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REGIONAL PATENT RIGHTS PROTECTION IN ASEAN: EFFECTS OF THE “ASEAN WAY” AND PROSPECTS UNDER THE ASEAN ECONOMIC COMMUNITY

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Abstract

This dissertation seeks to address the disconnect between the Association of Southeast Asian Nations ("ASEAN")'s vision towards regional economic integration and the lack of a formalised ASEAN patent system. While the ASEAN Economic Community ("AEC") was established in 2015 to enable free flow of goods, services, investment, and freer flow of capital in the region, movement towards the integration and centralisation of a single ASEAN regional patent system has proved to be difficult. In particular, ASEAN member states' doctrinal purchase on state sovereignty and non-intervention, commonly known as the "ASEAN Way," restricts the implementation of the AEC to informal and non-binding cooperative approaches. As trade barriers are gradually lifted under the AEC, the lack of a supranational patent authority along with the conscious limitation of national patent laws to only conducts occurring within territorial borders in line with the ASEAN Way encourages widespread circumvention of national patent laws when production processes are sliced and diced across each ASEAN member state.

To illustrate the existing issues and prescribe potential solutions, this dissertation adopts a comparative approach to illustrate how different regional patent systems and other local jurisdictions resolve instances of cross-border patent infringement, in contrast with ASEAN's framework for patent rights protection. Drawing from the comparative analyses, this dissertation then proposes several solutions that ASEAN may consider to narrow the gap between vision and execution moving forward, depending on the degree of adherence to the ASEAN Way: a supranational patent system, a single ASEAN private international law, or extraterritorial application of national patent laws if ASEAN intends to erode the effects of the ASEAN Way, or mutual recognition of patents or interoperability if the ASEAN Way remains relevant.

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List of Abbreviations

AEC	ASEAN Economic Community
AFTA	ASEAN Free Trade Area
AIC	ASEAN Industrial Complementation
AIP	ASEAN Industrial Projects
ALI	American Law Institute
ARIPO	Africa Regional Industrial Property Organization
Art.	Article
Art(s).	Article(s)
ASA	Association of Southeast Asia
ASEAN	Association of Southeast Asian Nations
ASEAN MS	Association of Southeast Asian Nations member states
ASPEC	ASEAN Patent Search and Examination Cooperation
ATIGA	ASEAN Trade in Goods Agreement
Brunei	Brunei Darussalam
CARICOM	Caribbean Community and Common Market
CEPT	Common Effective Preferential Tariff
Cf.	Confer; compare
CJEU	Court of Justice of the European Union
CPC 1975	Community Patent Convention in 1975
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CU	Customs Union
EAPO	Eurasian Patent Office
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECOWAS	Economic Community of West African States
EEC	European Economic Community

EPC	European Patent Convention
EPO	European Patent Office
ERIA	Economic Research Institute for ASEAN and East Asia
EU	European Union
EUIPO	European Union Intellectual Property Office
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GCCPO	Gulf Cooperation Council Patent Office
GDP	Gross Domestic Product
GI	Geographical Indications
GPPH	Global Patent Prosecution Highway
ICC	International Chamber of Commerce
IP	Intellectual Property
IPOPHL	Intellectual Property Office of the Philippines
IPR	Intellectual Property Rights
IPOS	Intellectual Property Office of Singapore
JPO	Japan Patent Office
Lao PDR	Lao People's Democratic Republic
LDCs	Least-Developed Country Members
MAPHILINDO	Malaya, the Philippines, and Indonesia
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-Favoured Nation
MIH	Ministry of Industry and Handicraft
MS	Member States
MyIPO	Intellectual Property Corporation of Malaysia
NAFTA	North American Free Trade Agreement

OAPI	Organisation Africaine de la Propriété Intellectuelle
PAIPO	Pan-African Intellectual Property Organisation
para(s).	Paragraph(s)
PCT	Patent Cooperation Treaty
PLT	Patent Law Treaty
PTA(s)	Preferential Trade Agreement(s)
RCEP	Regional Comprehensive Economic Partnership
RTAs	Regional Trade Agreements
SADC	Southern African Development Community
Sec.(s)	Section(s)
SICC	Singapore International Commercial Court
TAC	Treaty of Amity and Cooperation in Southeast Asia
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership Agreement
UK	United Kingdom
UKPO	United Kingdom Patent Office
UNCTAD	United Nations Conference on Trade and Development
UPC	Unified Patent Court
UPCA	Unified Patent Court Agreement
US	United States of America
USD	United States dollar
USPTO	United States Patent and Trademark Office
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO MS	World Trade Organization member states
vs	versus

Chapter I: Introduction

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: by 2019, 98.6% of tariff lines in intra-ASEAN trade have been eliminated.[1] 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.[2]

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, insistence by the ASEAN member states ("ASEAN MS") on state sovereignty and non-intervention, commonly known as the "ASEAN Way," [3] has hindered progress towards the centralisation 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 analyse ASEAN's framework for patent protection, observe the regional norms that have 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,

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[1] The ASEAN Secretariat, "ASEAN Integration Report 2019" (Jakarta, Indonesia, 2019), 19–20, https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf.
[2] *ASEAN Economic Community Blueprint 2025*, section B3.
[3] The concept of the ASEAN Way will be explored further in this dissertation. Infra Chapter 3.2 of this dissertation.

the research statement, literature review, methodology, and significance of the study are detailed below.

1.1 Background

ASEAN is a regional organisation established by way of the ASEAN Declaration in 1967.[4] 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.[5] ASEAN was initially established as a political association to maintain regional peace and stability in Southeast Asia, but the organisation was gradually endowed upon greater functions by the 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,[6] 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 realisation of ASEAN's end goal of economic integration: it envisions ASEAN as a single market and

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[4] *The ASEAN Declaration (Bangkok Declaration), Bangkok, 8 Agustus 1967*.

[5] ASEAN's membership eligibility is stipulated under Art. 6 of the ASEAN Charter. Art. 6(2)(a) in particular provides that the MS needs to be located "in the recognised geographical region of Southeast Asia." ASEAN had a loose political delineation on the boundaries of Southeast Asia, but gradually adopted an understanding which mirrors that of the conventional geographic parlance. This is best illustrated by the Sri Lanka's application for membership: while Sri Lanka, then Ceylon, could have obtained membership during ASEAN's formative years, after a period of deference it's application in 1981 was denied due to its geographical location. On this, Chin has noted that the rejection was also based out of political consideration given ASEAN's aversion to be embroiled in the political and security problems of the Indian subcontinent. See: Kin Wah Chin, "ASEAN: The Long Road to 'One Southeast Asia,'" *Asian Journal of Political Science* 5, no. 1 (June 1, 1997): 4–5, https://doi.org/10.1080/02185379708434091. Further, according to a statement released on 11 November 2022, ASEAN has agreed "in-principle to admit Timor-Leste to be the 11th member of ASEAN," and to provide a roadmap for Timor-Leste's full membership in accordance with specific milestones. In the meantime, Timor-Leste is granted an observer status and allowed participation in all ASEAN Meetings. See: Association of Southeast Asian Nations, "ASEAN Leaders' Statement on the Application of Timor-Leste for ASEAN Membership," November 11, 2022, https://asean.org/asean-leaders-statement-on-the-application-of-timor-leste-for-asean-membership/.

[6] *Charter of the Association of Southeast Asian Nations.*

production base, a highly competitive region, equitable economic development, and fully integrated into the global economy.

