

## 別紙 4

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## 主 論 文 の 要 旨

論文題目 Regional Patent Rights Protection in ASEAN: Effects of the “ASEAN Way” and Prospects under the ASEAN Economic Community

(アセアンにおける地域的な特許権の保護：アセアン経済統合体の下での  
” ASEAN Way” の影響と展望)

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## 論 文 内 容 の 要 旨

In 2015, the Association of Southeast Asian Nations (“ASEAN”) formally established the ASEAN Economic Community (“AEC”) to advance economic integration and enable the free flow of goods, services, investment, and freer flow of capital in the region. The AEC is ASEAN’s most significant milestone to date and has demonstrated significant success in reducing trade barriers: according to statistics published by the ASEAN Secretariat, 98.6% of tariff lines in intra-ASEAN trade have been eliminated in 2019. The AEC also addresses the reduction of non-tariff barriers to create an integrated economy, and identifies the strengthening of patent protection as one of the core elements to create a competitive, innovative, and dynamic ASEAN.

While the AEC identifies the strengthening of patent rights protection as a key objective, movement towards further integration of the ASEAN’s patent system has proved difficult to achieve. In particular, the ASEAN member states’ (“ASEAN MS”) insistence on state sovereignty and non-intervention, commonly known as the “ASEAN Way,” has hindered progress towards the centralization of a single regional patent system. As a result, implementation of the AEC is largely limited to informal and non-binding action plans and cooperative approaches. As trade barriers are progressively removed under the AEC, the deliberate limitation of national patent laws by ASEAN MS to conduct occurring within its territorial

borders in accordance with the ASEAN Way also encourages widespread circumvention of national patent laws when processes are sliced and diced across each ASEAN member state, and in turn undermines the integration goals under the AEC.

In line with the objectives of the AEC, this dissertation seeks to analyze ASEAN's framework for patent protection, observe the regional norms that led to the current framework, identify potential effective solutions to transnational patent infringement disputes, and ultimately propose alternatives for a regional patent system in Southeast Asia that is consistent with its economic integration visions. To further inform the context of this research, background to the research topic, the research statement, and methodology are detailed below.

### **1.1 Background**

ASEAN is a regional organization established by way of the ASEAN Declaration in 1967. Since its founding by Indonesia, Malaysia, Singapore, and Thailand, ASEAN's membership has gradually expanded with the joining of Brunei Darussalam ("Brunei") in 1984, Viet Nam in 1995, Lao PDR and Myanmar in 1997, and Cambodia in 1999. ASEAN was initially established as a political association to maintain regional peace and stability in Southeast Asia, but the organization was gradually endowed upon greater functions by ASEAN MS to strengthen the region's economic power and competitiveness in the global market.

In 2007, ASEAN made its most significant breakthrough after forty years of establishment by signing the ASEAN Charter, which expressly codified its norms, rules, and institutional framework. The ASEAN Charter provided the legal framework for further regional integration, leading to the establishment of the ASEAN Community in 2015, comprising of the AEC, ASEAN Political Security Community and the ASEAN Socio-Cultural Community. The AEC in particular represents the realization of ASEAN's end goal of economic integration: it envisions ASEAN as a single market and production base, a highly competitive region, equitable economic development, and fully integrated into the global economy.

Prior to the AEC, economic liberalization was carried out mainly through tariff reduction, whereas the AEC seeks to eliminate tariffs and reduce non-tariff barriers through heightened cooperation and implementation, align ASEAN with global standards, and plug the industries of each ASEAN MS into the global supply chain. The significance of the AEC further lies in ASEAN's economic potential:

according to the ASEAN Secretariat, total combined GDP of ASEAN MS grew fivefold from USD 0.6 trillion in 2000 to US\$3.0 trillion in 2020, making ASEAN the fifth largest economy in the world. Intra-ASEAN trade accounts for the largest share of all ASEAN trade at 26.9%. Additionally, FDIs to Southeast Asia has grown from USD 41.9 billion in 2005 to USD 137.3 billion in 2018.

