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THE COMMERCIAL IMPORTANCE OF INTELLECTUAL PROPERTY IN ASEAN.

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Economic Development Of Asean Countries And Intellectual Property

Relative to the industrially developed countries, the ASEAN countries have traditionally been agri-based and producers of primary resources - intrinsically labour intensive and inherently dependent on the economies of the industrialised West.

Their then modest success saw internal national attention on and investments in infrastructure and education producing societies with adequate levels of literacy and skill in an environment viable for economic development. In Malaysia, for example, the expenditure on education consistently ranks highest in the Malaysian Federal Government's annual operating expenditure.

Spiralling labour and land costs in the industrialised countries of the West made the option of exploiting the relatively cheap and competent labour force in Asia attractive thus leading to the growth of foreign investments in the region.

This symbiotic co-existence saw the growth of a significant middle class in Asia and the emergence of a new market in the eyes of the industrialised and developed nations. General international awareness of the importance of these new markets grew. This consciousness maintained and in general increased foreign investments in the ASEAN countries and other developing countries in Asia.

Whilst the primary objectives of the host developing country and the investing country may not be identical, they are nevertheless not incompatible up to a point.

For the countries in ASEAN, the need to develop and industrialise is a natural consequence. Some, if not all, of these countries are now poised to spring into industrialisation (in Malaysia, the Vision 2020 programme). To an important extent, programmes for industrialisation call for technological know-how hitherto possessed substantially by the industrialised countries of the West. Hence the constant accentuation on technology transfer in relation to foreign investments. The commercial importance of technology and know-how is now palpable.

Thus, generally speaking, pivotal to the ASEAN nations development is the acquisition and exploitation of technology and know-how in the widest sense. Consonant with this, it is suggested that there must also be a climate which would encourage the development of local original technology and know-how.

It is submitted here that the creation of a suitable modern intellectual property regime and a proper appreciation of the role that intellectual property can play will materially assist the industrialisation ambitions of the ASEAN nations.

The New Asean Markets

The heightening of economic development has led inter alia to a heightening of confidence, sophistication and the desire to industrialise. Now emerging within ASEAN is a large middle class who are sophisticated and financially powerful.

Their wants and "needs" now tend to be products of the intellect and not merely from pure labour. New technologies and consumer goods driven by fashion and cultural differences are demanded.

To facilitate the in-flow of these products there is of course a corresponding requirement for, amongst other things, the protection of these products of the intellect. At the heart of this is the protection of intellectual property. Thus to lure, the host must make it safe.

Those in the practice of law locally are beginning to see intellectual property issues surfacing in their foreign investment and corporate practices. It is not infrequent that one encounters investors or commercial entities where the basis of their existence is grounded on some intellectual property e.g. the trade mark in the garment industry, the innovation or invention in the case of some companies, the copyright in the music industry and the secret formulae in the food and beverage industry.

For the legal practitioner, at the one end of the scale, there is the need to cater for the needs of the various types of intellectual property rights relative to the investment or business in question. This for example, translates into licensing agreements, registration of trade marks and patents and ensuring that designs are protected. Confidentiality provisions in joint venture agreements are frequently employed for protecting trade secrets and know how.

At the other end of the scale is enforcement. The understanding of the various options open and the ability to determine the correct option to utilise are equally important. Litigation by civil action is not always the most efficient way to act against counterfeit products in certain conditions - such as street vendor situations.

A strong intellectual property system in a developing country which is economically viable would be attractive to the industrially strong with developed know-how and a history of inventions.

Correspondingly, the host developing country can tap the investment capital and reap from technology transfer.

It has frequently been argued that the "monopolistic" advantage practically conferred by a developed intellectual property system in, for example the field of patents, has in fact caused home industries to grow rather than to be retarded. (see the example of the Italian pharmaceutical industry given in "*Why Patent Protection*: Part 1" in INSAF January 1995, by Dr Hans Stange).

Whether this would be the case for ASEAN countries remains to be seen. It would certainly appear that a "copy-cat" culture would not encourage inventiveness or originality. Furthermore, the actual international trade regime that presently exists, post cold war, admits of direct or indirect governmental participation in trade related matters. Some countries have even been accused of using their secret service to further the interests of their multinational companies. The failure to recognise and protect intellectual property rights can precipitate adverse international trading conditions for ASEAN. This is evidenced by the recent dispute between China and the USA and more recently (although not in relation to IP) between USA and Japan in relation to the motorcar industry.