The AEC subsumes prior initiatives by ASEAN in eliminating intra-ASEAN tariffs and expands the scope of trade liberalisation to include the reduction of non-tariff barriers. The significance of the AEC further lies in ASEAN's economic potential: total combined GDP of ASEAN MS grew substantively from 2.2 trillion USD in 2011 to 3.0 trillion USD in 2020, making ASEAN the fifth largest economy in the world.[7] FDI inward flows also grew from 87.5 billion USD in 2011, as compared to 137.3 billion USD in 2020.[8] With the progressive removal of trade barriers among ASEAN MS, intra-ASEAN trade is robust and accounts for the largest share of all ASEAN trade in goods at 549 billion USD (26.9%) in 2020.[9]

The implementation of the AEC is guided by AEC Blueprints, which list objectives to be achieved by specific deadlines.[10] Two of such blueprints have been established to correspond to different time periods: the AEC Blueprint 2015[11] (2009-2015), and the AEC Blueprint 2025[12] (2016-2025). Both blueprints consistently emphasise the need for better intellectual property rights ("IPR") protection to create a more competitive and dynamic ASEAN, and specific initiatives to attain the blueprint goals are detailed under the ASEAN IPR Action Plan. 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 goals under the blueprints.[13] These initiatives include work-sharing activities between patent offices, the setting up of guidelines and best practices, and promote ASEAN MS to accede to specific international treaties.[14]

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[7] The ASEAN Secretariat, "ASEAN Key Figures 2021" (Jakarta, Indonesia: Association of Southeast Asian Nations, 2021), 33–39, https://www.aseanstats.org/wp-content/uploads/2021/12/ASEAN-KEY-FIGURES-2021-FINAL-1.pdf.
[8] The ASEAN Secretariat, 49–51.
[9] The ASEAN Secretariat, *ASEAN Statistical Yearbook 2021* (Jakarta: ASEAN Secretariat, 2021), 53, 58, https://asean.org/wp-content/uploads/2021/12/ASYB_2021_All_Final.pdf.
[10] Infra. Chapter 2.1.3 of this dissertation.
[11] *ASEAN Economic Community Blueprint.*
[12] *ASEAN Economic Community Blueprint 2025*.
[13] Infra. Chapter 2.2.2 of this dissertation.
[14] See: Association of Southeast Asian Nations, "The ASEAN Intellectual Property Rights (IPR) Action Plan 2016-2025: Updates to the ASEAN IPR Action Plan (Version 2.0)," 2021, 6,

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 each ASEAN MS to implement. 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 centralised patent system to capture and address intra-regional patent infringement activities.[15] 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 practising the same invention. Legal certainty is thus paramount in patent rights protection, and from a regional perspective, having divergent national patent systems operating in the same regional economy will raise doubts on the enforceability of a patent in the event of a cross-border infringement, and will affect the operation of the regional economy when divergent national patent laws keep markets fragmented.[16] Given that patent rights are registered rights, if an inventor does not obtain patents from each ASEAN 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 all MS, multiple proceedings would still need to be initiated across each jurisdiction.[17]

Further, the AEC Blueprints categorized the protection of patent rights as part of the creation of a highly competitive and dynamic ASEAN, rather than explicitly addressed it as part of the creation of a single market and production base. In particular, the AEC's success in lowering trade barriers, but without a centralised patent mechanism in place would lead to widespread patent infringement. ASEAN aims to form not just a single market but a production base, and given the fragmented patent systems within the region, one may simply circumvent national patent laws by sourcing parts and components from different ASEAN MS, creating an assembly line within the region and manufacture

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https://www.aseanip.org/Portals/0/PDF/ASEAN%20IPR%20Action%20Plan%202016-2025%20v2.0.pdf?ver=2021-06-10-135518-427.

[15] Infra. Chapter 3.1.3 and 4.2 of this dissertation.

[16] See e.g. Bruno Van Pottelsberghe, *Lost Property: The European Patent System and Why It Doesn't Work*, vol. IX, Bruegel Blueprint Series (Belgium: Bruegel, 2009), 5–6.

[17] On geographical fragmentation of the patent system, see e.g. Nari Lee, *Exclusion and Coordination of Fragmentation: Five Essays toward a Pluralistic Theory of Patent Right*, Publications of the University of Eastern Finland. Dissertations in Social Sciences and Business Studies (Joensuu: University of Eastern Finland, 2010), 25–26.

the invention at a chosen jurisdiction with weak patent enforcement capabilities.[18] The impact of such circumvention would threaten the AEC's aim of creating a competitive and innovative region, and 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 to the presence of a robust patent protection system, may be deterred.[19]

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 formalised approach to achieve 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.[20] 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 legalisation through the ASEAN

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[18] The ease of purchasing patent infringing products in ASEAN has been an ongoing issue. European Commission has identified Malaysia, Thailand and Viet Nam as having weak protection and enforcement of IP rights. IPR-infringing goods is widely accessible in Malaysia and IPR enforcement has been raised as a serious concern. Thailand on the other hand has a considerable backlog in terms of substantive examination of patent applications, the process taking on average 10-12 years which cover a substantive portion of the patent term, whereas Viet Nam remains "an important producer of counterfeit goods" and a highly complex enforcement system. See: European Chamber of Commerce in Vietnam, "Whitebook 2020: Trade Investment Issues and Recommendations," 2020, 73–74, https://www.eurochamvn.org/whitebook2020; European Commission, "Commission Staff Working Document: Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries," April 27, 2021, 44–45, 49–51, 55–57, https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159553.pdf.

[19] On the modes and measurement of how innovation is driven by knowledge and technology transfer activities, see e.g. Anthony Arundel, Suma Athreye, and Sacha Wunsch-Vincent, eds., *Harnessing Public Research for Innovation in the 21st Century: An International Assessment of Knowledge Transfer Policies*, 1st ed. (Cambridge University Press, 2021), https://doi.org/10.1017/9781108904230. The volume of patent filings is also a key indicator in WIPO's Global Innovation Index. See: Soumitra Dutta et al., eds., *Global Innovation Index 2022: What Is the Future of Innovation-Driven Growth?*, 15th ed. (Geneva: World Intellectual Property Organization, 2022), https://doi.org/10.34667/TIND.46596.

[20] Mely Caballero-Anthony, "The ASEAN Way and the Changing Security Environment: Navigating Challenges to Informality and Centrality," *International Politics*, June 11, 2022, https://doi.org/10.1057/s41311-022-00400-0.

Charter, the same degree of formalisation is still not reflected in many parts of ASEAN's integration process and legal instruments, and ASEAN's function as a regional organisation remains limited.[21]

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, that ASEAN's active aversion to greater legalisation 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 regime may be improved to better support the goals of improving 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; (Chapter 2)
2) A regional approach to patent protection is promising for ASEAN of the stalled multilateral negotiations; the ASEAN Way which emphasises informality, consultation and consensus may be giving way to increased legalisation and formalisation as evidenced from the ASEAN Charter; however, the ASEAN Way remains deeply embedded in the development of ASEAN's instruments and institutions; (Chapter 3)
3) To attain the goals set out under the AEC, ASEAN should opt to lessen reliance on the ASEAN Way and consider instituting a centralised patent system similar to that of the unified patent system in the EU, as patentability standards among ASEAN MS increasingly converge with

[21] Imelda Deinla, ed., *From ASEAN Way to the ASEAN Charter: Towards the Rule of Law?* (Cambridge: Cambridge University Press, 2017), 198–201, https://doi.org/10.1017/9781108147934.001.

global standards, ASEAN should consider intermediate alternatives to lessen the impact of divergent national patent laws to its economic integration goals (Chapter 4).

1.3 Literature Review

Despite being a regional organisation, ASEAN does not have supranational authority over its MS, has limited binding legal instruments, and has a dispute settlement system that has yet to be utilised. Given ASEAN's comparatively weak legal instruments and institutions, and with no ascertainable ASEAN legal methodology, legal research on ASEAN's patent system has often adopted an inter-disciplinary approach. To establish fundamental premises to work through the informal aspects of the economic integration process, existing patent-related works often reference relevant studies spanning across the fields of international law, political science, international relations, and economic and trade theories.

In terms of ASEAN's historical development, numerous researches have detailed ASEAN's rise as a security alliance and subsequent reformation into an economic organisation. Narine's take on ASEAN has been particularly influential: ASEAN represents a shared regional identity embodying fundamental norms and acts as an instrument for ASEAN MS to pursue national goals.[22] Acharya's research on the effects of ASEAN's propensity for consensus-seeking and non-legalistic approach to inter-state diplomacy, colloquially known as the ASEAN Way, also laid down the foundation in understanding ASEAN's role as a security community and overall institutional design.[23] Stubbs has also referred to ASEAN's approach to conducting regional relations as antithesis to the prevailing notion of global governance, notably the preoccupation with regional stability, neutrality, sovereignty, territorial integrity, informality, non-confrontational negotiations, and peaceful settlement of disputes.[24]

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[22] Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers, 2002).
[23] Amitav Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order* (London; New York: Routledge/Taylor & Francis Group, 2009).
[24] Richard Stubbs, "The ASEAN Alternative? Ideas, Institutions and the Challenge to 'Global' Governance," *The Pacific Review* 21, no. 4 (August 28, 2008): 451–68, https://doi.org/10.1080/09512740802294713.

For the analysis of ASEAN's economic integration, most studies have relied on Balassa's authoritative work which defined the categories of economic integration,[25] to analyse the structure and implementation of goals under the AEC.[26] Comparisons have also been made between the AEC and other regional economies, such as that of the EU single market, emphasizing the variations in institutional design, legal instruments, and the strength of the rule of law.[27] Additionally, Woon's seminal commentary on the ASEAN Charter,[28] and the *Integration through Law* series published by the Centre of International Law, National University of Singapore also adopted a conceptual approach in understanding ASEAN's economic integration model by examining the importance of substantive and procedural legal principles and rules, along with the implementation, enforcement, and dispute settlement,[29] and how ASEAN functions as prescribed through its legal instruments as compared to other regions.[30]

Building upon the aforementioned studies, the study of patent rights protection in ASEAN has taken into account of the institutional and normative aspects of ASEAN's integration, frequently referencing the ASEAN Way:[31] Hilty and Romandini noted that realistic backlog issues before national

[25] Bela Balassa, "Towards a Theory of Economic Integration," *Kyklos* 14, no. 1 (1961).
[26] Jacques Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*, ed. J. H. H. Weiler and Tan Hsien-Li, Integration Through Law: The Role of Law and the Rule of Law in ASEAN Integration (United Kingdom: Cambridge University Press, 2016), 18–40; Koichi Ishikawa, "The ASEAN Economic Community and ASEAN Economic Integration," *Journal of Contemporary East Asia Studies* 10, no. 1 (January 2, 2021): 24–41, https://doi.org/10.1080/24761028.2021.1891702. Tan however, criticised the application of Balassa's categorisation to ASEAN since "unlike the EU, ASEAN leaders lacked the political will to advance beyond a free trade area" and that ASEAN leaders put national policies over and above regionalism." See: Lay Hong Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?," *International & Comparative Law Quarterly* 53, no. 4 (October 2004): 943–47, https://doi.org/10.1093/iclq/53.4.935.
[27] See e.g. Jean-Claude Piris and Walter Woon, *Towards a Rules-Based Community: An ASEAN Legal Service* (Cambridge University Press, 2015); Michael Plummer, *The ASEAN Economic Community and the European Experience* (Manila, the Philippines: Asian Development Bank, 2006), https://www.adb.org/publications/asean-economic-community-and-european-experience; Sang Chul Park et al., eds., *Economic Integration in Asia and Europe: Lessons and Policies* (Japan: Asian Development Bank Institute, 2021), https://www.adb.org/publications/economic-integration-asia-europe-lessons-policies.
[28] Walter Woon, *The ASEAN Charter: A Commentary* (Singapore: NUS Press, 2016).
[29] The General Editor's Preface of each of the series' books lists out the methodological undertakings. See e.g. Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*, xiii.
[30] See e.g. Stefano Inama and Edmund W. Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile*, Integration Through Law: The Role of Law and the Rule of Law in ASEAN Integration (United Kingdom: Cambridge University Press, 2015); Carlos Closa et al., *Comparative Regional Integration Governance and Legal Models* (Cambridge, United Kingdom: Cambridge University Press, 2016); Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*.
[31] Elizabeth Siew-Kuan Ng, "ASEAN IP Harmonization: Striking the Delicate Balance," *Pace International Law Review* 25, no. 129 (2013); Irene Calboli, "Free Movement of Goods and Intellectual Property

patent offices should override ASEAN's strong insistence on territoriality and the creation of an ASEAN Patent Office is a viable option given the marginal differences on patent eligibility across ASEAN MS.[32] Lim et al. on the other hand insist on an non-binding approach to IPR protection in contrast to a "hard-nosed legalistic approach",[33] and Ng further argued that ASEAN should instead strive towards interoperability, and technical and procedural convergence.[34]

While the available literature on ASEAN patent rights protection has provided insightful analyses on the pathways that ASEAN may take, there is a paucity of work that examines ASEAN's patent initiatives in light of the AEC's goal of creating a single market and production base, and how intra-ASEAN patent rights protection would be affected as a result of the overall reduction of tariffs and non-tariff barriers. Furthermore, existing works generally do not challenge the notion of the ASEAN Way and assume its prevalence in prescribing solutions for ASEAN, while there have been changes in ASEAN MS' perceptions of territorial sovereignty and the principle of non-interference. Thus, this dissertation seeks to fill in this gap in patent research in the ASEAN context.

1.4 Methodology

The dissertation draws on comparative law methodology to study and analyse ASEAN's patent regime, adopting a predominantly functional approach: (i) analysing 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

Exhaustion in ASEAN: A Road Block in the ASEAN Way?," *Faculty Scholarship*, March 1, 2019, 317–41, https://doi.org/10.1017/9781108563208.017.

[32] Reto Hilty and Roberto Romandini, "Developing a Common Patent System: Lessons to Be Learned from the European Experience," in *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, ed. Elizabeth Siew-Kuan Ng and Graeme W. Austin (United Kingdom: Cambridge University Press, 2017), 288–89.

[33] Mark Lim, Sok Yee See Tho, and Diyanah Binte Baharudin, "Singapore's Intellectual Property Dispute Resolution Experience," in *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, ed. Elizabeth Siew-Kuan Ng and Graeme W. Austin (United Kingdom: Cambridge University Press, 2017), 92–93.

[34] Elizabeth Siew-Kuan Ng, "Intellectual Property Interoperability in ASEAN and Beyond: An Integration Model," in *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, ed. Elizabeth Siew-Kuan Ng and Graeme W. Austin (United Kingdom: Cambridge University Press, 2017), 5–21.

fulfil the designated function best in comparison.[35] To conduct both inter-regional and intra-regional comparison, this dissertation also references other closely-related disciplines, including comparative regionalism and economic integration theories to provide context and further insights to ASEAN's establishment and development as an organisation. The specific research methods that are employed differs for each research statement as set out in 1.1, and are as follows.

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 instituting patent rights protection 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 legalisation, the ASEAN Way as a mode of diplomacy remains prevalent among ASEAN MS, resulting in ASEAN's institutional limitations where there are no centralised 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

[35] Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 342.

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 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 Principles[36] and CLIP Principles[37] are also addressed to demonstrate the options available for ASEAN. For (ii), mutual recognition of patents which has already been undertaken by some ASEAN MS, and the proposed interoperability concept is also addressed.

The general approach adopted by this dissertation broadly reflects works of legal scholarships on "policy analysis" as categorised by Minow,[38] and incorporates both legal and inter-disciplinary approaches as needed. Parallel to the move from doctrinal analysis to a wider acceptance of methodological pluralism to address considerations of policy prescriptions in legal research, this dissertation references established comparative regionalism literature and economic integration theory for clear conceptual distinctions from the outset: regionalism is defined as "a primarily state-led process of building and sustaining formal regional institutions and organizations among at least three states" and regional integration "begins when states transfer at least some authority and sovereignty rights to the regional level."[39] Regional organisations are "formal and institutionalised cooperative relations among states(…)."[40] While regional integration entails supranationalism, regional cooperation on the other hand is "primarily intergovernmental relations that do not entail the transfer of authority to the respective regional organisation,"[41] and takes place when states at a

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[36] *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes.*
[37] *Principles on Conflict of Laws in Intellectual Property.*
[38] Martha Minow, "Archetypal Legal Scholarship: A Field Guide," *Journal of Legal Education* 63, no. 1 (August 1, 2013): 66.
[39] Tanja A. Börzel and Thomas Risse, "Introduction: Framework of the Handbook and Conceptual Clarifications," in *The Oxford Handbook of Comparative Regionalism* (Oxford, United Kingdom: Oxford University Press, 2016), 7–8, https://doi.org/10.1093/oxfordhb/9780199682300.013.1.
[40] Börzel and Risse, 7.
[41] Börzel and Risse, 8.

regional level join and act together through treaties to fulfil common ends.[42] In accordance with common practice, "ASEAN" and "Southeast Asia" are also used interchangeably in this dissertation.

In addition, this dissertation distinguishes between utility patents and design patents, and does not analyse the latter. There are two main reasons for this exclusion. The protection of designs differs across jurisdictions, which sometimes involve a multiplicity of overlapping intellectual property rights. Noting the importance of assessing the role of design protection in ASEAN, this dissertation leaves the issue on creating a regional design system within Southeast Asia for future research, and focuses on the role of utility patents.

1.5 Significance of the Study

This dissertation seeks to provide a comprehensive overview of ASEAN's current initiatives, understand the relevant issues, and devise solutions for ASEAN's goals under the AEC through comparative law methodology and an inter-disciplinary approach. For now, cross-border patent infringement cases among ASEAN MS are rarely brought to light. There is no singular regional patent law to speak of, and no supranational authority to give rise to an ASEAN law methodology. Thus, while some degree of conjecture is required in assessing the prospects of ASEAN's patent rights protection, specific instances of cross-border infringement from other jurisdictions are applied and assessed in light of ASEAN's institutional limitations and prevailing norms, an exercise that is rarely been carried out by current patent literature on ASEAN.

Further, authoritative works on ASEAN's patent rights protection are generally premised on the ASEAN Way, which assumes that ASEAN's norms are unique to the region and thus rules out any possibility of considering alternative options derived from the experience of other regional organisations. While it is important to consider workable mode of cooperation for ASEAN in consideration of the status quo, this dissertation contends that there needs to be a distinction of what *ought* to be done rather than what *can* be done. Analysis must first be carried out based on the precise

[42] Mathias Forteau, "Regional Co-Operation," in *Max Planck Encyclopedia of Public International Law*, para. 1, accessed October 19, 2020, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e671?prd=OPIL.

wordings of ASEAN's economic integration objectives as a whole, including the creation of a dynamic and competitive ASEAN and the conception of a single market and production base – followed by a clear identification of the shortcomings. Even in the absence of similar coordinated region-wide trade liberalisation, the slicing and dicing of production processes resulting in complex cross-border patent infringement disputes have been brought before courts under the current European patent system, and also before Japanese and US courts. These considerations could serve as useful reference for ASEAN moving forward.

Another contribution that this dissertation seeks to make is to address the territorial sovereignty concept characterised under the ASEAN Way, and patent law's territoriality principle. Both concepts have been conflated in the assessment of ASEAN's IP system – the former supported by public international law, whereas the latter being a private right enforceable within the borders of the state granting the patent. Thus, the assessment of a regional patent system in ASEAN becomes a two-step process: understanding the ASEAN Way as a form of inter-regional diplomacy between ASEAN MS, and how the mode of diplomacy affects the enforcement of patent rights on a regional basis.

The focus on patents in this dissertation arises from the role of patents in trade and its impact on restricting the free movement of goods in Southeast Asia. Since enabling the free movement of goods within the region constitutes the primary aim under the AEC, better solutions should be prescribed to facilitate the movement of goods. One may argue that while patents constitute a non-tariff barrier in ASEAN,[43] it is simply not as significant as compared to other non-tariff barriers, and that according to a joint study conducted by the Economic Research Institute for ASEAN and East Asia ("ERIA") and United Nations Conference on Trade and Development ("UNCTAD"), IP is ranked fairly lowly in the incidence of import and export non-tariff measures.[44] Moreover, it is arguable that a focus on regional trademark protection would have been more apropos in the context of Southeast Asia due

[43] Ing Lili Yan, Olivier Cadot, and Rully Prassetya, "Managing Non-Tariff Measures in ASEAN," ed. Ponciano Intal and Mari Pangestu, *Integrated and Connected Seamless ASEAN Economic Community*, May 2019, 42–44.

[44] This is in comparison to other non-tarifff measures: in 2018, technical barriers to trade constitute 36.2%, sanitary and phytosanitary measures at 29.4%, whereas IP is at 0%, one out of 9,502 non-tariff measures. See: Thi Thanh Ha Doan and Salvador M. Buban, "Managing Non-Tariff Measures in ASEAN," ed. Ponciano Intal and Mari Pangestu, *Integrated and Connected Seamless ASEAN Economic Community*, May 2019, 24.

to the widespread manufacturing and sale of counterfeiting goods within the region. In response, this dissertation seeks to establish that patents embody market power that is capable of promoting or restricting technology transfer, and while IP's effects are not as readily quantifiable, the volume and quality of granted patent is a strong indicator of competitiveness.[45] Regional patent protection is thus highly relevant and deeply connected to the creation of a dynamic and innovative Southeast Asia, and would contribute to the creation of an ASEAN single market and production base. While regional trademark protection is just as important to enable product recognition in the marketplace, it does not directly address the aim of improving technological innovation under the AEC. Furthermore, since patent law is subsumed under IP law and shares a "family semblance,"[46] as the most territorial right as compared to trademark and copyright;[47] apt solutions for patents would serve as a guide for other IPR protection.

Overall, the main contribution of this dissertation is to present workable and viable options for the consideration of ASEAN's policymakers while outlining the shortcomings of each approach. The proposals outlined in Chapter 4 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. Ultimately, if ASEAN seeks to complete its creation of a single market and production base, ASEAN would still need to consider the formalisation of a single ASEAN patent system.

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[45] See for instance, the World Economic Forum which used patent activity in assessing the competitiveness of a market. e.g. Klaus Schwab and Saadia Zahidi, *The Global Competitiveness Report Special Edition 2020* (Cologny/Geneva: World Economic Forum, 2020), 30–32, 49.

[46] Alexandra George, "The Metaphysics of Intellectual Property," *W.I.P.O.J* 7, no. 1 (2015): 16–28.

[47] Chisum notes that among the three principal forms of IP which are patents, copyrights, and trademarks, "patent rights are most explicitly territorial." See: Donald S. Chisum, "Normative and Empirical Territoriality in Intellectual Property: Lessons from Patent Law Symposium: Intellectual Property Law in the International Marketplace," *Virginia Journal of International Law* 37, no. 2 (1997): 605. Dinwoodie has also noted that patent law is more often than not, subject to the strict interpretation of territoriality than other IP laws since the right only exists with the active granting by the state. See: Graeme B. Dinwoodie, William O. Hennessey, and Shira Perlmutter, *International and Comparative Patent Law* (Newark, NJ: LexisNexis/Matthew Bender, 2002), 30–35.

2. ASEAN's Economic Integration and Patent-Related Initiatives

ASEAN was established in August 1967 to promote economic growth, social progress, cultural development, and peace and stability within the region. As a region of great diversity in terms of culture, politics, religion, languages, colonial history, and economic development levels, ASEAN's objectives and policies have evolved throughout the years to reflect the needs of each ASEAN MS. In terms of economic cooperation, ASEAN first focused on merchandise trade and tariff reduction, and subsequently expanded efforts to include services, investment, labour, and the lowering of non-tariff barriers. In the context of ASEAN's overall integration process, regional protection of patent rights grew from discussions and joint considerations to practical implementation such as that of the ASEAN Patent Examination Co-operation Program and the ASEAN Intellectual Property Right Action Plan ("ASEAN IPR Action Plan").

As a prelude to deeper evaluation of ASEAN's patent rights protection system, this Chapter will briefly outline the historical context that led to ASEAN's creation, the obstacles to ASEAN's early emergence and development, rise to prominence in the area of economic cooperation, and the various stages of its economic integration development, followed by an analysis into how the current patent initiatives are in line with the goals as stipulated under the AEC. This Chapter will also illuminate ASEAN's achievements, but further demonstrate the shortcomings of ASEAN's approach to meeting the goals that it has laid out.

2.1 Overview of ASEAN's Economic Integration Initiatives

ASEAN's incremental evolution as a regional organisation, and its economic integration initiatives may be studied in different stages in accordance with policy changes set out by ASEAN MS, beginning from ASEAN's establishment as a regional organisation in the 1960s, subsequent foray into region-wide economic efforts during the mid-1970s, followed by bolder visions of further economic integration efforts in the 1990s. Each of these will be examined in turn in this section.

2.1.1 Establishment of ASEAN as a Regional Organisation

Since ASEAN's establishment on 8 August 1967 by way of the ASEAN Declaration, ASEAN has engaged in initiatives to further regional integration, albeit with varying degrees of success.[48] Southeast Asia in the 1960s was embroiled in intraregional conflicts and frequent interference by foreign powers. At the height of the Cold War, regional unrest was further fuelled by Cold War alignments and exacerbated by conflicts in Viet Nam and Cambodia.[49] Even among the founding ASEAN MS, continued frictions and disputes over territoriality and regional legitimacy were also frequent – Indonesia expressed their intention to "crush" Malaysia during the *Konfrontasi* period; Singapore was separated from Malaysia on August 1965; and Malaysia and the Philippines were embroiled in territorial dispute over Sabah.[50]

As the region continued to be embroiled in political uncertainty, initial attempts to establish a regional association to promote reconciliation and security cooperation were not fruitful. Two significant attempts to build a regional organisational structure predates that of ASEAN: the Association of Southeast Asia ("ASA"), and a tripartite group, MAPHILINDO. ASA was established on 31 July 1961 incorporating the Federation of Malaya,[51] Singapore, and the British Borneo territories, but collapsed quickly due to the territorial dispute between the Philippines and Malaysia. MAPHILINDO on the other hand was a loose consultative grouping first formed by the Philippines and Indonesia on July 1963, followed by the Federation of Malaya's signing on August 1963. MAPHILINDO was also envisioned to be a vehicle "for devising Asian solutions to Asian problems by Asians

[48] These initiatives include the Colombo Plan and the Southeast Asia Treaty Organisation ("SEATO") for collective defense. For an overview of the initiatives, see: Vincent K. Pollard, "ASA and ASEAN, 1961-1967: Southeast Asian Regionalism," *Asian Survey* 10, no. 3 (1970): 244–55, https://doi.org/10.2307/2642577.
[49] Tim Huxley, "ASEAN Security Co-Operation — Past, Present and Future," in *ASEAN into the 1990s*, ed. Alison Broinowski (London: Palgrave Macmillan UK, 1990), 86–90, https://doi.org/10.1007/978-1-349-20886-9_4.
[50] For an overview of regional cooperation efforts up until 1964, see e.g.: Bernard K. Gordon, "Problems of Regional Cooperation in Southeast Asia," *World Politics* 16, no. 2 (1964): 222–53, https://doi.org/10.2307/2009506.
[51] The Federation of Malaya comprising of states in Peninsular Malaysia attained independence on 31 August 1957. The Federation was then amalgamated with Singapore, Sarawak, and Sabah to form Malaysia in 1963, followed by Singapore's exit in 1965. See e.g. R. S. Milne, "Malaysia: A New Federation in the Making," *Asian Survey* 3, no. 2 (1963): 76–82, https://doi.org/10.2307/3023678.

themselves."[52] However, the grouping was dissolved a month later in September 1963 due to the formation of the Federation of Malaysia, whose legitimacy was subsequently challenged by Indonesia and led to the severance of diplomatic ties.

The idea of a regional association in Southeast Asia continued to be flouted among Southeast Asian leaders, and while neither the ASA nor MAPHILINDO survived, both were influential predecessors of ASEAN. In 1966, regime changes in the Philippines and Indonesia led to an improvement of relations and revived talks of a regional organisation, and in 1967, ASEAN was established in Bangkok with the signing of the ASEAN Declaration by five countries - Indonesia, Malaysia, the Philippines, Singapore, and Thailand.[53] The declaration drew heavily from the ASA, particularly on the elements economic cooperation as each country assigned a high priority to promote national economic development.[54] The ASEAN Declaration is broad in terms of its objectives, which included the acceleration of economic growth, social progress, regional peace and stability, active collaboration and mutual assistance in the economic, social, cultural, technical, and administrative spheres.[55]

ASEAN was created with three goals in mind: to alleviate intra-ASEAN pressures, to reduce the influence of external actors in the region, and to promote socioeconomic development.[56]At the time of ASEAN's founding, regional cooperation was hampered by strained relationships. Southeast Asia was in the midst of the Vietnam War and inter-ASEAN diplomacy was still on precarious grounds.

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[52] Embassy of Indonesia, Washington D.C., "Sukarno, Macapagal Meet in Manila," in *Report on Indonesia*, vol. 13 (Information Office, Embassy of Indonesia., 1964), 4.
[53] In terms of the enforceability of the ASEAN Declaration, ASEAN's own matrix has excluded Statements and Declarations as legal instruments, noting that both serve only to reflect aspirations and political will of parties. See: Association of Southeast Asian Nations, "Explanatory Notes," ASEAN Legal Instruments, accessed March 28, 2021, http://agreement.asean.org/explanatory/show.html.
[54] Roger Irvine, "The Formative Years of ASEAN: 1967–1975," in *Understanding ASEAN*, ed. Alison Broinowski (London: Macmillan Education UK, 1982), 13–14, https://doi.org/10.1007/978-1-349-81250-9_2.
[55] The aims and purposes of the establishment of ASEAN as according to the declaration include the following:

> "1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
> 2. To promote regional peace and stability (…)
> 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields."

[56] Shaun Narine, "Institutional Theory and Southeast Asia: The Case of ASEAN," *World Affairs* 161, no. 1 (1998): 33.

The first few years for ASEAN were focused mainly on intra-regional confidence building,[57] normalising relations between its MS,[58] alleviating political pressures and preventing further escalation of volatile situations.[59] ASEAN provided a platform for ASEAN leaders to engage in talks, lessen territorial disputes, and greatly emphasised mutual respect for each other's territorial sovereignty.[60] Respect for sovereignty was especially emphasised as Indonesia, Malaysia, Singapore, and the Philippines were newly independent states. Minimising regional unrest would translate into peace and stability, which in turn allows each member state to focus on their own domestic agendas. As ASEAN MS engaged in nation-building, regional economic development at this stage was still restricted due to protectionist policies, lack of organisational structure of ASEAN, and weak industrial bases and competitive economies.[61]

2.1.2 Expansion into Region-wide Economic Policies

ASEAN remained a politically-oriented grouping up until almost a decade later. ASEAN MS gained confidence in reassessing the extent of cooperation, moving from political considerations to being more market-driven. The next breakthrough for ASEAN only happened in 1976 during the

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[57] Irvine, "The Formative Years of ASEAN," 8–36.

[58] Each ASEAN MS sought to attain different ends by joining ASEAN. Malaysia saw ASEAN as a means to minimising the threat of external powers over its economic resources, and believed that "neutralising" the expansion of communism within the region would limit foreign interference within the region. Singapore on the other hand did not see the presence of external powers as a threat, favoured a balance of powers within the region, and saw joining ASEAN as an opportunity to associate with other ASEAN MS and stress its Southeast Asian identity. Indonesia strived for some form of regional pre-eminence and leadership within ASEAN, and also to transplant its policy of "national resilience" as ASEAN's common policy. As for Thailand, joining ASEAN was a pragmatic option to maintain peaceful coexistence with other Southeast Asian states, and gradually move from the country's a one-sided policy of dependency with the US. For the Philippines, an ASEAN membership helps strengthen their Asian identity to counter-balance the relationship with US. See e.g.: Huxley, "ASEAN Security Co-Operation — Past, Present and Future," 84–85; Michael Leifer, *ASEAN and the Security of South-East Asia* (Routledge, 1989), 600–607; Poon-Kim Shee, "A Decade of ASEAN, 1967-1977," *Asian Survey* 17, no. 8 (1977): 755–57; 766–67, https://doi.org/10.2307/2643336.

[59] Huxley pointed out that ASEAN provided the mechanism for the MS to resolve the ongoing disputes with one another – tensions could be reduced if the MS work towards finding a shared goal or interest together. See: Huxley, "ASEAN Security Co-Operation — Past, Present and Future," 84–85.

[60] Antolik notes that ASEAN provides an escape from "distasteful realities," including intramural differences or external problems. Thus, the Association "speaks in positive language," and "points to opportunities and benefits that economics and cultural cooperation can bring. See: Michael Antolik, *ASEAN and the Diplomacy of Accommodation* (London; New York: Routledge, Taylor & Francis Group, 2016), chap. 9, https://doi.org/10.4324/9781003069744."

[61] Shee, "A Decade of ASEAN, 1967-1977," 769.

ASEAN Summit,[62] where all five ASEAN MS gathered for the first time since its establishment. This was prompted by the rapidly changing political and economic landscape and thus the crucial need for economic cohesiveness.[63]

During the Summit, the ASEAN MS reviewed activities of ASEAN since 1967, and expressed the will to move to higher levels of cooperation.[64] This gave rise to the Declaration of Concord[65] where ASEAN MS agreed to a programme of actions under the headings of political, economic, social, cultural and information, and security, as the framework for ASEAN cooperation. Under the declaration, ASEAN MS agreed to sign among all, two notable agreements:(i) the Treaty of Amity and Cooperation in Southeast Asia ("TAC") which prescribes norms and principles for regional order and peaceful coexistence and friendly cooperation among ASEAN MS,[66] and (ii) the establishment of the ASEAN Secretariat through consolidating separate national secretariats established in each ASEAN MS with their own Secretary General coordinating ASEAN-related affairs, into a single ASEAN Secretariat.[67] ASEAN MS are also required to improve the ASEAN machinery by regularly reviewing the organisational structure of ASEAN with a view to enhance its effectiveness, and study the desirability of an ASEAN constitutional framework.

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[62] The ASEAN Summit is later affirmed in the ASEAN Charter to the supreme policy-making body of ASEAN, and comprises of the Heads of State or Government of the MS. See infra Chapter 3.1.3 of this dissertation.

[63] Chin pinpointed six imperatives for further consolidation among ASEAN MS: (i) opening-up of the Indochinese states, (ii) new regional security concerns after the end of the cold war, (iii) economic competitiveness between regional groupings and increased economic regionalism, (iv) new international concerns and transnational movements such as human rights, democracy, and the environment, (v) widening of the role of regional think tanks in engaging with NGOs, and (vi) internal challenges among ASEAN S brought about by social, economic, political, technological and societal changes. See: Kin Wah Chin, "ASEAN: Consolidation and Institutional Change," *The Pacific Review* 8, no. 3 (January 1, 1995): 425–26, https://doi.org/10.1080/09512749508719148.

[64] Association of Southeast Asian Nations, "Press Release The First Pre-ASEAN Summit Ministerial Meeting Pattaya, 10 February 1976," May 14, 2012, https://asean.org/press-release-the-first-pre-asean-summit-ministerial-meeting-pattaya-10-february-1976/.

[65] Association of Southeast Asian Nations, "The Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976," May 14, 2012, https://asean.org/the-declaration-of-asean-concord-bali-indonesia-24-february-1976/.

[66] Infra 3.2.2 of this dissertation.

[67] For an overview of the ASEAN Secretariat organisational structure as a result of the revamp, see: Srikanta Chatterjee, "ASEAN Economic Co-Operation in the 1980s and 1990s," in *ASEAN into the 1990s*, ed. Alison Broinowski (London: Palgrave Macmillan UK, 1990), 59–61, https://doi.org/10.1007/978-1-349-20886-9_3.

The Declaration of Concord was the first milestone in the expansion of ASEAN's role into economic cooperation, particularly on enhancing trade on basic commodities and raw materials, establishing industrial plants, and utilising preferential trading arrangements for the long-term. The underlying machinery for economic cooperation was also provided under the declaration where ASEAN MS agreed to hold meetings to exchange views, formulate recommendations, and review the implementation of ASEAN programmes and projects on economic matters. Most importantly, ASEAN's initiatives under the declaration were centred on promoting "peace, progress, prosperity and the welfare of peoples of member states,"[68] and the shared understanding was that such cooperation would promote political stability which in turn would enable the acceleration of economic growth in the region for each ASEAN MS.[69]

Discussions for greater intra-ASEAN cooperation continued and three key projects were implemented: the ASEAN Preferential Trading Arrangements in 1977, the ASEAN Industrial Projects (AIP) in 1980, and the ASEAN Industrial Complementation (AIC) in 1981. However, the PTAs applied only to limited commodities broadly listed under the Declaration of Concord, and discussions to further extend the preferential arrangements to cover more product categories have been slow. In addition to inadequate tariff preferences, trade liberalisation under the PTA was also impeded by a plethora of non-tariff barriers: ASEAN MS were in the midst of developing their own manufacturing industries, and erected protectionist policies often in the form of complex regulations to dissuade foreign investors seeking market access, to protect these sectors against regional competition.[70]

[68] Association of Southeast Asian Nations, "The Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976."

[69] The preamble of the Declaration of ASEAN Concord prioritises regional security, stating that "ASEAN cooperation shall take into account, among others, the following objectives and principles in the pursuit of political stability." Kurus further pointed out that economic benefits that ASEAN MS derive from the ASEAN framework at that time was attributable to the existence of ASEAN's role in maintaining peace, rather through intra-ASEAN economic schemes per se. See: Bilson Kurus, "Understanding ASEAN: Benefits and Raison d'Etre," *Asian Survey* 33, no. 8 (1993): 828, https://doi.org/10.2307/2645090.

[70] Janamitra Devan, "The ASEAN Preferential Trading Arrangement: Some Problems, Ex Ante Results, and a Multipronged Approach to Future Intra-ASEAN Trade Development," *ASEAN Economic Bulletin* 4, no. 2 (1987): 200–201; Chatterjee, "ASEAN Economic Co-Operation in the 1980s and 1990s," 65–78.

Implementation of the AIP and AIC in 1981 which sought to promote regionally-based import substitution industrialisation were similarly hampered.[71]

The 1990s marked a turning point in ASEAN's development as a regional organisation. The easing of ideological divides and the ASEAN-Mekong Basin Development Cooperation[72] enabled the gradual participation of Cambodia, Lao PDR, Myanmar, and Viet Nam, which not only helped stabilise the domestic economies but also allowed further regional initiatives to take flight.[73] In addition, the rise of China as a competitor for FDIs[74] along with the springing up of regional trade agreements (RTAs) including the Mercado Común del Sur ("MERCOSUR"), North American Free Trade Agreement ("NAFTA"), and the envisioning of the EU prompted ASEAN leaders to further deepen regional commitments in order to remain competitive.[75] This led to the envisioning of greater intra-ASEAN economic cooperation through regional integration and the creation of a highly competitive production base, linked with and open to the global market.[76]

To that effect, the ASEAN MS agreed to establish an ASEAN Free Trade Area ("AFTA") beginning on 1 January 1993, the goals of which are to be realised by 2008, but later brought forward to 2003.[77] AFTA is aimed at creating a single market and international production base, attract FDIs, and expand intra-ASEAN trade and investments.[78] AFTA does not apply a common external tariff, but

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[71] Chatterjee, "ASEAN Economic Co-Operation in the 1980s and 1990s," 68–70; John Ravenhill, "Economic Cooperation in Southeast Asia: Changing Incentives," *Asian Survey* 35, no. 9 (1995): 851–53, https://doi.org/10.2307/2645786.
[72] *Basic Framework of ASEAN- Mekong Basin Development Cooperation Kuala Lumpur, 17 June 1996.*
[73] Chin, "ASEAN: The Long Road to 'One Southeast Asia,'" 10–15; Seiji F. Naya and Michael G. Plummer, "Economic Co-Operation after 30 Years of ASEAN," *ASEAN Economic Bulletin* 14, no. 2 (1997): 123–24.
[74] Alice D. Ba, *(Re)Negotiating East and Southeast Asia: Region, Regionalism, and the Association of Southeast Asian Nations*, Studies in Asian Security (Stanford, Calif.: Stanford University Press, 2009), 105; David Martin Jones, "ASEAN's Imitation Economic Community: The Primacy of Domestic Political Economy," in *ASEAN Economic Community: A Model for Asia-Wide Regional Integration?*, ed. Mia Mikic and Bruno Jetin (United Kingdom: Palgrave Macmillan, 2016), 20.
[75] Between 1995 and 2001, a hundred RTAs were formed which covering much of the whole world. See: Francesco Duina, "Varieties of Regional Integration: The EU, NAFTA and Mercosur," *Journal of European Integration* 28, no. 3 (July 1, 2006): 247–48, https://doi.org/10.1080/07036330600744456.
[76] Inama and Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile*, 5; David Carpenter, Rokiah Alavi, and Izyani Zulkifli, "Regional Development Cooperation and Narrowing the Development Gap in ASEAN," in *Narrowing the Development Gap in ASEAN*, ed. Mark McGillivray and David Carpenter (United Kingdom: Routledge, 2016), 140.
[77] Hadi Soesastro, "The ASEAN Free Trade Area: A Critical Assessment," *The Journal of East Asian Affairs* 16, no. 1 (2002): 20.
[78] Other agreements that came into effect during the decade include the ASEAN Framework Agreement on Services (AFAS) in 1995 and the ASEAN Investment Area (AIA) in 1998.

for goods originating from ASEAN, reduced tariff rates would apply. The main mechanism to attain AFTA's goals is the Common Effective Preferential Tariff Scheme ("CEPT") which prescribed a phased schedule for the gradual elimination on tariffs on goods within the ASEAN region.

The CEPT requires tariffs to be lowered for a large range of products, including both manufactured and semi-manufactured products, notably much more than that of the previous PTA. Under the schedule, tariffs on goods on the fast track had to be reduced to 0-5% by 2000, whereas goods on the normal track will be reduced in the subsequent years.[79] ASEAN MS also had the option to exclude certain products, either temporarily,[80] or sensitive agriculture products, or other general exceptions. Protocol to Amend the CEPT-AFTA Agreement for the Elimination of Import Duties was also signed in 2003 – Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand will eliminate all import duties on products in the inclusion list by 1 January 2010, and not later than 1 January 2015 for Cambodia, Lao PDR, Myanmar, and Viet Nam, with some flexibility on duties on some sensitive products. The removal of tariffs and quotas was further complemented by several initiatives, such as the Framework Agreement on the Facilitation of Goods in Transit to allow movements of goods with minimum customs inspection, and the Framework Agreement on Mutual Recognition Arrangements to reduce technical barriers to trade.

Despite some success in lowering tariffs, the CEPT and AFTA did not transform the trade practices within ASEAN due to the existing non-tariff barriers,[81] nor did it revive FDI flows.[82] The elimination of non-tariff barriers remains a major obstacle as divergent product standards and technical regulations still prevents the free movement of goods. In addition, administration of the

[79] See: Art. 4, *Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)*; Association of Southeast Asian Nations, "CEPT Product Profile: Structure of the CEPT Product List," October 3, 2012, https://asean.org/cept-product-profile/.

[80] This is allowed under the Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List.

[81] While the CEPT-AFTA Agreement had provisions on the elimination of quantitative restrictions and non-tariff barriers beginning in January 1996, Chia pointed out that the removal has been slow because "it took considerable time for ASEAN to compile and update its [non-tariff barriers] database." The non-tariff barriers were supposed to be removed by 2010, with exception to the Philippines (by 2012) and Cambodia, Lao PDR, Myanmar, and Viet Nam (by 2015 with some flexibility). See: Siow Yue Chia, "The ASEAN Economic Community: Progress, Challenges, and Prospects," *Asian Development Bank Institute*, ADBI Working Paper Series, 440 (October 2013): 15, https://www.adb.org/sites/default/files/publication/156295/adbi-wp440.pdf.

[82] Jones, "ASEAN's Imitation Economic Community: The Primacy of Domestic Political Economy," 20.

AFTA is left to each ASEAN MS: while the ASEAN Secretariat monitors compliance, the Secretariat has no legal authority to compel action. It became apparent that mere trade liberalisation and non-discriminatory principles were insufficient, and ASEAN needed more stringent measures to reinvigorate the ASEAN economy.[83]

2.1.3 Vision for a Highly Integrated and Competitive Economic Region

In 1997, ASEAN leaders adopted the ASEAN Vision 2020, envisaging "a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investment, a freer flow of capital, equitable economic development and reduced poverty and socioeconomic disparities" by the year 2020. This was seen as a long-term roadmap for ASEAN.[84] This vision was then translated into a declaration during the ASEAN Concord II[85] in 2003, where ASEAN leaders declared the establishment of an ASEAN Community. The community would consist of "three pillars" – the ASEAN Economic Community, the ASEAN Socio-Cultural Community, and the ASEAN Political-Security Community, all of which would work in tandem to establish an ASEAN Community by 2020.[86]

While the ASEAN Community was to be implemented by 2020, ASEAN leaders moved the timelines forward and accelerated the process of the establishment of the AEC to 2015. The AEC Blueprint 2015 was then adopted on 20 November 2007. The creation of the AEC is also espoused in the ASEAN Charter which entered into force on 15 December 2008, a treaty between ASEAN MS codifying regional cooperative initiatives.[87] This initiative also marks another milestone in ASEAN's development, effectively moving ASEAN from an "association" to a three-pillared "community."[88]

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[83] Das has pointed out that ASEAN's commitment to deeper integration is believed to be able to generate more welfare gains for ASEAN as a whole, rather than mere tariff liberalisation under AFTA. See: Sanchita Basu Das, *The ASEAN Economic Community and Beyond* (ISEAS-Yusof Ishak Institute, 2016), 12.
[84] A Hanoi Action plan was also drafted in 1998 to guide the final goal of the AEC, followed by the Vientiane Plan of Action in addressing the development gap within the region.
[85] *Declaration of ASEAN Concord II (Bali Concord II)*.
[86] Piris and Woon, *Towards a Rules-Based Community*, xvii.
[87] Infra Chapter 3.2.2 of this dissertation.
[88] Pasha L. Hsieh and Bryan Mercurio, "ASEAN Law in the New Regional Economic Order: An Introductory Roadmap to the ASEAN Economic Community," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 14, 2018), 12, https://papers.ssrn.com/abstract=3230488.

For ASEAN, regional economic integration is no longer restricted to lowering tariff barriers via PTAs. To become a competitive and globally integrated economic region, the AEC is geared towards integrating supply and value chains across ASEAN, expanding vertical intra-industry trade in parts and components, intermediate goods, and final products.[89] Subsequent enlargement of intra-regional markets in ASEAN is projected to enable the exploitation of scale, which would in turn attract more FDIs and strengthen transnational corporation networks in ASEAN.[90]

i. ASEAN Economic Community Blueprint 2015[91]

The AEC Blueprint 2015 was developed in 2007 to provide a roadmap for the implementation of economic integration for the government entities involved. The blueprint is part of the "Roadmap for an ASEAN Community" plan, which lasted from 2009 to 2015. The blueprint constitutes a binding declaration among ASEAN MS, and stipulates that "each ASEAN Member Country shall abide by and implement the AEC by 2015." The blueprint is also seen as a departure from ASEAN's tradition of keeping regional cooperation open-ended as the objectives have been expressly written with some degree of specificity. ASEAN envisages the AEC to have the following key characteristics, which are intertwined and mutually reinforcing:[92]

(i) **A Single Market and Production Base**

This objective comprises five core elements: free flow of goods, services, investment, skilled labour, and freer flow of capital. There are two further important elements to add to this objective. The first element provides for the priority integration sectors which ASEAN will focus its resources on comprehensively integrating. The second element refers to the food, agriculture, and forestry sectors, primarily to promote

[89] Amelia U. Santos-Paulino, "The Asian Economic Integration Cooperation Agreement: Lessons for Economic and Social Development," UNCTAD Research Paper No. 3 (United Nations, 2017), 9, https://unctad.org/en/PublicationsLibrary/ser-rp-2017d3_en.pdf.
[90] Lawan Thanadsillapakul, "Legal and Institutional Frameworks for Open Regionalism in Asia: A Case Study of ASEAN," in *The Dynamics of East Asian Regionalism in Comparative Perspective*, ed. Tamio Nakamura, ISS Research Series 24 (Japan: Institute of Social Science, University of Tokyo, 2006), 196.
[91] Some research studies have referred to this blueprint as the 2007 blueprint, which is attributed to the year of the blueprint's promulgation. This dissertation refers to this blueprint as the 2015 blueprint, as noted under the AEC Blueprint 2025.
[92] *ASEAN Economic Community Blueprint,* 6-26.

cooperation and technology transfer among ASEAN MS and international, regional organisations, and private sectors.

(ii) **A Highly Competitive Economic Region**

This objective aims to foster a culture of fair competition through cooperation on competition policy, consumer protection, IPR, infrastructure development, avoidance of double taxation, and e-commerce.

(iii) **A Region of Equitable Economic Development**

This objective aims to promote SME development as well as narrowing the development gap among ASEAN countries through ASEAN integration.

(iv) **A Region Fully Integrated into the Global Economy**

This objective aims to maintain ASEAN's coherent approach towards external economic relations, and ASEAN's enhanced participation in global supply networks.

Apart from the strategic measures, a strategic schedule that explains the actions to be taken across different time periods is attached along with the blueprint. There are 17 "core elements" and 176 "priority actions" under the blueprint, which are meant to be taken in four separate implementation periods (2008-2009, 2010-2011, 2012-2013, and 2014-2015).[93] The ASEAN Secretariat[94] and the ministers concerned from each country are responsible for implementing the tasks under the blueprint, and report the progress of the implementation to the Council of the AEC who is accountable for the overall implementation of the blueprint.[95] The ASEAN Secretariat also utilised scorecards as statistical indicators to track the progress of implementation and compliance.[96] Further, under the goal of establishing "a single market and production base," the blueprint notes the significant progress made by AFTA in removing tariffs, but emphasised that "free flow of goods would

[93] *ASEAN Economic Community Blueprint*, 30-55.
[94] The ASEAN Secretariat is established in 1976 by the Foreign Ministers of ASEAN, and is responsible for increasing the efficiency of the coordination between ASEAN organs and facilitate stakeholder collaboration in accordance with the ASEAN Charter. See Association of Southeast Asian Nations, 'ASEAN Secretariat', *ASEAN*, 2012.
[95] *ASEAN Economic Community Blueprint*, 2, 26.
[96] *ASEAN Economic Community Blueprint*, 27. See also: Sanchita Basu Das, "Assessing the Progress and Impediments towards an ASEAN Economic Community," in *ASEAN Economic Community Scorecard: Performance and Perception* (Singapore: Institute of Southeast Asian Studies, 2013), 1–19.

require not only zero tariffs but the removal of on-tariff barriers as well."[97] The blueprint further directs the review and enhancement of the CEPT scheme to accelerate ASEAN's economic integration.

ii. ASEAN Trade in Goods Agreement (ATIGA)

While enhancing the CEPT constitutes one of the key measures stipulated under the AEC 2015, the scheme was subsequently replaced by the ASEAN Trade in Goods Agreement ("ATIGA") which entered into force on 17 May 2010 alongside the ASEAN Framework Agreement on Services ("AFAS"), and the Comprehensive Investment Agreement ("ACIA"). ATIGA supports the goals of the AEC to establish a single market and production base with free flow of goods by 2015, and as compared to the CEPT, ATIGA includes more comprehensive coverage of other trade distortions, including that of non-tariff barriers, rules of origin, customs, standards, and phytosanitary measures.[98] ATIGA also expressly required all ASEAN MS to have full tariff reduction schedules completed by 2015,[99] and to eliminate identified non-tariff barriers in tranches, which would be subject to review by the AFTA Council.[100]

The Coordinating Committee on the Implementation of ATIGA aids the Senior Economic Officials' Meeting and the AFTA Council to oversee and monitor the effective implementation of the ATIGA. While ASEAN has adopted non-tariff measure classifications for the repository in accordance with UNCTAD's classification, which classifies IP as a non-tariff measures, very little if any further information is available as to how reduction measures are being carried out.[101] ATIGA also established an ASEAN Trade Repository which contains trade related information to provide transparency on nine

[97] *ASEAN Economic Community Blueprint*, 6.
[98] Art. 40-42, *ASEAN Trade in Goods Agreement*.
[99] Art. 19-20, *ASEAN Trade in Goods Agreement.*
[100] Art. 42, *ASEAN Trade in Goods Agreement.*
[101] On the ASEAN trade repository database, only Malaysia has been listed as including IP as a non-tariff measure in its own national trade repository. Still, IP as a non-tariff measure remains descriptive as compared to other non-tariff measures such as import licensing, where each measure is clearly listed out. See for instance: Association of Southeast Asian Nations, "Intellectual Property," ASEAN Trade Repository, accessed August 16, 2020, https://atr.asean.org/read/intellectual-property/315; Royal Customs Department Malaysia, "Intellectual Property," Malaysia National Trade Repository, 2020, http://mytraderepository.customs.gov.my/en/ntm/Pages/int_pro.aspx.

"topics" divided by ASEAN MS, which is maintained and updated by the ASEAN Secretariat when notified by ASEAN MS.[102]

Through ATIGA, tariff lines between ASEAN MS have been significantly lowered.[103] However, ASEAN MS still struggled to meet the commitments by 2015 and the work remained incomplete. This is then translated to the ASEAN Blueprint 2025, but as pointed out by Nguyen et al., by the end of 2016, "progress on unfinished items in the AEC had slowed to a crawl."[104]

iii. ASEAN Economic Community Blueprint 2025[105]

The AEC Blueprint 2015 was reviewed in 2015, and was determined then that the targets provided under the have not been fully attained. The AEC Blueprint 2025 was then overhauled in November 2015 to address the next ten years, and prioritises unfinished implementation of measures under the AEC Blueprint 2015.[106] The creation of this blueprint is also part of ASEAN's new declaration, "ASEAN 2025: Forging Together," declared by ASEAN MS during the 27th Summit in 2015, succeeding the previous plan.

As noted in the previous section, the AEC Blueprint 2015 was based on the "four pillars." The AEC Blueprint 2025 added a fifth pillar and updated the wordings as below:[107]

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[102] This includes tariff nomenclature, most-favoured-nation tariffs and preferential tariffs, rules of origin, non-tariff measures, national trade and customs laws and rules, procedures and documentary requirements, administrative rulings, best practices in trade facilitation, and list of authorised economic operators. See also Art. 13, ATIGA. See; Association of Southeast Asian Nations, "About," ASEAN Trade Repository, accessed August 16, 2020, https://atr.asean.org/read/about-asean-trade-repository/22.

[103] Among ASEAN MS, Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand have reduced more than 99 per cent of the products in the CEPT Inclusion List to the 0-5 per cent tariff range. See: Association of Southeast Asian Nations, "The ASEAN Free Trade Area (AFTA)," ASEAN, 2012, http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/.

[104] Minh Hue Nguyen, Deborah Elms, and N Lavanya, "The ASEAN Trade in Goods Agreement: Evolution and Regional Implications," in *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*, ed. Bryan Mercurio and Pasha L. Hsieh (Cambridge: Cambridge University Press, 2019), 25, https://doi.org/10.1017/9781108563208.003.

[105] The AEC 2025 constitutes part of the "ASEAN 2025: Forging Ahead Together" initiative, which was formulated by ASEAN MS during the 27th Summit in 2015. The initiative includes: (i) Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together; (ii) ASEAN Community Vision 2025, (iii) AEC 2025, (iv) ASEAN Political Security Community Blueprint 2025, and (iv) ASEAN Socio-Cultural Community Blueprint 2025. See: The ASEAN Secretariat, *ASEAN 2025: Forging Ahead Together* (Jakarta, Indonesia: The ASEAN Secretariat, 2015), https://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf.

[106] *ASEAN Economic Community Blueprint,* 1.

[107] For comparative purposes, the EU focuses on the four freedoms in the creation of a single market: the free movement of goods, capital, services and people. The AEC Blueprints textually modified the goals, seeking merely to facilitate the movement of people, and further includes an additional aspect of

(i) **Creation of a Highly Integrated and Cohesive Economy**

This objective is achieved by facilitating the movement of goods, services, investment, and capital within ASEAN.

(ii) **A Competitive, Innovative and Dynamic ASEAN**

The second objective is attained through effective competition policy, fostering creation and protection of knowledge, deepening ASEAN participation in global value chains, strengthening regulatory frameworks and overall regulatory practice and coherence at the regional level.

(iii) **Enhanced Connectivity and Sectorial Cooperation**

The third objective focuses on the enhancement of economic connectivity on the transport, telecommunication and energy sectors.

(iv) **A Resilient, Inclusive, People-oriented and People-Centred ASEAN**

The fourth objective aims to create a resilient, inclusive, people-oriented and people-centred ASEAN, which involves the promotion of equitable development through greater involvement of different stakeholders.

(v) **A Global ASEAN**

This final objective aims to integrate ASEAN into the global economy through FTAs and comprehensive partnership agreements.

There are marked differences between the AEC Blueprint 2015 and 2025. The third pillar of "Enhanced Connectivity and Sectoral Cooperation" constitute a new addition to the 2025 blueprint, focusing on transport, telecommunication, and energy sectors, which originally fell under the ambit of pillars 1 and 2 of the AEC Blueprint 2015. The creation of a "Single Market and Production Base" under the first pillar of the AEC Blueprint 2015 is now reworded as "Highly Integrated and Cohesive

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attracting investment. The AEC's goal of attracting FDI inflow is quite apparent: Plummer and Cheong pointed out that the attraction of FDI inflows and investment creation is an important objective in the creation of AEC, which in large part determines the success of the integration effort by ASEAN. See: David Cheong and Michael G. Plummer, "FDI Effects of ASEAN Integration," *LEAD (Laboratory of Economics Applied to Development), