that countries appear to be more eager to sign such agreements rather than implement them (Cernat 2005, p. 31). Though Cernat does not provide reasons for the lack of implementation, other scholars suggest that there are limits to the effectiveness of competition policy provisions, particularly if competition officials are not involved in negotiations. Competition officials find more informal methods of cooperation to be more effective than formal cooperation rules (Alvarez et al. 2005).

More recently, Gal and Wassmer (2012) come up with similar findings. They suggest that despite the proliferation of regional competition agreements in developing jurisdictions, these have been problematic and have not enhanced the enforcement of competition law in the respective regions. They suggest that this may be due to financial and human resource constraints and a weak competition culture.

Sokol (2008) conducted a survey of regional free or preferential trade agreements to which at least one Latin American country was a party. Many of these agreements include chapters on competition policy.[27] Sokol contends that conventional wisdom overstates the effectiveness of these chapters. Many of these chapters lack binding dispute settlement. Sokol found that all Latin American preferential trade agreements (with competition policy chapters) lack binding dispute settlement for core issues such as mergers, collusion and monopolization. The determining factor for the inclusion of competition chapters appears to be whether or not some or all parties had antitrust laws at the time they signed the agreements. The decision to include competition policy chapters is not a result of power relationships, so a substantial number of American agreements lack competition provisions. Sokol interprets the American position as one where it does not oppose the inclusion of competition policy chapters so long as they are non-binding. Anti-competitive practices may also be addressed in the IP and services discussions. Interestingly only three of the 36 agreements lack dispute settlement in IP and none in services. Thus Sokol concludes that competition policy is treated differently from other areas of regulation and suggests that this may be due to the fact that competition policy is not covered in the WTO agreement whereas IP and services are. The WTO serves as a floor for coverage; in other words, countries will not go below what they agreed to in the WTO.

In essence, countries may enter into non-binding agreements because there are no globally agreed principles of competition and there is a lack of convergence even between the EU and the United States. The difference between the treatment of antitrust and IP could be because the transaction costs of dispute resolution may be higher for antitrust than for IP violations, where detection is easier and violation may be an issue of the level of enforcement. Sokol offers a number of reasons as to why non-binding agreements may be of value. Firstly, they could play a signalling role. They may signal to other countries that a country plays by the rules, or similar rules based on the norms of competition. They could also serve as a signal to foreign investors that the country is market-oriented and pro-investment. Secondly, such agreements could have symbolic value for domestic constituencies as to the importance of regulatory liberalization and country competitiveness. Thirdly, non-binding agreements could promote relational contracting between competition agencies, in other words; cross-border disputes may be better resolved through bilateral discussion rather than through trade remedies. Lastly, this could be due to the fear of adverse outcomes. In summary, then, non-binding competition agreements could still be of value so long as the costs of negotiating them do not outweigh their symbolic value.

4. ASEAN Intellectual Property Laws and Integration

Innovation is the main driving force in economic growth. Innovation includes not only invention but also the diffusion and absorption of new ideas, knowledge and technology. IPRs give inventors and artists the right to exclude others from using their ideas, expression, etc. This allows IPR holders not only to appropriate the returns from their innovation but also, by creating a legal property right, allows them to transfer their innovation to others who can better produce or distribute the resulting products or services by sale or licence.

IPRs are usually classified as either industrial or artistic and literary property. The former includes patents but also industrial designs, trademarks, geographical indications and trade secrets, and the latter covers copyright. There are several other 'tailor-made' IPRs covering database protection, integrated computer chips, and plant breeder rights.

Knowledge has public good characteristics and is usually *non-excludable*. If a new technology is valuable it will be copied unless it can be protected. This reduces the original innovator's profits, so the incentive to engage in innovation is reduced. Knowledge is also *non-rival*. One person's use of the knowledge does not diminish another's use, so there is no scarcity value. For economic efficiency then, once created, knowledge should be available to all at the marginal cost of transferring it, which may be close to zero. But, access to knowledge at its marginal transfer cost reduces the rewards to innovators and thus the incentives to innovate. While IPRs provide incentives for inventors to create new knowledge and for artists to create new expressions exclusivity comes at a price: limited dissemination of the technology or expression during the life of the IPR protection. At the single-country level, there is a trade-off between promoting innovation (long-term dynamic efficiency) and its dissemination (short-term static efficiency). IP protection, given in the short term to encourage innovation, leads to temporarily higher prices and therefore less access. So in a closed economy, governments have to make a policy choice between short- and long-term effects.

When innovation occurs in one country and is sold in another, this welfare trade-off becomes more complicated. IP laws are national, and governments naturally focus on maximizing their own country's economic welfare. A small number of developed countries produce most innovation. Their interest is in having strong IPRs in the countries to which they sell. On the other hand, for developing countries, with limited research and development, imitation and adaptation of new technology is more important than its creation; thus their interest is in having weak enforcement or non-enforcement of IPRs. For a less developed country the introduction of IPRs can reduce the profits of local imitators and increase the profits of the innovator in the developed country, a difficult idea to sell to locals in a developing country.

The welfare effects of harmonizing IPRs across countries at different levels of innovation (or development) can be illustrated with the help of

FIGURE 5.1
Welfare Effects of Harmonizing IPRs

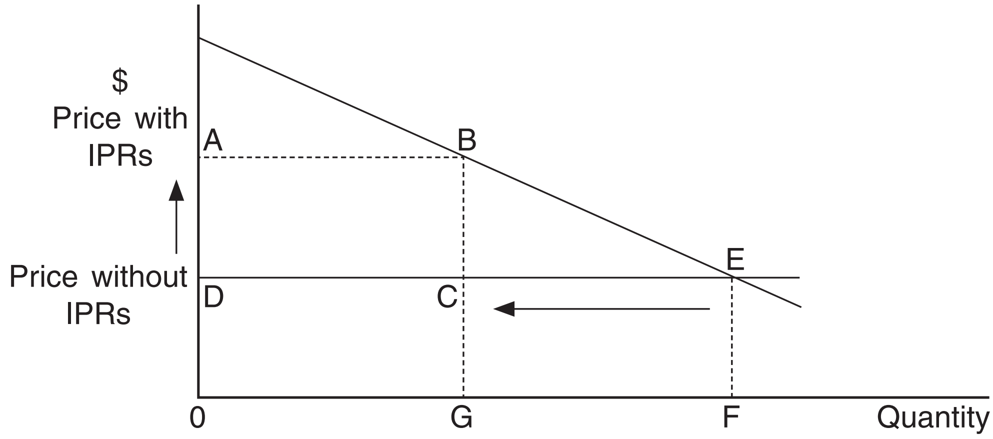

Figure 5.1, which assumes that research and development are undertaken in Country I and the resulting products are sold (the technology is diffused) in Country W — which, for simplicity, is initially assumed not to have IP laws (or does not enforce them).

Firm X is the innovating firm in Country I. Harmonization means that Country W will introduce IPRs similar to those in Country I; Firm X can now also seek patent protection in Country. W. If it is assumed that prior to harmonization, Firm X's product was imitated and produced under competitive conditions in Country W; then the following occurs. With harmonization, Country W loses all domestic production (OF) and imports the quantity OG from Firm X in Country I. Because prices have risen in Country W there is a consumer welfare loss of ABED, of which ABCD is transferred to Firm X in Country I. Of course there are other possibilities. For example, Firm X could invest in Country W and produce OG there, or Firm X could licence a firm from Country W to produce (which could lead to less or more production in Country W depending on the licence fee). For both foreign direct investment (FDI) and licensing, the introduction of IPRs could also lead to research and development in Country W to adapt the product or process for local conditions. In addition, there could be exports from Country W due to preferential access in other countries in the region that are part of a regional trade agreement. Overall the net effect of the introduction of IPRs depends on a range of factors, including the capacity of Country W to absorb new technologies, which in turn depends on skills and educational attainment. However, it is likely that firms in country with weak IPRs may have difficulty moving beyond imitation (Maskus 2000).

In summary, there are a number of possible economic effects from introducing IPRs or harmonizing and enforcing them to a higher standard. These include:

1. A loss of employment in any pre-existing imitative industries. Due to the closure of the imitators, the innovator has greater demand in the importing country for their (now) IPR protected-product. Maskus (2000) calls this the *market-expansion effect* — obviously, market expansion across borders.
2. Possibly greater innovation in the importing country, which leads to both locally made goods and services replacing imports and more exports, but the evidence for this is weak (see Lerner 2002, for example).
3. The innovator having greater market power in the importing country. This allows the exporting IPR owner to charge a higher price. Maskus (2000) calls this the *market-power effect*. Maskus and Penubarti (1995) suggest that the market-power effect is probably greater for countries with a low capacity to imitate with the opposite likely in countries with a high ability to imitate.
4. Possibly greater research and development by developed countries on adapting and tailoring their products to developing country problems, but this is only likely if there is sufficient demand and income in developing countries.
5. A greater willingness to invest in the importing country or form a joint venture or licence production of now IPR-protected products, processes and expressions.

The welfare effects of IPRs in an open economy context are mixed, as is the empirical evidence on the impact of IPRs on trade, investment, and growth. This is by no means a new debate. Machlup and Penrose (1950, p. 9) suggest that the debate on patent protection in nineteenth-century Europe was ideologically linked with tariff protection. Dutfield (2003, p. 53) corroborates this view, suggesting that those who opposed patents "denounced them as anachronistic and unfair monopoly privileges that should be dispensed with". Now it is generally acknowledged that IPRs rarely create monopolies, but their owners justifiably use them to maximize the profits from innovation. But how do IPRs affect trade and growth? A recent survey by Bessen and Meurer (2008, pp. 20–21) concluded that:

> ... with the cross-country studies in particular, the quality of general property rights institutions has a substantial direct effect on economic growth. Using the same methodology and in the same studies, intellectual property rights have at best only a weak and indirect effect on economic growth … the positive effects of patents appear to be highly contingent.

Bessen and Meurer (2008) also conclude that less developed countries benefit less from patents, but those with higher levels of trade benefit more.

Insofar as FDI and technology diffusion are concerned, Kiriyama (2012, p. 5) concluded, after surveying the empirical literature, that:

> ... the state of domestic intellectual property legislation and enforcement has improved in recent years, and evidence suggests that this has facilitated technology diffusion through various channels, including FDI and trade.

Another recent paper, by Breitwieser and Foster (2012, p. 55), summarizes the available empirical evidence on IPRs and technology diffusion. The empirical evidence examined deals mainly with patents. They conclude that:

> … views on the importance of IPR protection tend to be polarised. On the one side, it is believed that stronger IPR protection can encourage innovation, technology diffusion and enhance growth. On the other it is thought that stronger IPR protection leads to monopoly power for patent holders, reduces the incentive to innovate and limits the diffusion of knowledge. The evidence reviewed supports neither claim.

Similarly, the UK Commission on IPRs (2002, p. 23) concluded the evidence that IPRs provide incentives for FDI is lacking:

> If this was the case, then large countries with high growth rates but weak IPR regimes would not have received large foreign investment inflows in the past and even now. This includes many of the East Asian and Latin American economies which have received the bulk of such flows. If the question is addressed in terms of what factors are most important in determining foreign investment, it is quite common for IPRs to be omitted altogether.

They do find, however, that IPRs in developing countries are important in "IPR sensitive" industries such as chemicals and pharmaceuticals.

The Commission Report also indicates that developed countries traditionally regard IP laws as part of their industrial policy, establishing and changing them to suit their own stages of economic development. On the relationship between IPRs and growth, the Commission concluded that (p. 22):

> … in most low income countries, with weak scientific and technological infrastructure, IP protection at the levels mandated by TRIPS is not a significant determinant of growth. On the contrary, rapid growth is more often associated with weaker IP protection.

International agreements on IPRs such as TRIPS, by setting minimum standards, have already harmonized IP laws across countries and indeed within ASEAN, at least on paper. But there is a gap between TRIPS minimum standards and the actual enforcement of those standards.