There is certainly still a lingering doubt as to whether a host developing nation would suffer some side-effects from full fledged intellectual property protection. The traditional area of concern is in the field of pharmaceuticals. Substantial strides by the industry have been made in this area. Unfortunately, whilst the need for medicine transcends the distinction between rich and poor, affordability of the modern day panacea does not. The role of a responsible government in such situations can conceptually be strained.

Ultimately, the conglomeration of rights under the rubric of intellectual property, it would appear, needs each to be examined individually in the context of national needs and aspirations.

There are also the practical and commercial oddities and weakness which have evolved and surfaced from the "traditional" approaches to intellectual property. The effects have sometimes blurred the conceptual differences that distinguish the various types of intellectual property e.g. copyright and patents and registered design. Copyright concepts have crept into proceedings for the rectification of registered trade marks (see *Re AUVI Trade Mark* [1992] 1 SLR 639), mechanical parts not capable of patent protection is however conferred copyright protection against reverse-engineering [see *Peko Wallsend Operations Ltd v Linatex Process Rubber Ltd* [1993] 1 MLJ 225; cf Copyright in Functional Drawings? The *Linatex* Case and *British Leyland* Revisited by *Lim Heng Gee* [1994] 1 MLJ xc]. The ineffectiveness of proceeding for breach of confidential information in curial systems which call for the disclosure and particularisation of the very information sought to be protected. All these suggest the necessity for some re-evaluation of the system.

Whilst the rights conferred by intellectual property laws do not create true monopolies in the economic sense, at a certain level they can nevertheless adversely affect prices from the consumer's point of view. From a nation building perspective, the socio-economic and political agenda of governments may necessitate some adjustments to prevailing intellectual property law systems.

Different areas perhaps require different treatments. Compare a developing nation's need for certain important pharmaceutical products and its desire for designer goods.

At the outer limits, one can see that both judges and governments have been forced to grapple with the difficulties that present themselves in practical circumstances when traditional concepts of intellectual property law are applied very rigidly to the protean face of the business world. For the judges to prevent ludicrous consequences and for governments to prevent retardation of their national development programmes, various concepts and devices such as parallel imports/grey market goods, exhaustion of rights, compulsory licensing, licensing conditions, corporate sell-down requirements and unfair competition laws have been employed. What impact GATTS will have on these remains to be seen.

Conclusion

There is probably no definitive solution to all the challenges that now face intellectual property law. The question whether the approach ought to be by development within the law of intellectual property itself which will take time, or the utilisation of indirect governmental policies, or both, involves difficult issues.

The flexibility and effectiveness of checking adverse developments or excesses by means of governmental policies is an attractive option. Suitable responses to factual situations can rapidly be deployed and removed when the need no longer exists. There are those who would argue that navigating the progress of a developing country calls for such flexibility. Unfortunately, the uncertainty that such policies present may prove to be disadvantageous for the investor and drastic measures may drive them off.

Regionally too, with the formation of the ASEAN Free Trade Area (NAFTA) and the promotion of growth triangles such as the Singapore-Johore-Riau Growth Triangle (SIJORI), the Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) and the Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) there will be the search for special legal regimes to facilitate the objectives of these projects. Intellectual property too has a role to play. Regional harmonisation of laws and regulations associated with commerce, trade and industry will become more important. There will be many issues to be debated and considered. No doubt the region will be eclectic and adopt the best ingredients of other regional groupings such as the NAFTA and even the European Union. The region may also have to develop its own formula for certain things tailored for itself having regard to its requirements, culture and aspirations.

In view of how intellectual property has evolved so intimately with the economy and commerce of the region and the role that it can be made to play bearing in mind the aspirations of ASEAN, it is obvious that its teaching and training cannot be treated in a fashion similar to that of the more traditional legal subjects. There is much pressure to rationalise the present law, there is much pressure to break new ground, and there is much pressure to harmonise.

A centre fully equipped and having the special knowledge and understanding of the needs of intellectual property is thus essential.

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