The implementation of the AEC is guided by AEC Blueprints, which list objectives to be achieved by specific deadlines. Two of such blueprints have been established to correspond to different time periods: the AEC Blueprint 2015 (2009-2015), and the AEC Blueprint 2025 (2016-2025). Both blueprints consistently emphasize the need for better intellectual property rights (“IPR”) protection to create a more competitive and dynamic ASEAN, and specific initiatives are further supplemented by the ASEAN IPR Action Plans. The action plans predate the AEC with the first one dating back to 2004, and since the establishment of AEC have been drafted to be consistent with the AEC, setting out strategic goals and clear deliverables to match the objectives under the blueprint.

While ASEAN has made positive strides towards better patent rights protection, the initiatives are largely cooperative in nature, formulated in open-ended language, and left to the individual ASEAN MS to implement. These initiatives include work-sharing activities between patent offices, establishing of guidelines and best practices, and promoting ASEAN MS to accede to specific international treaties. ASEAN’s predominantly cooperative and flexible approach stands in stark contrast with other regional economies, which generally seek to provide greater legal certainty through the establishment of a centralized patent system to capture and address intra-regional patent infringement activities. A patent exists only by virtue of a grant, and the extent of protection is determined by the ability of the patentee to enforce the rights granted by the patent to prevent others from practicing the same invention. Legal certainty is thus paramount in patent rights protection, and from a regional perspective, having divergent national patent systems operate in the same regional economy will raise questions about the enforceability of a patent in the event of a cross-border infringement, and affects the functioning of the regional economy when divergent national patent laws keep markets fragmented. Given that patent rights are registered rights, if an inventor does not obtain patents from each of the MS, it is likely that the inventor would face difficulties in halting patent infringement within the region; and even if the inventor were to obtain patents from each of the MS, multiple proceedings would still need to be initiated across each jurisdiction, creating more

uncertainties and challenges to the enforcement.

Furthermore, the AEC Blueprints categorized the protection of patent rights as part of the creation of a highly competitive and dynamic ASEAN, rather than explicitly addressing it as part of the creation of a single market and production base. In particular, the lowering of trade barriers without a centralized legal mechanisms in place would lead to widespread patent infringement: ASEAN aims to create not just a single market but a production base, and given the fragmented patent systems within the region, a potential infringer may simply circumvent national patent laws by sourcing parts and components from different ASEAN MS, setting up assembly lines within the region and manufacture the invention in a chosen jurisdiction with weak patent enforcement capabilities. The impact of such circumvention would threaten the AEC's aim of creating a competitive and innovative region. If ASEAN provides the ideal conditions to facilitate intra-ASEAN trade, but does not address the resulting cross-border patent infringement, technology transfer and increased foreign direct investment ("FDI") which is correlated with the presence of a robust patent protection regime, may be deterred.

As seen from the establishment of the AEC, ASEAN has a clear vision for its economic integration end-goal. The question then turns to why ASEAN has not opted for a legalistic and formalized approach to achieving its objectives under the AEC. This may be explained by the underlying norm that has characterized ASEAN's functioning since its inception: colloquially referred to as the "ASEAN Way," ASEAN's operational code of conduct has been that of informal decision-making, respect for state sovereignty, and non-interference. The general reluctance of ASEAN MS to cede state sovereignty to a supranational regional institution, and the reliance on consultation and consensus among ASEAN MS results in weak ASEAN organs with no vested decision-making power and limited functions. Even with ASEAN's gradual shift towards increasing legalization through the ASEAN Charter, the same degree of formalization is still not reflected in many parts of ASEAN's integration process and legal instruments, and ASEAN's function as a regional organization remains limited.

## **1.2 Research Statement and Question**

This dissertation contends that ASEAN's current approach to patent rights protection is not consistent with its economic integration goals, and that ASEAN's

active aversion to greater legalization across all areas of integration would not solve the potential problems surrounding cross-border patent rights infringement. The central research statement of this dissertation is as follows: What insights can comparative law generate, through reference to other regional economies and local courts, to strengthen ASEAN's patent protection system? Using insights from comparative legal methodology and comparative patent law, this dissertation aims to propose ways in which ASEAN's legal system may be improved to better support the goals of enhancing patent protection. To that end this dissertation will demonstrate that:

- 1) The conception of the AEC lacks clarity, and even under the broadest interpretation, the vision is not supported sufficiently by the current patent initiatives due to divergent patent laws, facilitated cross-border patent infringement, and legal uncertainty on cross-border disputes;
- 2) A regional approach to patent protection is promising for ASEAN in the context of the stalled multilateral negotiations; the ASEAN Way which emphasizes informality, consultation and consensus may be giving way to increased legalization and formalization as evidenced from the ASEAN Charter; however, the ASEAN Way remains relevant in the development of ASEAN's instruments and institutions;
- 3) To attain the goals set out under the AEC, ASEAN should opt to reduce its reliance on the ASEAN Way and consider the adoption of a centralized patent system similar to that of the unified patent system in the EU, and as patentability standards among ASEAN MS increasingly converge with global standards, ASEAN should consider other intermediate alternatives to lessen the impact of divergent national patent laws to its economic integration goals.

### **1.3 Methodology**

The dissertation draws on comparative law methodology to study and analyze ASEAN's patent regime, adopting a predominantly functional approach: (i) analyzing legal systems and judicial decisions in response to real life situations, (ii) interpreting fact in light of their functional relation to society, (iii) identifying functionally equivalent institutions performing similar functions in different legal regimes, and (iv) allowing for a "better-law comparison" where the better of several

laws would fulfil the designated function best in comparison. To conduct both inter-regional and intra-regional comparison, this dissertation also draws on other closely-related disciplines, including comparative regionalism and economic integration theories to provide context and further insights into the establishment and development of ASEAN as an organization.

The first objective of this dissertation is to outline the defining features of ASEAN's overall economic integration and relevant patent-related initiatives. To that end, this dissertation adopts a descriptive approach in identifying relevant legal instruments giving rise to ASEAN as a regional institution, the scope and extent of economic integration, and the ensuing patent landscape as shaped by ASEAN's many initiatives. The primary legal sources are the relevant treaties and declarations adopted by ASEAN in the context of economic cooperation, including the ASEAN Charter and the AEC blueprints. Furthermore, to grasp the overarching goal of the AEC, particularly the concept of a "single market," economic and trade theories are employed to form the basis of analysis in determining the integration model adopted by ASEAN and its intended outcomes. Potential legal issues and resolution of patent disputes associated with the cross-border trade of patent-embodied goods is also underscored under the AEC framework through functional and comparative approaches, with reference to sources of laws in different jurisdictions.

After identifying the relevant issues, this dissertation then turns to understanding the global trend towards regionalism, and how protecting patent rights on a regional scale became prevalent. In order to understand why the same was not implemented by ASEAN, the question then turns to the influence of the ASEAN Way in ASEAN's overall regional governance, and that despite shifts towards greater legalization, the ASEAN Way as a mode of diplomacy remains influential, resulting in ASEAN's institutional limitations where there are no centralized system and a general lack of accountability.

Finally, this dissertation identifies the patent-related treaty agreements applicable to ASEAN, and prescribes potential solutions for ASEAN based on two different approaches: (i) the gradual erosion of the "ASEAN Way" which enables ASEAN to establish a patent system on a regional level, or (ii) maintaining ASEAN's status quo and what can be done better. For both proposals, a better comparative practice is conducted with considerations on concept, institution, and judicial arrangements on patent prosecution and enforcement. For (i), special emphasis is placed on the proposed Unified Patent Court and Unitary Patent, and

whether the same can be implemented in ASEAN. The possibility of extraterritorial application of national patent law and the adoption of a common private international law, such as that of the ALI and CLIP Principles are also addressed to demonstrate the options available for ASEAN. For (ii), the recognition of foreign patents is raised as an option with three variations: recognition of a foreign patent as a national patent, mutual recognition of a foreign patent with unitary effect, or issuance of patents with national effect through a centralized regional patent office. Additionally, the interoperability concept which focuses on enabling the effective operation of patent offices and judiciary in contrast with the harmonization of patent law is also addressed.

Overall, the main contribution of this dissertation is to present workable and viable options for the consideration of ASEAN's policymakers. The proposals outlined could serve as a reference for ASEAN policy makers to consider the direction to which ASEAN can take to enhance its regional patent rights protection goals. This dissertation further calls the formalization of an ASEAN patent system and greater legalization to fulfill ASEAN's initiatives under the AEC. Furthermore, ASEAN needs give due consideration to developing its own legal methodology and should take incremental steps to strengthen the rule of law as necessitated under the ASEAN Charter.