4.1 The TRIPS Story

Research-intensive developed countries have an interest in lobbying for increased IP protection in countries in which they sell or in which copies are sold (which may be imported back into the IP-originating country reducing prices there and creating incentives). IP laws started to internationalize and harmonize from the 1960s, as developed countries argued that developing countries needed sound IP laws to attract foreign capital and technology. Over time, developed countries sought to extend overseas the IP protection given in their own countries by setting minimum international IP standards, which arguably benefitted developed countries more than developing (Finger 2002).

For a long time developed countries lobbied through the World Intellectual Property Organization (WIPO) for better worldwide IP protection, but the developed countries failed to achieve the IP outcomes they wanted (Drahos 1998). At the beginning of the Uruguay Round the US argued for the introduction of IPRs as part of the trade negotiations agenda, since its proposals could be defeated by coalitions of developing countries in other forums such as WIPO and UNCTAD (Drahos 2002).

The Uruguay Round led to the TRIPS Agreement, which set minimum IP standards for WTO Members covering copyright, patents, trademarks, geographical indications, industrial designs, the layout designs of integrated circuits, protection of and undisclosed information, including trade secrets and test data, and the control of anti-competitive practices in licences on the basis that IPRs affect trade flows.

TRIPS incorporated provisions from pre-existing international agreements on IPRs, such as the Paris and Berne Conventions administered by WIPO. However, TRIPS also added provisions dealing with enforcement and a dispute resolution mechanism, which were lacking in previous treaties. Of particular importance was the extension of the principles of 'national treatment' and 'most favored nation' to all IPRs.

Developing countries agreed to accede to TRIPS for several reasons: pressure from developed countries (mainly the US and EU); a belief that there would be greater access to developed country markets particularly for agriculture and textiles; some lobbying by innovators in the developing countries themselves; and a belief that stronger IP protection would lead to increased technology transfer through foreign direct investment and increased technology licensing.

However, TRIPS does not fully harmonize international IP laws as IPRs still can be tailored to a country's level of development. The Preamble to TRIPS notes that the public policy underpinning includes *development and technological objectives*. The advent of TRIPS means that countries now find it difficult to adapt IP laws to suit their stage of development through imitation like developed countries had previously done. Instead, countries must now place less reliance on imitation and instead rely primarily on using IPRs to develop domestic innovation and to increase FDI and cross-border IP licensing. TRIPS recognized (Article 40) that IP licensing and other practices can have "adverse effects on trade and may impede the dissemination of technology". As a result members have discretion to specify "in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market".[28]

All ASEAN countries are members of TRIPS, apart from the Lao PDR, which has observer status and is currently negotiating access, and have enacted IP laws based on imported Western models. Little attempt has been made by ASEAN countries to develop IP laws from the ground up based on their different stages of economic development or institutional capacity.

But since TRIPS was signed, developing countries have tried to dilute the provisions. For example, to clarify the scope of TRIPS with respect to medicines, a new round of talks began that resulted in the Doha Declaration in 2001. One outcome of the talks was an agreement that TRIPS should be interpreted in light of the goal "to promote access to medicines for all".[29] In addition, the WTO Council extended (by more than 7 years to July 2013) the period for least developed countries to implement TRIPS commitments. Least developed countries need not protect pharmaceutical products until 2016.

While TRIPS has uniform protection standards, it does not provide for a uniform enforcement system. Articles 41 to 47 require TRIPS members to set up national enforcement systems for the rights agreed to in TRIPS. Members must ensure that IPR holders have fair and equitable enforcement procedures. The mechanisms must include the authority to require the production of evidence and remedies such as injunctions and compensation for damages. But as Antons (2011, p. 2) notes, procedural harmonization can be a challenge in developing countries:

> … the problems of harmonising procedural rules in developing Asia are much more severe than those experienced in Europe and North America, with law in Asia drawn not only from different traditions, but also from different colonial periods, and with a judiciary that is often struggling to free itself from political influence and from a negative image of being corrupt to some degree.

In any event, increasing IP protection takes time. Harmonization is even more difficult in practice given that IP laws are generally national in nature. For example, even the European Union has not achieved full IP integration; most patent and utility model law is solely national, while trademark, design and copyright law has been harmonized to a degree through EU Directives. Only community trademarks and community designs law are EU-wide (Antons 2011, p. 5). The European efforts toward harmonization of IP laws are discussed next.

4.2 Harmonizing IP Laws in the European Union

As an economic union, Europe has had the most experience in harmonizing IPRs. The task has not been easy. This section provides a brief discussion of the path the EU has taken toward harmonizing each type of IPR. This provides a background to the likely IP harmonization issues ASEAN will have to deal with.

Patents give an exclusive right to the inventor of a new idea the right to stop others from making, selling, distributing, importing or otherwise using the invention without permission for a period (TRIPS provides for a minimum of 20 years from the filing date of the patent application). Patents need to be registered. Industrial designs protect aesthetic aspects such as symbols or colours. TRIPS requires a minimum of 10 years protection. The idea of an EC patent was considered when the EC was set up in 1957. In 1973 the European Patent Convention (EPC) was signed in Munich. Initially, the intent was to promote a European system of examination rather than using it to promote trade between member countries. European patents are only granted to inventions that are new, involve an inventive step and are susceptible to industrial application. Changes were made to the EPC in 2000 (EPC 2000), which came into force at the end of 2007. The EPC 2000 provided for a single, centralized process for patent grants. As Seville (2009, p. 94) puts it:

> A successful application will result in single grant of a bundle of national patents in each of the countries designated by the applicant. Each European patent has, in each of the countries for which it is granted, the effect of a national patent. Its term is 20 years from the application filing date.

However, issues of validity and infringement are still matters for the national courts as the EPC harmonizes the national IP laws only up to the point of grant of the patent. There is no appeal from the national courts to a European Court or Tribunal. As a result, a European patent may be interpreted differently in different member countries. This could be an important issue for ASEAN in the future.

A working party was set up in 1999 to address the fact that there was no single dispute resolution mechanism. In 2003, a draft European Patent Litigation Agreement (EPLA) was proposed, which would commit member states to an integrated judicial system, including uniform rules of procedure and a common appeal court for patent disputes.[30] The Council of the European Union proposed a Community Patent with its own Patent Court (EUPC) in 2009. To date, nothing has happened.

Trademarks give an exclusive right to use distinctive signs to identify the source of the product. Trademarks, unlike patents, do not promote research and development directly but mainly exist to protect the producer's reputation and to encourage product development. By doing so, they also serve a consumer protection function by preventing consumers from being misled. Usually, trademarks can be renewed indefinitely. An international registration of marks system (the Madrid system) is administered by WIPO. This system allows a trademark owner to file one application with their national trademark office. Once registered, the mark is protected in the countries chosen by the applicant, unless the trademark office of any of those countries refuses protection within a certain time.

The first step in harmonizing trademark law within the EU was the 1988 Trade Mark Directive, which harmonized the conditions for obtaining and continuing to hold a registered trademark. Next, Regulation 40/94 on the Community Trade Mark [1994] OJ 11/1 introduced an EU trademark. This gave uniform protection in all countries with a single registration, but individual country trademarks coexist and are often more important, given difficulties in demonstrating community-wide eligibility. Though the EU has been relatively successful in harmonizing trademark law, there is some lack of clarity in the legislation and, therefore, a considerable amount of case law.

Copyright covers copying and not independent creation. It covers literary and artistic work, music, television, broadcasts, computer software, databases, advertising ideas and multimedia products. TRIPS requires that copyright must last for at least 50 years after the death of the author (70 years in the US and the EU). Copyright must be granted automatically and not based on registration. Computer programs must be regarded as "literary works" under copyright law and so receive the same terms of protection.

Copyright is difficult to harmonize, because it covers such a broad range of subject matter. There is no EU copyright. Instead, there are a number of directives dealing with particular areas (for example, databases, satellite broadcasting and rental rights). However, the Commission is interested in examining the issue of copyright in promoting competition and innovation through the exploitation of cross-country rights. There is a difference between common law and civil law countries with respect to copyright. The common law seems mainly concerned with economic rights while the civil law usually gives priority to the natural rights of authors. Civil law makes a distinction between author's rights and 'entrepreneurial' rights. However, both systems have much in common.

Copyright protection is affected considerably by changes in technology. For example, digitization allows for low-cost, almost perfect copies. International copyright protection started because of the lower costs of international travel in the nineteenth century. Copyrighted English books would be sent to the United States and re-published at a lower cost, because the publisher had only to pay the printing costs. Pressure by authors and artists led to the Berne Convention in 1886 based on the principle of *national treatment*, that is, it required signatories to recognize the copyright of works of authors from other signatory countries in the same way that it recognized its own authors (the United States was not a signatory). Initially, the Convention only covered literary and artistic works, including cinematographic. No protection was provided for performers, sound recording, broadcasters or publishers. A separate agreement was negotiated (the Rome Convention 1961), dealing with performers, producers of phonograms and broadcasters. TRIPS further harmonized and raised the level of copyright protection.

Another important IPR issue for economic integration is the protection of designs. Design refers to the appearance and composition of an article and to any preliminary drawings or models. It can include product or packaging design, web design, software design, graphic design, theatre design, colour design, architectural design, automotive design, fashion design, environmental design, furniture design, industrial design, interior design, etc. Patent protection is rare for designs, but trademarks or copyright may be used to protect designs. Lack of harmonization of design IPRs can affect the free movement of goods.

In 1991, the European Commission issued a Green Paper, which proposed a Community Design system (somewhere between patent and copyright). A Directive was adopted in 1998 to harmonize design IPRs including registration, the extent and time of protection and the conditions for refusal. Remedies and enforcement were left to national laws. Regulation 6/2002 on Community Designs followed [2002] OJ L/1. The EU has acceded to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, which allows for a single application at WIPO for protection not only within the EU, but in all countries that are signatories to the Geneva Act of the Hague Agreement. However, the breadth of designs has led some EU countries to use different protection through copyright, patent and *sui generis* design protection. While the conditions for obtaining registration, and the extent and terms of protection have been harmonized, many procedural elements are left to individual countries.

Trade secrets allow firms to protect their research and development without disclosing the property (as required by patents). Trade secrets are protected, as long as they remain secret and are protected by laws against unfair acquisition or unauthorized disclosure. Trade secrets help to ‘fill in the gaps’ in the protection given by statutory IP protection. The EU does not have any specific legal provisions to protect trade secrets or undisclosed information. TRIPS (Section 7) provides for minimal legal standards for trade secret protection, leaving individual countries considerable discretion. All that is required is that the secret information has commercial value because it is secret, and the person controlling the information has taken reasonable steps to keep it secret. Because of its secretive nature, there is potential for such information to be used anti-competitively.

4.3 Integration of IP Laws in ASEAN

EU integration saw IPRs as playing an important part in its overall regional growth strategy, called the Lisbon Strategy, which called for the harmonization of IP laws to establish an *internal market in knowledge*. Like the EU, ASEAN also sees an important role for IPRs in fostering economic growth. In particular, according to the ASEAN IP Rights Action Plan 2011–2015, ASEAN seeks to accelerate the pace of IP asset creation and commercialization so as to transform the region into one where growth is driven primarily by innovation. More importantly, it seeks to attract foreign direct investment and, to that end, sees the need to ensure the protection of IPRs of trading partners. However, nowhere does the Plan explain how IPRs actually help economic integration, particularly with differing standards of actual protection (harmonization is ruled out). Nor is it explained how improved protection of trading partners’ IPRs will encourage FDI. As summarized earlier the evidence on the relationship between IPRs and FDI is not conclusive. Even if FDI is encouraged the investment need not necessarily involve technology transfer, which stresses the importance of looking at IPRs as part of a broader technology policy.

Like the EU, ASEAN has worked on IP integration issues for some time. The ASEAN Working Group on Intellectual Property Cooperation

(AWGIPC) has served as the consultative body for ASEAN cooperation since 1996. The ASEAN Project on the Protection of Intellectual Property Rights (ECAP III) has followed the EC-ASEAN Patents and Trade Marks or ECAP (1993–1997) and the EC-ASEAN Intellectual Property Rights Co-operation Programmes (ECAP II 2000–2007), which were funded by the EU (€13.8 million) and the European Patent Office (€1.5 million). The 4-year ECAP III program started in January 2010 with an additional funding of €5.1 million from the EU and European Patent Office. The goal is to enhance regional integration "by strengthening institutional capacity, and legal and administrative frameworks for protecting IPRs in the region".[31]

More recently, the AEC Blueprint includes several measures that relate to IP protection, including the full implementation of the ASEAN IPRs Action Plan 2004–2010. Under that plan and the more recent ASEAN IPRs Action Plan 2011–2015, ASEAN members have set out a number of priority goals and actions. These include the improvement of IP legislation, protection and enforcement; accession to international IP treaties (Madrid Protocol); establishing an ASEAN filing system for design; promoting regional cooperation on traditional knowledge, genetic resources and cultural traditional expressions; consultations and information exchange among national IP enforcement agencies; the simplification and harmonization of IP registration and procedures.

Harmonization of IP laws is central to the European approach and, as discussed earlier, it has yet to be achieved on the enforcement side. ASEAN rules out harmonization. It takes a 'soft-law' approach to integration, that is, commitments are declarations of political will, often voluntary and non-binding, rather than legally binding agreements backed up by a binding dispute resolution mechanism. This allows member states to implement rules when they are able to do so and to incorporate differences that reflect national conditions. This is the approach used for IP. The ASEAN IPRs Action Plan 2011–2015 states (p. 2) that:[32]

> Instead of trying to formulate a single set of laws and designing a harmonised regional system in IP, the AWGIPC has crafted its own means of integrating through a higher level of cooperation by undertaking programmes and activities together, with AMSs strengthening linkages with each other to improve their capacity and participating in global IP structures, subject to the capacity and readiness of each AMS.

Harmonizing both rules and enforcement is an important element of reducing trade barriers. The latter is difficult, particularly in developing countries. Europe only started on the path of harmonizing enforcement in 2004. A 2004 European Commission Directive noted that harmonization "promoted the free movement of goods between European Union countries and made the rules more transparent, the means of enforcing intellectual property rights have not been harmonized at all until now". The Directive was aimed at harmonizing enforcement and promoting innovation and business competitiveness.[33] Given ASEAN's relative infancy and major differences in levels of economic development, harmonized regional standards and enforcement are a long-term agenda item, one that could nevertheless lead to major benefits in terms of development of a regional market. These include:

1. Better protection and enforcement of IPRs will mean greater confidence that goods or services produced in one ASEAN country can be sold in another without copying, leading to more investment not only by non-ASEAN countries but also by ASEAN companies as well. However, in the short term, more developed countries in ASEAN may gain more.
2. Reduced cross-border transaction costs for the sale and licensing of IPRs.
3. A reduced level of national 'strategic' use of IPR regimes within ASEAN; for example, granting wide patents to local industry but giving narrow protection to other countries in ASEAN and elsewhere.
4. A consistent level of protection and enforcement within the region will lead to FDI into ASEAN being made on the basis of the comparative advantage of countries rather than just the IP regime.

Without harmonization, those seeking IPR registration *or* enforcement within ASEAN will have different requirements in each country. This may impact on FDI to the region. Since TRIPS sets a minimum level of protection, there seems little point in setting ASEAN IP standards at a higher level. The ASEAN commitments are to greater cooperation, which over time should be able to resolve the institutional and public policy issues involved with integration. The main problems are likely to be the use of national IP laws to limit intra-ASEAN trade (which could be corrected by each ASEAN country allowing for parallel importation) and limiting private anti-competitive conduct which inhibits intra-ASEAN trade and integration (which, due to problems of proof and the impact of anti-competitive conduct, which differs in different ASEAN countries can only be resolved by cooperation or an ASEAN-wide competition law). This is discussed in the next section.

5. Policy Issues in the IPRs and Competition Law Intersection

IPRs give a property right over an idea, expression, trademark, commercial secret etc. It is appropriate, then, that IPRs be subject to competition law as are other property rights. Should competition law treat IPRs in exactly the same way as real property rights? This has been the subject of considerable debate in developed countries in the last 20 years or so as IPRs have become more important to their economies.

It should not be surprising that competition law and intellectual property laws overlap. Competition laws are concerned with maintaining competition. Intellectual property laws protect against copying, which may provide some market power, but help competition by allowing competition from follow-on substitute products. Generally, developed countries do not give IPRs immunity from competition law but do allow for some differences in treatment from normal competition laws. As previously mentioned, intellectual property law is mainly determined by international treaty (TRIPS), while competition laws are determined nationally. Article 8.2 of TRIPS says, "… appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of knowledge."

The anti-competitive use of IPRs can be divided into three main types:

1. Strategic conduct by firms in setting too wide a scope for IPRs due to deficiencies in the procedures for examining and granting the IPR. This is mainly a problem with patents, where patent applications may be given too easily or too broadly and so are used to block other beneficial patents. Differences between ASEAN

countries in patent grants could lead to disputes. Harmonizing registration systems (for patents and trademarks) would reduce future conflicts.

2. Where the IPR grant is correct but *used* in a way that limits competition in either the product market, innovation (licensing) market or a research and development market; for example, a dominant firm tying an unrelated good or service X, which reduces competition in the market for X.
3. Where there is abusive enforcement of IPRs by either ASEAN or non-ASEAN countries; for example, a firm with considerable resources prevents, improperly, a less well-resourced firm from exploiting a new idea by predatorily claiming the small firm's patent has infringed an existing patent. The only solution here is rigorous IPR examination systems and sophisticated courts. The Action Plan is, by stressing institutional development, likely to address this problem.

Each problem is discussed in turn.

5.1 Problems in the Procedures for Examining and Granting an IPR

While the boundaries of copyright protection are clear, patent boundaries are usually vague and settled only through expensive litigation. Jaffe and Lerner (2004, p. 6) describe how the US patent system:

> … provides incentives for applicants to file frivolous patent applications, and for the patent office to grant them. It likewise encourages patent holders to sue, and those accused of patent infringement to give in and pay under threat, even if the patent is of dubious validity.

Uncertain patent boundaries affect the ability of others to improve products and processes. These could be improvements that better suit a country's circumstances, such as the development of drugs for tropical conditions. Uncertainty also allows firms to use a number of strategies, such as making a broad claim (i.e., establishing a 'beachhead' like planting a flag on an island claiming the whole island). Firms could set up a number of narrow claims with gaps in between, which a would-be patentee would have trouble negotiating, or build a cluster of patents around a new technology (called a 'blanket' or 'flood' strategy). Challenges to these large numbers of patents are much costlier to litigate.

Externally imposed regulation can also provide the holder of an IPR with market power. For example, environmental regulations requiring the best or cleanest technology will limit competition from older technologies. Countries can try to stifle imports by setting technology standards best suiting local companies. Or companies in a country could agree to an industry-wide technology standard that favors their own technology.

In dealing with the potential anti-competitive impact of patent grants, the OECD has recommended a number of measures, including stricter examination of patent applications or a discount for successful grants, thus raising the cost of unsuccessful applications and so deterring frivolous claims and the greater use of petty patents or utility models as alternative for minor inventions, which are protected for a shorter time period (OECD 2004, p. 29).

Trademarks may not last forever, if the trademark relates to an expired patent. For example, LEGO's patents on the geometrical patterns on the studs on top of the bricks expired, but LEGO tried to protect those designs by trademark. The Canadian Supreme Court ruled against it, saying, "A purely functional design cannot be the basis of a trade-mark and trade-mark law should not be used to perpetuate monopoly rights enjoyed under now-expired patents. [40–61]"[34]

5.2 Problems When IPR is Used to Limit Competition

As the pace of globalization increases and companies (and countries) develop a better understanding of their intangible assets, companies look for more imaginative strategies to maximize the value of their IPRs and to stop others from using them. For example, pharmaceutical companies may try to 'patent-flood' to stop generics or deliberately raise the costs of rivals legally imitating them or by refusing to licence or supply drugs when faced with terms they do not like. Or dominant firms may offer cumulative discount schemes designed to prevent the entry of new competitors. Or micro-processer manufacturers may acquire a patent portfolio to use when either negotiating cross-licences with other manufacturers or trying to avoid patent litigation. In these cases, IPRs provide some kind of market power, which is then used to reduce competition by new or existing competitors. Of course, the market power may be domestic or derived from overseas.

Copyright has a smaller breadth than patents but can still be used anti-competitively. In both *Magill* and *IMS* the ECJ said that in exceptional circumstances the European Commission could prevent a refusal to licence as an abuse of a dominant position by imposing a compulsory copyright licence.[35] For example, in Europe, in Microsoft, the General Court upheld the European Commission's decision to order compulsory access to interface codes protected by IPRs on the grounds that technological progress was impeded.

When these problems arise across countries the only solution is cooperation between national competition agencies or an ASEAN-wide competition law. Cooperation alone is likely to be problematic, as the effects of anti-competitive conduct will differ across countries. For example, a merger between two firms in ASEAN could be beneficial for one country (which gains employment) and worse for another (which loses research or production facilities). In these kinds of situations, there will be a direct conflict between overall ASEAN economic welfare where resources go to countries that can best use them and the interests of individual countries who may use industrial policies to advantage their own country at the expense of other ASEAN countries. While these kinds of problems are mainly political and can be resolved through existing means, there is still a place for independent examination of the likely effects through perhaps the ASEAN Experts Group on Competition or cooperation among competition regulators.

5.3 Where There is Abusive Enforcement of IPRs

Firms may seek injunctions through the courts to try and stop legitimate competition. In the United States, the fraudulent procuring of a patent by a firm with market power can violate *s. 2* of the *Sherman Act*, i.e., the monopolization or abuse of dominance.[36] In addition, competition law may sanction situations where litigation by a firm with market power is either 'objectively baseless' or used by the firm as an anti-competitive weapon.[37] Similarly, sometimes customs authorities have the power to detain goods suspected of infringing IP laws (e.g., see European Regulation 1383/2003). These kinds of problems can only be resolved through proper enforcement.

6. Getting the ASEAN Balance Right between Competition Law and IPRs

Competition law limits the exercise of IPRs based on the adverse economic *effects* of the conduct. But getting the balance right between giving incentives to create new ideas and their dissemination is not easy. Importantly, from a regional integration perspective, the balance will differ between countries. Countries with considerable research and development like the United States and Japan will not want to limit their company's strategic use of IPRs in other countries, if it damages their own future R&D. Countries without domestic R&D will be more concerned with the low-priced dissemination of goods and services involving IPRs (almost all from overseas), because there is negligible domestic economic impact on innovation in the short term. But as countries develop and engage in domestic R&D, there will be greater concern to develop and protect local innovation. Hence, there will be an increasing concern with anti-competitive use of domestic innovation if it hinders further innovation.

Countries in ASEAN are at different stages of development and have different levels of R&D and domestic competition. Singapore is the most developed and has the highest level of IPR protection coupled with considerable international competition due to an absence of trade barriers. Other countries, like Cambodia, Lao People's Democratic Republic and Myanmar, have negligible R&D and undeveloped, uncompetitive markets. Determining a one-size-fits-all model of competition law and IPRs would not seem possible. Some countries will not want to sacrifice static efficiency losses, particularly when the innovative benefits go elsewhere. Countries with high levels of research and development will want their firms to maximize their profits in other countries.

Because ASEAN countries have different interests in balancing static efficiency and dynamic efficiency, firm conduct that may be in the interests of one country may not be in the interests of another. For example, Singapore, with its much higher level of research and development and living standards may not want to affect research incentives and so will be careful about using competition law to limit what innovators can do in Singapore. On the other hand, a less developed country in ASEAN, with negligible research and development, may find it in its interest to limit the anti-competitive use of IPRs.

Thus, harmonization of the standards used to judge anti-competitive *use* of IPRs may not be justified. If national interest is paramount, then each ASEAN country should develop its own standards for the anti-competitive use of IPRs, as whether a practice is anti-competitive or not depends on its *impact or effect* in their own country. Harmonization of IPR competition rules would inevitably favor some countries within ASEAN over others.

6.1 The Intersection Between IPRs and Competition Law in Europe

The ECJ has interpreted IP rights narrowly when there is a conflict with competition law. In particular, the ECJ has found that, while the EC Treaty did not interfere with the existence of IPRs, competition laws could curtail the *exercise* of IPRs. In other words, the exercise of IPRs should not impede the essential freedom of movement of goods between member states (which includes the possibility of parallel imports).

In the *Consten and Grundig* case in 1966, the Court found that competition law prevented trademark owners and their licencees from using their national IPR to block parallel imports from another European country.[38] The Court held that their decision did not affect the national trademark rights but only their *exercise*. In 1968 in *Parke, Davis v. Probel*, the Court decided similarly over the possible abuse of patent rights to divide EC markets.[39] However, in that case, the ECJ held that the owner of a Dutch patent for an antibiotic process could stop the selling of a version of the drug in Holland, because the drug had been manufactured in Italy, which did not provide patent protection for drugs. As the drug had been placed on the market in the EC without the permission of the patent holder, the freedom of movement issue was not relevant. Under national law, an IPR is 'exhausted' after the protected product has been sold for the first time by the IPR holder (or a licensee with the holder's consent) only within that country. For example, under the doctrine of community-wide exhaustion, once a product has been put on the market in a particular member state with the consent of the legitimate trademark owner, the owner can no longer rely on his national rights to prevent the importation of the product from that state into another member state.

6.2 Some Examples of Anti-Competitive Practices That Can Affect Intra-ASEAN Trade

Anti-competitive conduct can occur in any of the areas normally proscribed by competition law, i.e., single-firm conduct by a dominant firm, anti-competitive agreements involving IPRs, and anti-competitive mergers that involve IPRs. An important area in practice in developed countries has been refusals to supply IPRs. Generally, competition law in developed countries regards IPRs in the same way as other forms of property and so owners have the right to refuse sale or licence. However, in certain circumstances some countries enable compulsory licensing to allow others to compete, the circumstances differing from jurisdiction to jurisdiction.

It is important to note that developed countries use compulsory licensing to correct violations of competition laws (for example, unilateral refusals to licence). In the United States, the Federal Trade Commission (FTC) has used compulsory licensing to remedy an antitrust violation. *Rambus* had concealed essential patents it held from an industry-wide standards-setting organization. The FTC imposed a compulsory licence by setting a maximum royalty rate.[40] In the EU, competition law has been used to force compulsory copyright licences.[41]

Compulsory licencing is not inconsistent with TRIPS. Article 8.2 of the TRIPS Agreement recognizes that:

> Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Section 8 of Part II of TRIPS provides for international cooperation in the control of anti-competitive practices in contractual licences and allows members to take appropriate remedies, such as the grant of a compulsory licence. Where a compulsory licence is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, there is no longer a requirement to seek first a voluntary licence on reasonable commercial terms and conditions, the goods produced under the licence need not be predominantly for the supply of the domestic market of the member granting the compulsory licence, and the need to correct anti-competitive practices may be taken into account in determining the amount of remuneration of the right holder.

Developing countries have also used competition laws to force supply, particularly for pharmaceutical products. In 2003, the Competition Commission of South Africa found that GlaxoSmithKline and BoehringerIngelheim had abused their dominant positions in their anti-retroviral markets and violated prohibitions against excessive pricing. The Commission also found that the firms had refused access to essential facilities and the exclusionary activities had anti-competitive effects, which outweighed any technological, efficiency or other pro-competitive gains. Menzi Simelane, Commissioner at the Competition Commission said (Competition Commission of South Africa Press Release 2003):

> Our investigation revealed that each of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty. We believe that this is feasible and that consumers will benefit from cheaper generic versions of the drugs concerned. We further believe that granting licenses would provide for competition between firms and their generic competitors.

Other kinds of dominant firm conduct can include tying (i.e., forcing consumers to buy a product as a condition of selling a product they do not want). This could be a patent or copyright tie (e.g., block booking of films where one copyrighted film is licenced on condition that the exhibitor also licences another film) or trademark. It could also involve deceptive conduct before standard setting organizations, such as failing to disclose the holding of a patent that could be used to stop other firms from manufacturing products according to the standard.

Anti-competitive agreements could include IPR price-fixing, patent pooling, blanket licensing of copyright works (to collecting societies), standards setting organizations that set standards to exclude particular technologies, and market allocation (e.g., firms distributing products incorporating IPRs across countries), where parallel importing is not available. This means that firms can set different prices in different countries, because arbitrage across countries is not allowed due to the fact that the IPR holder has sole right to sell in each country.

7. Conclusions and Implications for ASEAN

In the area of competition policy, ASEAN countries are well on their way to meeting the goals set out in the AEC Economic Community Blueprint. Most countries have a statute and others appear to be committed to meeting this obligation by 2015. The regional competition guidelines have already been published. The ASEAN Group of Competition Experts could evolve into a regional forum to facilitate coordination and cooperation and to build capacity. The major challenge however is whether countries will be able to implement and apply their competition laws effectively and in a manner that does not distinguish between domestic and foreign firms.

The provisions of the competition laws show considerable variance across countries, as they should, insofar as they reflect domestic political and economic realities. Given some of the evidence provided above, harmonization at this stage appears to be unrealistic, but should be on the agenda as a long-term goal. In the meantime, the focus should be on comity and cooperation, although the MERCOSUR discussion above shows that even this may prove to be a challenge when parties are not at comparable levels of economic development.

Four critical issues deserve further consideration as they impact the goals ASEAN has set for itself, although they appear to have been ignored. The first is dispute resolution. The competition provisions in NAFTA and ANZCERTA do not have a formal dispute resolution system, and yet this has led to different outcomes. ANZCERTA countries appear to be able to resolve any differences through goodwill and cooperation. On the other hand, the two NAFTA cases discussed above suggest that when there is no formal dispute resolution system for competition disputes, particularly between investors and states; parties will look elsewhere and indulge in 'forum shopping'. Although ASEAN does have a dispute resolution process for trade and investment disputes, it is rarely used, as ASEAN countries prefer to use international rather than regional institutions for this purpose. Research on other RTAs shows that there is little enthusiasm for formal dispute resolution for competition-related provisions. Where a system exists, it is seen as being included for cooperation rather than for specific enforcement.

The second issue is anti-dumping. Many scholars view anti-dumping as a means of protecting competitors and not competition. The thinking is that the predatory pricing provisions of competition laws are better able to handle this. However, only a handful of agreements have eliminated anti-dumping, including the EU, the Chile-Canada FTA and ANZCERTA. The third issue relates to export cartels. Most competition laws exempt export cartels on the basis that the goal of competition laws is to protect domestic and not foreign consumers. This thinking can clearly be problematic in a regional context. The fourth and final issue is the elimination of export subsidies for intra-ASEAN trade. There cannot be an ASEAN 'single market' if countries play market share games. Some agreement along the lines of "State Aid" provisions in Europe may be desirable in the medium to long term.

Insofar as IPRs are concerned, the welfare effects of strong IPR protection in a regional integration context are ambiguous. This is supported both by theory and empirical evidence. For less developed countries, the introduction of IPR protection legislation can reduce employment and the profits of local imitators. Yet, it may also lead to more research and development by developed countries by adapting and tailoring their products to developing country problems. In addition, there may be a greater willingness on the part of developed countries to invest in developing countries or to form joint ventures, or licence production. The empirical evidence suggests that, although strong IPR protection may facilitate technology diffusion, the link with economic growth is weak. If anything, the growth experience of East Asian countries shows that strong intellectual property protection is not an important determining factor for foreign direct investment. For developing countries, rapid growth is more often associated with weaker IP protection.

Within ASEAN, the TRIPS agreement sets a minimum standard of protection, since all countries (except Lao People's Democratic Republic) are signatories, yet TRIPS allows IPRs to be tailored to a country's level of development. More importantly, while in principle, protection standards may be uniform under TRIPS, it does not provide for a uniform enforcement system. Harmonizing both rules and enforcement is an important element of reducing trade barriers. But the latter is difficult, not just in developing countries but also in single markets such as the European Union. Europe only started on the path of harmonizing enforcement in 2004, and the progress has been slow. However, in the absence of a harmonized ASEAN IPR system, IPR registration *or* enforcement within ASEAN will have different requirements in each country. This could mean less foreign direct investment into the region compared to a harmonized system.

Turning to the interplay between competition and IP, some issues are procedural and can be sorted through more rigorous IPR examination systems and sophisticated courts. Cooperation among ASEAN countries and capacity development may be sufficient to resolve issues such as setting too wide a scope for IPRs and abusive enforcement of IPRs. However, only aggressive enforcement of competition law can solve issues related to the exclusionary use of IPRs by both domestic and foreign firms.

Given the diversity in the level of economic development among ASEAN countries, it is reasonable to expect that countries will balance static and dynamic efficiency goals differently. Countries without domestic R&D will be more concerned with the low-priced dissemination of goods and services involving IPRs (almost all from overseas) because there is negligible domestic economic impact on innovation in the short term. For the more developed members of ASEAN, which engage in domestic R&D, there will be greater concern to develop and protect local innovation. Because ASEAN countries have different interests in balancing static efficiency and dynamic efficiency, firm conduct that may be in the interests of one country may not be in the interests of another. It is not evident that this issue can be resolved only by cooperation. So it may prove to be another impediment to achieving the goal of a single market and production base. It appears then that ASEAN countries, like those in many other regions are adopting these policies for signalling and symbolic reasons. Ultimately, both competition and IP laws are just two components of the overall business environment. The focus both now and post-2015 should be on the institutional arrangements to ensure the effective implementation and enforcement of agreed policies in a non-partial manner. This in itself may prove to be the real challenge, given the poor governance and weak institutions in many ASEAN countries. Because ASEAN is an example of loose integration, the focus should be on minimizing the negative impacts of greater integration rather than trying to maximize the positive benefits.

Appendix 5.1
Survey of Competition Laws in ASEAN

This appendix provides a survey of competition laws in ASEAN countries. All ASEAN countries except Cambodia have some type of statute though, not necessarily a stand-alone general competition law.

BRUNEI DARUSSALAM

Brunei Darussalam does not have a general competition law; however the sector specific regulations on telecommunications contain various competition provisions. As in many countries, the government has the power to grant exclusive privilege. The Monopolies Act, which has existed since 1932, allows His Majesty the Sultan and Yang Di-Pertuan to grant exclusive privilege to collect and export crocodile, python and monitor lizard skins. In addition, His Majesty can grant exclusive rights to manufacture and to trade, either in the domestic market or in international markets, firearms and defence equipment used by the Royal Brunei Police and Armed Forces.[1]

The Telecommunications Order of 2001 (Telecom Order) and the Authority for Info-communications Technology Industry of Brunei Darussalam Order of 2001 (AiTi Order) governs sector regulation of the telecommunications industry. The Telecom Order grants AiTi the exclusive privilege to provide and operate telecommunications infrastructure and services in Brunei Darussalam.[2] The AiTi has a broad set of powers and duties, but in essence it is a regulator and promoter of the industry and the international representative of Brunei Darussalam in matters relating to the information and communication industry.[3] It issues licenses for the provision of infrastructure and services; approves prices and tariffs; ensures access; monitors market conduct to ensure fair and effective competition; encourages investment and the domestic expansion of the industry; and promotes its international competitiveness.

The AiTi issues infrastructure (InTi) and services licenses (SeTi) and has also published an Interconnection Handbook (Handbook), which lays out the regulatory framework. Section 7 of both InTi and SeTi are identical. They list prohibited anti-competitive practices including misleading claims; undue discrimination; cross-subsidisation, predatory pricing; vertical price squeezes; and anti-competitive agreements, including non-compete agreements, bid-rigging, refusal to deal, agreements to fix prices, restrict output or otherwise restrict competition. Section 7 also contains an efficiency defence, which trades off anti-competitive effects with potential efficiencies in the development, production, marketing or delivery of services:[4]

> If such efficiencies offset the potential anti-competitive effect, and could reasonably be achieved through measures that reduce competition to a lesser extent, AiTi will conclude that the agreement is not anti-competitive.

Licensees are also prohibited from restricting competition in the domestic market using their affiliations with a firm or operator that is dominant in a foreign market. Mergers or "Contracts with Third Parties" are subject to approval by AiTi.[5]

Section 5 of The AiTi Interconnection Handbook contains provisions on market dominance. The role of these provisions is to ensure that potential entrants can access and/or connect to infrastructure controlled by a dominant incumbent firm and negotiate access at reasonable prices. A licensee is considered dominant if it has the ability to act in an unconstrained way or if replication of infrastructure is an entry barrier. Market dominance is assessed using both structural and conduct factors. The former include market share or industry concentration metrics, the level of vertical integration and the extent of entry barriers, whereas the latter include the ability to independently raise prices or restrict supply.

INDONESIA

Indonesia is an early adopter of competition law and passed the Law Concerning Prohibition of Monopolistic Practices and Unfair Business Practices in 1999 (henceforth "Law"), which came into effect in March 2000.[6] The Law is quite comprehensive and covers prohibited agreements, prohibited activities, abuse of dominance, and mergers. Its objectives are to protect the public interest, improve economic efficiency and provide fair and equal business opportunity for all firms regardless of size.[7]

The Law prohibits agreements that lead to the formation of oligopolies, which then have the potential of using monopolistic or other unfair business practices. Two or three firms that control more than 75% of a market segment may draw the attention of regulators. A similar prohibition and structural hurdle applies to oligopsonies. Other prohibited agreements include price fixing, price discrimination, predatory pricing and resale price maintenance. In addition, division of territories or allocation of markets, boycotts, refusal to deal, and other agreements, which create entry barriers are prohibited. The price fixing provisions do not apply to joint ventures or agreements "entered into based on the prevailing laws".[8] Cartels, trusts and agreements with foreign parties "which may lead to monopolistic or unfair business practices" are also prohibited, as are vertical agreements with the intent of controlling part of the vertical chain.[9] The Law also prohibits "Closed Agreements" which essentially include tied sales and other restrictive or exclusionary covenants.[10]

Chapter IV of the Law covers prohibited activities (or practices) including monopolistic and monopsonistic practices and other activities, such as limiting distribution, predation with the intent of eliminating competition, bid rigging, and conspiring to obtain secret or classified information about competitors. The structural hurdle to infer monopoly or monopsony is the control of over half the market by "one business actor or a group of business actors".[11] In addition, monopoly or control over the market may be inferred if there are entry barriers or if there are no available substitutes for the product or service in question.

The Law prohibits abuse of dominance, interlocking directorates and cross-ownership of firms in the same field of business through majority equity holdings. The structural hurdle for abuse of dominance and equity holdings is 50% for one or a group of businesses and 75% for two or three businesses or groups of businesses. Mergers that lead to monopolistic practices or unfair business competition are also prohibited and have to be notified to the competition authority within 30 working days (post-notification) if they result in asset values of the merged enterprise exceeding Rp2.5 trillion and/or value of sales exceeding Rp5 trillion. The hurdle for the banking sector is an asset value exceeding Rp20 trillion.[12] Post-notification does not apply to consolidations and acquisitions among affiliated companies. Businesses that fail to notify transactions may be subject to fines of Rp1 billion for every day of delay, up to a maximum of Rp25 billion.[13]

Adjudication rests with the Commission for Supervision of Business Competition (KPPU), whose decisions can be appealed to the District Court within 14 days of the decision. Remedies available to the KPPU include cease-and-desist orders, ordering compensation payments, revocation of business licenses, and levying fines and imprisonment terms.[14] The Law contains a number of exceptions, which include agreements relating to intellectual property rights, technical standards, agency agreements which do not include resale price maintenance clauses, R&D collaboration agreements, export cartels, and activities of cooperatives and small-scale enterprises.

LAO PDR

Competition law in the Lao PDR takes the form of a decree issued by the Prime Minister's Office 2004. The objectives of the decree are to:[15]

> … promote fair trade competition, protect the rights and legal interests of consumers and to encourage business activities in the Lao PDR to function efficiently in the market economy mechanism …

The decree prohibits monopolization and mergers and acquisitions that may lead to monopolization. It suggests a structural test for dominance. The test is based on "sales volume or market share" in excess of that recommended by the Trade Competition Commission.[16] While there is no explicit mention of predation, conduct including dumping which indents to "eliminate other business entities" is prohibited.[17] The decree also covers price fixing, collusion, bid rigging, hoarding or otherwise restricting quantities and consumer choice. Exclusive dealing and market allocation are also prohibited, as are cartels that involve foreign entities which seek to limit "opportunity of local businesses".[18]

Implementation is the responsibility of the Ministry of Commerce and the Trade Competition Commission, which is chaired by the Minister for Trade. Remedies include orders to cease and desist or indefinitely shutting down the business and "punishment according to the law". In addition the aggrieved party may have to be compensated.[19] Certain sectors or businesses may be exempted from the application of the decree for "socio-economic or security reasons".[20]

MALAYSIA

In June 2010 the Malaysian House of Representatives (Dewan Rakyat) passed two statutes: The Competition Act (henceforth "Act") and The Competition Commission Act. Both statutes came into effect on 1 January 2012. The Competition Act seeks to "promote economic development" by "promoting and protecting the process of competition" so as to protect the "interests of consumers".[21] The benefits of the competitive process listed in the Act include efficiency, innovation, entrepreneurship, competitive prices, and improvements in product quality and a broader set of choices for consumers. The Act covers commercial activity within Malaysia and also activities in other countries that may have a detrimental impact on competition in the domestic market. In addition, the Act excludes the energy and communications and multimedia sectors, which have sector-specific regulators and legislation that prohibits anti-competitive practices or otherwise regulates market conduct.[22] Collective bargaining activities do not fall under the purview of the Act; neither do "revenue-producing" monopolies or enterprises "which have been entrusted with the operation of services of general economic interest".[23]

Broadly the Act lists two anti-competitive practices, which include horizontal or vertical agreements and abuse of dominant position. Chapter 1 (Part II) of the Act prohibits horizontal or vertical agreements that have the "object or effect" of "significantly preventing, restricting or distorting competition".[24] Prohibited horizontal agreements include conspiracy, bid rigging, market sharing, restricting supply, limiting or controlling technological development and investment.[25] There are no specifics on prohibited vertical agreements. Malaysia has opted to include what in many jurisdictions is referred to as the "efficiency defence" and usually applied in the context of horizontal mergers. Malaysia has chosen to trade off *all* restrictive agreements and relieve infringing parties of liability if there are technological efficiency or social benefits which could not have been provided in the absence of the agreement and if the agreement does not result in a monopoly or in the elimination of all competition. In addition, the benefits have to be proportional to the detriment. In other jurisdictions that allow such trade-offs, for example, Canada, the benefits or efficiency gains have to be greater and have to offset any detrimental impacts.[26] The Competition Act also allows for the Competition Commission to provide individual and block exemptions.

Chapter 2 (Part II) of the Act prohibits abuse of dominant position and specifies that the Commission not rely on a structural test alone to infer dominance.[27] Abuse of dominance includes both horizontal and vertical provisions, such as discouraging entry, damaging or evicting competitors that are "no less efficient", refusal to deal, and predation.

The Act allows the Competition Commission, on its own initiative, to conduct and make public market reviews that would examine market structure and the conduct of firms operating in that market. Remedies include cease-and-desist orders or other steps required to terminate the infringement and the imposition of financial penalties.[28] A leniency regime is also available for firms that bring infringing practices to the notice of the Commission or otherwise cooperate with the Commission, or admit to involvement in the infringement, presumably, at early stages of the investigation. The leniency regime allows for a maximum waiver of all (100% of) penalties.[29] The decisions of the Commission can be appealed before the Competition Appeal Tribunal, and any party that has suffered a loss as a result of an infringement has the right to seek relief via civil proceedings.

The Competition Commission Act indicates that the Commission, in addition to a Chairman, shall have four members representing the government and between three and five other (lay) members with experience in competition policy. In addition to implementing and enforcing competition law and advocacy the Commission also has an advisory role and is expected to advise the Minister of Domestic Trade and Consumer Affairs on "all matters concerning competition" and on "all international agreements relevant to competition matters".[30]

MYANMAR

Myanmar does not have a general competition law, but the 2008 constitution contains an anti-monopoly provision. The constitution states the Myanmar has "a market economy system" which allows all "economic forces", including individuals, the State and cooperative to participate in economic activity:

> 36. The Union shall:
>
> (b) protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities; [31]

The State-owned Economic Enterprises Law (SLORC Law 9/89) gives the government (through state-owned enterprises) the exclusive right to carry out the following activities:[32]

1. Production, sale and export of teak
2. Forestry – plantation, cultivation and conservation
3. Petroleum and natural gas – exploration, extraction, production and sale
4. Pearl, jade and precision stones – exploration, extraction and export
5. Metals – exploration, extraction and export
6. Breeding and production of fish and prawn in certain fisheries
7. Post and telecommunications
8. Air and rail transport
9. Banking and insurance services
10. Broadcasting and television services
11. Electricity generation (other than permitted private and cooperative generation)
12. Manufacture of defence and related equipment

Violation of the law can result in fines, confiscation of property and imprisonment of up to 5 years.[33] Section 4 of the SLORC Law 9/89 allows for joint ventures in the above activities between government and any other party.

THE PHILIPPINES

While there is no single competition law in the Philippines, a number of statutes contain some basic provisions relating to price-fixing, cartels and monopolization. The constitution has the following provision on restraint of trade:[34]

> The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

There are no remedies provided in the constitution, and indeed the State is not obliged to act, but may do so to protect the public interest. Article XV, Section 11, has an almost identical provision, which relates specifically to "commercial mass media", and the regulatory power in this case is vested in Congress.[35] It also restricts foreign ownership of mass media.

The Revised Penal Code contains criminal penalties, including imprisonment and/or fines between 200 and 6,000 pesos, for conspiracy and monopolization:[36]

> 1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market; and
>
> 2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market.

The Price Act covers cartels particularly for basic necessities, which include items such as grains, bread, fish, meat, poultry, milk, fresh vegetables, cooking oil, charcoal, soap, detergent, candles and essential pharmaceutical drugs. The intent of the Act is to allow firms a "fair return on investment" while ensuring "the availability of basic necessities and prime commodities at reasonable prices at all times", but especially during times of emergency.[37] As remedies, the Act contains provisions for automatic and mandated price controls and ceilings. The Act defines a cartel as follows and also appears to cover conscious parallelism:[38]

> … any combination of or agreement between two (2) or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price. There shall be prima facie evidence of engaging in a cartel whenever two (2) or more persons or business enterprises competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic necessity or prime commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition among themselves.

The Corporation Code also contains some provisions to prevent monopolization. Voting trusts for example, may not be used for "circumventing the law against monopolies and illegal combinations in restraint of trade".[39] In addition, the National Economic Development Authority may recommend to the Batasang Pambansa (National Assembly), the imposition of limits on stock ownership in certain corporations to "prevent illegal monopolies or combinations in restraint of trade".[40]

A number of sector-specific regulations contain antitrust provisions. The Electric Power Industry Reform Act prohibits anti-competitive behavior in the interest of encouraging and protecting contestable markets.[41] It sets up the Energy Regulatory Commission (ERC) and directs it to issue, within 1 year of the "effectivity" of the Act, a set of rules and regulations which promote competition and penalize the abuse of market power or other anti-competitive behavior. The Act provides ERC a variety of remedies including, but not limited to:[42]

> … the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits and imposition of fines and penalties …

A similar approach is evident in the telecommunications sector, where the Public Telecommunications Policy Act established the National Telecommunications Commission (NTC). The NTC must promote consumer welfare and prevent the misuse of market power so as to ensure fair and efficient market conduct.[43] The NTC has the power to impose fines and or impose price controls.[44]

The Downstream Oil Industry Deregulation Act of 1998 includes explicit antitrust safeguards and provides for criminal sanctions. It directs the Departments of Trade and Industry and Energy to promote competition and prevent the misuse of power within the context of the Revised Penal Code.[45] In addition, Section 11 prohibits cartels, monopolization and predatory pricing. Penalties include imprisonment of company executives for between three to 7 years and fines between one and two million pesos.[46]

A number of "Competition Act" bills were introduced in the House of Representatives and the Senate in 2010 but none of them have been passed into law.[47] However, on 9 June 2011, President Benigno S. Aquino III signed an Executive Order designating the Department of Justice as the Competition Authority of the Philippines.

SINGAPORE

Singapore passed the Competition Act (henceforth "Act") in October 2004, which came fully into effect on 1 January 2006. The statute is based on UK law and has three broad prohibitions, including anti-competitive agreements (Section 34), abuse of dominance (Section 47) and mergers that substantially lessen competition (Section 54). Adjudication and enforcement rest with the Competition Commission of Singapore (CCS), which has a Chairman and between two and 16 members.[48] Decisions of the CCS may be appealed before a panel from the Competition Appeal Board that is chaired by "a person qualified to be a Judge of the Supreme Court".[49] Decisions of the Appeal Board may be appealed to the High Court and the Court of Appeal in so far as they relate to a point of law or to financial penalty.[50]

Section 34 of the Act prohibits anti-competitive agreements and concerted practices that prevent, restrict or distort competition. They include price fixing, market sharing or sharing sources of supply, limiting or controlling production, markets, technical development or investment and restrictive covenants. Block exemptions may be granted if agreements improve production or distribution or promote technical or economic progress so long as they do not eliminate competition in a substantial portion of the market.[51] Abuse-of-dominance provisions include predation, limiting or controlling production, markets, technical development or investment and restrictive covenants. Mergers that substantially lessen competition are prohibited.

The third schedule of the Act identifies a number of exclusions from both anti-competitive agreements and abuse of dominance. These provisions exclude many economic activities and do not apply to first-class mail, the supply of water and waste management services, scheduled bus and rail transit services, cargo terminal operations and clearing houses, and the association of clearing houses. Many of these services are regulated by other statutes and could be government-linked or government-provided. Vertical agreements are expressly excluded from Section 34 prohibitions but some may be potentially caught under the abuse-of-dominance provisions.[52] The exclusions also apply to services that are of a general economic interest, and the Minister (of Trade and Industry) may apply exclusions for "compelling reasons of public policy".[53] Exclusions also apply to agreements that improve production or distribution or promote technical or economic progress so long as they do not eliminate competition in a substantial portion of the market. Thus, a net-benefit test is applied not just to mergers but also for anti-competitive agreements. Regulated industries with sector specific regulators are excluded from the application of the Act to the extent that regulators have the authority to review anti-competitive activities. This excludes energy, telecommunications, media, aviation, casinos and the financial sector.[54] The problem in sector regulation is that regulators are both promoters and regulators of the industry. However, this appears to be typical of ASEAN countries.

Like many competition authorities, CCS has issued guidelines for various provisions of the Act. They contain structural hurdles even for anti-competitive agreements, where firms with a combined market share of 20% or less may be deemed to have no appreciable adverse impact on competition with the possible exception of price fixing and bid rigging. These are likely meant to exclude small and medium-scale enterprises. Abuse-of-dominance guidelines include both structure and conduct factors, the structural hurdle being 60%. Mergers are not required to be notified and in general may not raise competition issues unless the market share of the merged enterprise exceeds 40% or if the merged enterprise has a post-merger market share between 20 and 40% and the post-merger three-firm concentration ratio is 70% or higher. Remedies include a maximum penalty of 10% of turnover for each year of infringement up to a maximum of 3 years.[55] The Act also allows for the right to private action in relation to all competition offences via subsequent civil proceedings.

THAILAND

Thailand was one of the first countries in ASEAN to pass a competition law. The Trade Competition Act (henceforth "Act") was passed in 1999 and all competition offences fall under criminal law. The Act does not apply to farmers' groups, cooperatives or societies, or to state enterprises. In addition, the Minister for Commerce may exempt certain businesses from the application of some or all the provisions of the Act.[56]

The Act has provisions relating to abuse of dominant position, mergers and other restrictive trade practices. The abuse-of-dominance provisions prohibit price fixing, restricting quantities or services, using restrictive covenants, and otherwise intervening in the operation of another person's business operations.[57] The Act contains a structural test for what might be termed obvious monopolies. Section 30 indicates that if a business has a market share of over 75%, the Trade Competition Commission (henceforth "Commission") can order the business to "suspend, cease or vary the market share".[58] Other cases are covered by subsequent regulations which indicate that a single firm is considered dominant if its market share is at least 50% and its value of sales in the preceding year was at least one billion Thai Baht, or if it was one of the three largest firms in the industry where the three-firm concentration ratio is at least 75% and the value of sales of the three largest firms is at least one billion Thai Baht. A firm that has a market share of less than 10% or a sales volume of less than one billion Thai Baht is not considered dominant.[59]

Merger pre-notification is required, so mergers that lead to monopoly or unfair competition are not allowed unless the merging parties obtain permission from the Commission. A merger is defined as a full acquisition or an acquisition of assets or equity which essentially transfers control of "business policy, administration and management".[60] Restrictive practices can be separated into two parts — those that are prohibited and those that need to be notified to the Commission. Prohibited practices include price fixing, agreements which lead to market domination and bid rigging. Notifiable practices include exclusive territories, exclusive dealing including appointing sole distributors, market sharing or restrictive quantity allocation, reducing quality, and restrictive covenants that lead to uniform practices.[61] Upon notification, the Commission may allow a particular practice if it is "reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and does not affect material and due interests of general consumers".[62] Dealings with foreign firms are covered under Section 28, which prohibits domestic business that has any type of relationship with a foreign business from preventing domestic consumers from dealing directly with the foreign business.[63]

The Act sets up an administrative body, The Office of the Trade Competition Commission, which is headed by a Director General, in the Department of Internal Trade, Ministry for Commerce.[64] The adjudicative body is the Trade Competition Commission, which is chaired by the Minister for Commerce and includes two public officials: permanent secretaries of the Ministries of Commerce and Finance. The Council of Ministers can appoint between eight and 12 members. These members cannot be political officials or hold political office and at least half of them have to come from the private sector. The Commission can appoint specialized sub-committees to hear cases and appeals.[65] Thailand's competition law has criminal provisions for all competition offences:[66]

> … Any person who violates section 25, section 26, section 27, section 28 or section 29 or fails to comply with section 39 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, shall be liable to the double penalty.

There is a right to private action in the Act, which allows for compensation claims before courts within 1 year "from the day the person suffering injury has or ought to have had the knowledge of the ground thereof". However what is unique, at least in ASEAN, is what could be characterized as a class-action compensation claim.[67] The Act allows for the Consumer Protection Commission to claim compensation on behalf of consumers or a consumer protection association to claim compensation on behalf of its membership.[68]

VIET NAM

Viet Nam passed a Law on Competition (henceforth "Law") in 2004, which applies to trade and professional associations and to all enterprises operating in Viet Nam, including State monopoly industries in so far as they are operating outside their monopoly sector. Within their monopoly sector, for example in public utilities, such enterprises and their market conduct, including price and quantity determination, are under the control of the State. If they operate in other sectors, they are subject to the provisions of the Law.[69] The interests of the State are clearly protected by Vietnamese competition law, since the right to compete is defined as follows:[70]

> Competition must be undertaken on the principles of honesty; non-infringement of the interests of the State, the public interest and the lawful rights and interests of enterprises and consumers …

The statute also covers the conduct of State administrative bodies, albeit with a qualification for State monopoly sectors, since these bodies cannot:[71]

> Force an enterprise, organization or individual to purchase or sell goods or services with an enterprise appointed by such body, except for goods and services belonging to the State monopoly sectors …

International treaty obligations take precedence over the domestic competition law. Competition law takes precedence over other laws. This presumably refers to sector-specific regulations, which may have competition provisions:[72]

> Where there is any difference between the provisions of this Law and the provisions of another law … the provisions of this Law shall apply.

The Law broadly covers four areas: anti-competitive agreements, abuse of dominance, mergers, and other unfair competitive practices. Bid rigging and agreements that exclude competitors or otherwise impede their ability to participate in the market are prohibited.[73] However, price fixing, quantity restraints, market sharing, technical developments or investment and imposing inappropriate contractual obligations are only prohibited if the combined market share of the conspiring parties exceeds 30%.[74] Like Malaysia, there are exemptions to the application of these provisions "for a definite period", but they are much broader.[75] Exemptions may be granted if there is an increase in efficiency, technological progress, competitiveness of small and medium enterprises and competitiveness of Vietnamese enterprises in international markets, or if the agreement promotes the uniform applicability of product and/or technical standards, or unifies payment, delivery and trading conditions — essentially non-price factors.

In addition to the usual exclusionary practices, abuse of dominance covers predatory pricing and resale price maintenance. The structural hurdles for determining dominance are a market share of 30% for a single enterprise, 50% for two firms, 65% for three firms and 75% for four firms.[76] Mergers, or other means of increasing concentration, such as consolidations, acquisitions or joint ventures, are prohibited if the combined market share exceeds 50%. However, exemptions may be provided if the merger avoids bankruptcy of one of the parties or if as a result of the merger, there is an increase in exports or technological progress, or "a contribution to socio-economic development".[77] Merger pre-notification is required if the merging firms have a combined market share of between 30% and 50%. It is not required if the combined market share is less than 30% or if after the merger, the firm continues to be classified as a small or medium enterprise. Pre-notification is also not required for firms with a combined market share of 50% or more, if they plan to file for an efficiency defense. Instead, they are required to file for an exemption under Article 19. The Minister for Trade makes decisions regarding exemptions on the grounds of avoiding bankruptcy; the Prime Minister makes those where the basis is improvements in efficiency, technological progress or socio-economic development.[78]

Other unfair competitive practices are listed in Chapter III of the Law and include misleading advertising, multi-level marketing and other pyramid selling schemes, coercion, defamation, infringement of business secrets, causing disruptions in the activities of other enterprises and discriminatory practices by trade associations.[79] Interestingly, the Law has an explicit provision for third-party interveners who may request to participate either with one of the two parties or independently; they have identical rights and obligations as other parties in the dispute.[80] While the basic responsibility for administration lies with the Ministry for Trade, Chapter IV of the Law provides for setting up the Viet Nam Competition Administration Department to handle investigations and the Viet Nam Competition Council to serve as an adjudicator.[81] There is a wide variety of remedies, including warnings, fines, amending terms of illegal contracts, revocation of license or business registration certificates, confiscation of facilities, and enterprise restructuring and divestiture.[82] The Law also sets a maximum fine of 10% of the total turnover in the preceding financial year.[83]

NOTES TO APPENDIX 5.1

1. Monopolies Act, First Schedule, p. 4.
2. Telecom Order, Part II, section 3(1), p. 1143.
3. AiTi Order, Part III, section 6, pp. 1190–93.
4. SeTi, section 7.6.3(c), pp. 22–23.
5. SeTi, section 7.5, p. 21.
6. There are also various related government regulations and guidelines issued from time to time.
7. Law of Republic of Indonesia, 5/1999, Article 3.
8. Law of Republic of Indonesia, 5/1999, Article 5(2).
9. Law of Republic of Indonesia, 5/1999, Articles 11, 12 and 16.
10. Law of Republic of Indonesia, 5/1999, Article 15.
11. Law of Republic of Indonesia, 5/1999, Articles 17(2)c. and 18(2).
12. Government Regulation 57/2010, Article 5(2).
13. Government Regulation 57/2010, Articles 6 and 7.
14. Law of Republic of Indonesia, 5/1999, Chapter VIII.
15. Decree No. 15, Chapter I, Article 1.
16. Decree No. 15, Chapter I, Article 2.
17. Decree No. 15, Chapter 3, Article 10.
18. Decree No. 15, Chapter 3, Article 12.
19. Decree No. 15, Chapter 4, Article 14.
20. Decree No. 15, Chapter 3, Article 13.
21. Competition Act, p. 7.
22. Part VI, Chapter 2 of the Communications and Multimedia Act 1998 contains competition provisions and section 14 of The Energy Commission Act 2001 directs the Energy Commission to regulate market conduct and prevent the misuse of market power.
23. See Second Schedule of the Competition Act.
24. Competition Act, Part II, Chapter 1, section(4)1.
25. Competition Act, Part II, Chapter 1, section(4)2.
26. See section 96(1) Canadian Competition Act (R.S.C., 1985, c. C-34) <http://laws-lois.justice.gc.ca/eng/acts/C-34/page-53.html> (accessed 2 September 2011).
27. Competition Act, Part II, Chapter 2, section 4, states that the market share "shall not in itself be regarded as conclusive".

28. Maximum financial penalties including maximum imprisonment terms are provided for in Part VI, section 61.
29. Competition Act, Part III, section 41.
30. Competition Commission Act, Part III, section 16.
31. Constitution of Myanmar, Chapter 1, sections 35 and 36.
32. SLORC Law 9/89, Chapter II, section 3.
33. SLORC Law 9/89, Chapter V, section 9.
34. Philippine Constitution 1987, Article XII, section 19.
35. Philippine Constitution 1987, Article XV, section 11(1).
36. Revised Penal Code, Book 2, Title 4, Chapter 3, Section 1, Articles 186(1) and 186(2). Article 186(3) also covers foreign parties engaged in commerce in the Philippines.
37. Price Act, sections 1 and 3.
38. Price Act, section 5(3).
39. Corporation Code, Title VI, section 59.
40. Corporation Code, Title XVI, section 140.
41. Electric Power Industry Reform Act, Chapter IV, section 45.
42. Electric Power Industry Reform Act, Chapter IV, section 45.
43. Public Telecommunications Policy Act, Article III, section 5.
44. Public Telecommunications Policy Act, Article III, section 5 and Article VI, section 17.
45. Downstream Oil Industry Deregulation Act, Chapter II, section 7.
46. Downstream Oil Industry Deregulation Act, Chapter III, section 11.
47. <http://www.congress.gov.ph/legis/search/hist_show.php?congress=15&save=1&journal=&switch=0&bill_no=HB03134> (accessed 4 August 2011).
48. Competition Act, section 5.
49. Competition Act, section 72(5).
50. Competition Act, section 74(1).
51. Competition Act, section 41.
52. Competition Act, Third Schedule, 8(1).
53. Competition Act, Third Schedule, 4(1) and 4(4).
54. See Chapter VIII, [102]–[204], pp. 4–7, in *ASEAN Competition Law*, Issue 0, edited by R. Ian McEwin and Kala Anandarajah (Singapore: Lexis Nexis, February 2011).
55. Competition Act, section 69(4).
56. Trade Competition Act, section 4. McEwin and Anandarajah (2011) indicate that no exemptions have been granted (Chapter IX, [102] p. 3).
57. Trade Competition Act, section 25.
58. Trade Competition Act, section 30.
59. McEwin and Anandarajah (2011), Chapter IX [352], pp. 9–10.
60. Trade Competition Act, section 26.
61. Trade Competition Act, section 26 and section 27(5) through (10) are notifiable.
62. Trade Competition Act, section 37.
63. Trade Competition Act, section 28.
64. Trade Competition Act, section 18.
65. Trade Competition Act, sections 6 and 7.
66. Trade Competition Act, section 51.
67. Trade Competition Act, section 41.
68. Trade Competition Act, sections 40 and 41.
69. Law on Competition, Articles (15)1 through 3.
70. Law on Competition, Article (4)2.
71. Law on Competition, Article (6)1.
72. Law on Competition, Article 5.

73. See Decree 116/2005-ND-CP for implementation guidelines.
74. Law on Competition, Articles 8 and 9.
75. Law on Competition, Article (10) 1.
76. Law on Competition, Article 11.
77. Law on Competition, Article 19.
78. Law on Competition, Article 25.
79. Law on Competition, Article (7) 2 and Chapter IV. See Decree No. 110/2005/ND-CP and Circular 19 (2005) on multi-level marketing.
80. Law on Competition, Articles 71 and 66.
81. Law on Competition, Article (7)2 and Chapter IV, Decree No. 05/2006/ND-CP, Decree No. 06/2006/ND-CP.
82. Law on Competition, Article 117 and Decree 120/2005/ND-CP.
83. Law on Competition, Article 118.

STATUTES AND REGULATIONS

Brunei Darussalam

Authority for Info-Communications Technology Industry of Brunei Darussalam (AiTi). “Licensing and Regulatory Framework: Interconnection Handbook”. Brunei Darussalam, March 2006.

Authority for Info-Communications Technology Industry of Brunei Darussalam (AiTi). “Service Provider for the Telecommunication Industry (SeTi) License”. Brunei Darussalam, 1 July 2004.

Authority for Info-Communications Technology Industry of Brunei Darussalam (AiTi). “Infrastructure Provider for the Telecommunication Industry (InTi) License”. Brunei Darussalam, 1 July 2004.

Constitution of Brunei Darussalam Order No. S 39. Authority of Info-communications Technology Industry of Brunei Darussalam Order, 2001. 30 May 2001.

Constitution of Brunei Darussalam Order No. S 38. Telecommunications Order, 2001. 30 May 2001.

Laws of Brunei Darussalam. Monopolies Act. Revised ed., 2003, Cap. 73. 15 March 2003.

Indonesia

Law of the Republic of Indonesia. Prohibition of Monopolistic Practices and Unfair Business Competition, No. 5, 1999.

Republic of Indonesia. Government Regulation No. 57, 2010.

Lao PDR

The Prime Minister Office. Decree on Trade Competition, No. 15/PMO. Vientiane, 4 February 2004.

Malaysia

Laws of Malaysia. Act 588, Communications and Multimedia Act 1998.

Laws of Malaysia. Act 610, Energy Commission Act 2001.

Laws of Malaysia. Act 712, Competition Act 2010.

Laws of Malaysia. Act 713, Competition Commission Act 2010.

Myanmar

Constitution of the Republic of the Union of Myanmar. Ministry of Information, September 2008.

State Law and Order Restoration Council. The State-owned Economic Enterprises Law (No. 9/89), 31 March 1989.

The Philippines

Office of the President of the Philippines. Executive Order No. 45, 9 June 2011.

The Constitution of the Republic of the Philippines. 1987.

The Corporation Code of the Philippines. Batas Pambansa Blg. 68, 1 May 1980.

The Downstream Oil Industry Deregulation Act. Republic Act No. 8479, 10 February 1998.

The Electric Power Industry Reform Act. Republic Act. No. 9136, 8 June 2001.

The Public Telecommunications Policy Act. Republic Act No. 7925, 1 March 1995.

The Price Act. Republic Act No. 7581, 27 May 1992.

The Revised Penal Code, Republic Act No. 3815, 8 December 1930.

Singapore

Competition Commission of Singapore. Guidelines on the Section 34 Prohibition, June 2007.

Competition Commission of Singapore. Guidelines on the Section 47 Prohibition, June 2007.

Competition Commission of Singapore. Guidelines on Merger Procedures, June 2007.

Competition Commission of Singapore. Guidelines on the Substantive Assessment of Mergers, June 2007.

Laws of the Republic of Singapore. Competition Act, Chapter 50B, Revised ed., 2006.

Thailand

Kingdom of Thailand. Trade Competition Act, B.E. 2542 (1999).

Viet Nam

Socialist Republic of Viet Nam. Circular guiding a number of contents in the Government's Decree No. 110/2005/ND-CP dated 24 August 2005, on management of multi-level sale of goods, No. 19/2005/TT-BTM, 8 November 2005.

Socialist Republic of Viet Nam. Decree on Administration of Multi-level Selling Activities, No. 110/2005/ND-CP, 24 August 2005.

Socialist Republic of Viet Nam. Decree on Competition, No. 116/2005/ND-CP, 16 September 2005.

Socialist Republic of Viet Nam. Decree on Dealing with Breaches in the Competition Sector, No. 120/2005/ND-CP, 30 September 2005.

Socialist Republic of Viet Nam. Decree on Establishment, Functions, Duties, Powers and Organizational Structure of Viet Nam Competition Council, No. 05/2006/ND-CP, 6 January 2006.

Socialist Republic of Viet Nam. Decree on Functions, Duties, Powers and Organizational Structure of Viet Nam Competition Administration Department, No. 06/2006/ND-CP, 9 January 2006.

Socialist Republic of Viet Nam. Law on Competition, No. 27-2004-QH11, 2004.

NOTES

1. Summaries of intellectual property laws are available at <http://www.ecap-project.org/> (accessed 30 March 2012).
2. The ASEAN Experts Group on Competition (AEGC) was set up in 2007.
3. Concerns still remain according to the US Department of State, Investment Climate Statement for Singapore, March 2011 <http://www.state.gov/e/eb/rls/othr/ics/2011/157355.htm> (accessed 4 January 2012). "U.S. and other companies remain concerned about the lack of transparency in some aspects of Singapore's telecommunications regulatory and rule-making process." and "… some private sector companies have said they encountered unfair business practices and opaque bidding processes that appeared to favor incumbent, government-linked firms."
4. The Caribbean Community and Common Market (CARICOM) agreement is another example of a failed attempt at integration and regional competition policy because countries have not been willing to relinquish their sovereignty.
5. See Hsu (2012) in this volume for a discussion of dispute resolution for trade and investment. Hsu indicates that ASEAN trade and investment dispute settlement system was only used once (unsuccessfully) and countries prefer to take their disputes to international forums.
6. NAFTA Secretariat: <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=146> (accessed 19 December 2011).
7. NAFTA Secretariat: <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=146> (accessed 19 December 2011).
8. Canada Post acquired 75% of PCL Holdings, the parent company of Purolator in 1993. The transactions was reviewed and allowed by the Competition Bureau. Competitors in the courier market had no objections so long as there was no cross-subsidization between the monopoly and competitive product. The then Director of Investigation and Research concluded that this was unlikely to occur after the merger and Canada Post had provided assurances that its relationship with Purolator would be commercial and on an arm's length basis (OECD 1997, p. 124).
9. Section 14, Canada Post Corporation Act (R.S.C., 1985, c. C-10) <http://laws-lois.justice.gc.ca/eng/acts/C%2D10/> (accessed 20 December 2011).
10. The dispute also mentions Sections 1502 and 1503 since they relate to state enterprises and monopolies. The two Chapter 11 issues are not relevant here as they relate to cultural industries and customs regulations.
11. NAFTA Secretariat: <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=146> (accessed 20 December 2011).

12. See International Centre for Settlement of Investment Disputes, *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, 24 May 2007 <http://italaw.com/documents/UPS-Merits.pdf> (accessed 19 December 2011). This also includes the separate statement of the dissenting member of the panel Dean Ronald A. Cass. For a detailed discussion of the dispute, see Nafzier and Wanak (2009) and Hauk (2008).
13. USTR was required to undertake annual reviews under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988.
14. See World Trade Organization, "Mexico — Measures Affecting Telecommunications Services", WT/DS204/R, 2 April 2004 <http://www.worldtradelaw.net/reports/wtopanels/mexico-telecoms(panel).pdf> (accessed 20 January 2012).
15. WTO, GATS: <http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm> (accessed 20 January 2012). WTO Annex on Telecommunications: <http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm> (accessed 20 January 2012).
16. WTO, Telecommunications Reference Paper: <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> (accessed 20 January 2012).
17. See World Trade Organization, "Mexico — Measures Affecting Telecommunications Services", WT/DS204/R, 2 April 2004 <http://www.worldtradelaw.net/reports/wtopanels/mexico-telecoms(panel).pdf> (accessed 20 January 2012).
18. Article 1 of The Treaty of Asunción: <http://www.worldtradelaw.net/fta/agreements/mercosurfta.pdf> (accessed 1 December 2011). Venezuela's membership has not been ratified. Associate members include Bolivia, Chile, Colombia, Ecuador and Peru.
19. Protocol of OuroPreto: <http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp> (accessed 1 December 2011).
20. *Protocolo de Defensa de la Competencia del Mercosur* (Protocol on the Protection of Competition in the Mercusor). The English text is in Annex 1 of Azevedo (2005).
21. If a cease and desist order is required, the CDC has to refer the case to MTC.
22. This agreement has no formal dispute settlement mechanism and relies on the goodwill of parties (Commonwealth of Australia 1997, p. 22).
23. Article 1 of ANZCERTA: <http://www.dfat.gov.au/fta/anzcerta/downloads/anzcerta1.pdf> (accessed 28 January 2012).
24. Article 12 of ANZCERTA.
25. <http://www.dfat.gov.au/fta/anzcerta/index.html> (accessed 28 January 2012).

26. The Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, 22 February 2006, paragraph 5 <http://www.dfat.gov.au/fta/anzcerta/memorandum_of_understanding_business_law.html> (accessed 28 January 2012).
27. A total of 24 agreements signed between 1992 and 2006 have competition policy chapters and 15 of these are North-South agreements. Twelve agreements do not have competition policy chapters (Sokol 2008, p. 254).
28. WTO TRIPS Agreement: <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> (accessed 20 February 2012).
29. See Section 4 of the "Declaration on the TRIPS agreement and public health", Doha WTO Ministerial, 20 November 2001, WT/MIN(01)/DEC/2: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> (accessed 20 February 2012).
30. See <http://en.wikipedia.org/wiki/European_Patent_Litigation_Agreement> (accessed 20 February 2012).
31. See Overview ECAP III: <http://www.ecap-project.org/index.php?q=overview_ecap_III> (accessed 20 February 2012).
32. ASEAN IPRs Action Plan 2011–2015, Final, 31 July 2011 <http://www.asean.org/documents/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf> (accessed 20 February 2012).
33. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights: <http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_counterfeiting/l26057a_en.htm> (accessed 22 February 2012).
34. *Kirkbi AG v.Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302.
35. C-241-2/91P *Radio TelfisEireann&ITP v. Commission* [1995] ECR 1-743 *(Magill).* C-418/01 *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co* [2004] 4 CMLR 1543.
36. *Walker Process Equipment v. Food Machinery & Chemical Corp.* 382 US 172 (1965).
37. *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.* 508 US 49 (1993).
38. C-56 & 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, 348 [1966] CMLR 418.
39. C-24/67 *Parke Davis & Co v. Probel* [1968] ECR 55, [1968] CMLR 47.
40. In the matter of Rambus Inc., Docket No. 9302, Opinion of the Commission on Remedy, 5 February 2007.
41. C-418/01 *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co* [2004] 4 CMLR 1543.

REFERENCES

Abbott, Frederick M. "Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law". Issue Paper No. 12, UNCTAD — ICTSD Project on IPRs and Sustainable Development, February 2006. <http://www.iprsonline.org/unctadictsd/projectoutputs.htm#casestudies> (accessed 25 November 2011).

Alvarez, Ana María, Julian Clarke and Verónica Silva. "Lessons from the negotiation and enforcement of competition provisions in South-South and North-South RTAs". In *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, edited by Philippe Brusick, Ana María Alvarez, and Lucian Cernat. New York and Geneva: UNCTAD, 2005. <http://www.unctad.org/en/docs/ditcclp20051_en.pdf> (accessed 20 November 2011).

Antons, Christoph. "Introduction". In *The Enforcement of Intellectual Property Rights: Comparative Perspectives from the Asia-Pacific Region*, edited by Christoph Antons. The Netherlands: Kluwer Law International BV, 2011.

ASEAN Secretariat. *ASEAN Regional Guidelines on Competition Policy*. Jakarta, 2010. <http://www.aseansec.org/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf> (accessed 10 August 2011).

———. *Roadmap for an ASEAN Community 2009–2015*. Jakarta, 2009. <www.aseansec.org/publications/RoadmapASEANCommunity.pdf> (accessed 10 August 2011).

Azevedo, André Filipe Zago. "Mercosur Agreement on Competition Policy: How Effective has it been and how to promote further cooperation?" Deliverable 23, Competition Policy Foundations for Trade Reform, Regulatory Reform and Sustainable Development, 2005. <http://www.cpftr.org/cpftr/deliverables/Deliverable23.pdf> (accessed 20 January 2012).

Bessen, James E. and Michael J. Meurer. "Do Patents Perform Like Property?" Working Paper No. 08–08, Working Paper Series, Law and Economics. Boston University School of Law, 2008. <http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/BessenJMerurerM030508REV.pdf> (accessed 5 January 2012).

Botta, Marco. "The role of competition policy in the Latin American regional integration: A comparative analysis of Caricom, Andean Community and Mercosur". IX Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT): Revisiting Regionalism. Appenzel, Switzerland, 21–22 October 2011. <www.iadb.org/intal/intalcdi/PE/2012/09801a05.pdf> (accessed 17 December 2011).

Breitwieser, Anja and Neil Foster. "Intellectual Property Rights, Innovation and Technology Transfer: A Survey". MPRA Paper No. 36094, 20 January 2012. <http://mpra.ub.uni-muenchen.de/36094> (accessed 30 March 2012).

Cernat, Lucian. "Eager to ink, but ready to act? RTA proliferation and international cooperation on competition policy". In *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, edited by Philippe Brusick, Ana María Alvarez, and Lucian Cernat. New York and Geneva: UNCTAD, 2005. <http://www.unctad.org/en/docs/ditcclp20051_en.pdf> (accessed 20 November 2011).

Commonwealth of Australia. "Closer Economic Relations: Background Guide to the Australia New Zealand Economic Relationship". Department of Foreign Affairs and Trade, February 1997. <http://www.dfat.gov.au/fta/anzcerta/downloads/cer.pdf> (accessed 3 March 2012).

Competition Commission of South Africa. "Competition Commission finds pharmaceutical firms in contravention of the Competition Act". Press Release, 16 October 2003. <http://www.cptech.org/ip/health/sa/cc10162003.html> (accessed 29 April 2012).

Drahos, Peter. "Developing Countries and International Intellectual Property Standard-Setting". Study Paper No. 8. UK Commission on Intellectual Property Rights, 2002. <http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf> (accessed 20 December 2011).

———. "The Universality of Intellectual Property Rights: Origins and Development". Background Paper for Panel Discussion on Intellectual Property and Human Rights. Geneva: World Intellectual Property Organization, 1998. <http://www.wipo.int/export/sites/www/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> (accessed 20 December 2011).

Dutfield, Graham. *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History*. Aldershot: Ashgate Publishing Limited, 2003.

Finger, J. Michael. "The Doha Agenda and Development: A View from the Uruguay Round". ERD Working Paper Series No. 21. Manila: Asian Development Bank, September 2002.

Fox, Eleanor M. "Economic Development, Poverty and Antitrust: The Other Path". *Southwestern Journal of Law and Trade in the Americas 13*, no. 2 (2007): 211–36.

Gal, Michal S. and Inbal Faibish Wassmer. "Regional Agreements of Developing Jurisdictions: Unleashing the Potential". In *Competition Policy and Regional Integration in Developing Countries*, edited by Mor Bakhoum, Josef Drexel and Eleanor M. Fox. Cheltenham: Edward Elgar Publishing Limited, 2012.

Hauk, Ryan. "NAFTA'S Chapter 11: Lessons learned from the UPS Case". *8 Asper Review of International Business and Trade Law 8* (2008): 125–46.

Hsu, Locknie. "The ASEAN Dispute Settlement System". In *ASEAN Economic Community: A Work in Progress*, edited by Sanchita Basu Das, Jayant Menon, Rodolfo Severino and Omkar Lal Shrestha. Singapore: Institute of Southeast Asian Studies, 2013.

Jaffe, Adam B. and Josh Lerner. *Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It*. Princeton, NJ: Princeton University Press, 2004.

Jones, Clifford. "Competition Dimensions of NAFTA and the European Union: Semi-Common Competition Policy, Uncommon Rules, and No Common Institutions". Jean Monnet/Robert Schuman Paper Series, vol. 6, no. 18. University of Miami, 2006. <http://www6.miami.edu/eucenter/EULaw_LongPaper_06.pdf> (accessed 5 November 2011).

Kill, Theodore. "The Evidence for Constitutionalization of the WTO: Revisiting the Telmex Report". *Minnesota Journal of International Law* 20, no. 1 (2011): 65–122.

Kiriyama, Nobuo. "Trade and Innovation: Synthesis Report". OECD Trade Policy Working Papers No. 135. Paris: OECD, 2012. <http://dx.doi.org/10.1787/5k9gwprtbtxn-en> (accessed 26 April 2012).

Lerner, Josh. "Patent protection and innovation over 150 years". NBER Working Paper no. 8977. Cambridge, MA: National Bureau of Economic Research, June 2002.

Machlup, Fritz and Edith Penrose. "The Patent Controversy in the Nineteenth Century". *The Journal of Economic History* 10, no. 1 (1950): 1–29.

Maskus, Keith E. *Intellectual Property Rights in the Global Economy*. Washington, D.C.: Institute for International Economics, 2000.

Maskus, Keith E. and Mohan Penubarti. "How trade-related are intellectual property rights?" *Journal of International Economics* 39, nos. 3–4 (1995): 227–48.

Nafziger, James A.R. and Angela M. Wanak. "United Parcel Service Inc., v. Government of Canada: An example of a trend in the arbitration of NAFTA-related investment disputes". *Willamette Journal of International Law and Dispute Resolution* 17, no. 1 (2009): 49–79.

OECD. *Patents and Innovation: Trends and Policy Changes*. Paris: OECD, 2004.

———. "CPL Report on Positive Comity". DAFFE/CPL (99) 19. 1999. <www.oecd.org/dataoecd/40/3/2752161.pdf> (accessed 15 December 2011).

———. *Competition Policy in OECD Countries 1993–94*. Paris: OECD, 1997.

Porter, Michael E. *The Competitive Advantage of Nations*. New York: The Free Press, 1990.

Rosenthal, Rachel. "United States v. Mexico: The First Telecommunications Challenge Confronting The World Trade Organization". *CommLaw Conspectus: Journal of Communications Law and Policy* 10, no. 2 (2002): 315–36.

Round, David K., Jeremy Tustin and Kerrie Round. "Australasian Competition Law: History, Harmonisation, Issues and Lessons". Deliverable 24 Competition Policy Foundations for Trade Reform, Regulatory Reform and Sustainable Development, 2005. <http://www.cpftr.org/cpftr/deliverables/Deliverable24.pdf> (accessed 20 January 2012).

Seville, Catherine. *EU Intellectual Property Law and Policy*. Cheltenham: Edward Elgar Publishing Limited, 2009.

Sokol, D. Daniel. "Order without (enforceable) competition law: Why countries enter into non-enforceable competition policy chapters in free trade agreements". *Chicago-Kent Law Review* 83, no. 1 (2008): 231–92.

UK Commission on Intellectual Property Rights. "Integrating Intellectual Property Rights and Development Policy". London, September 2002. <http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf> (accessed 20 February 2012).

United States Department of Justice and Federal Trade Commission. "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition", 2007. <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (accessed 10 December 2011).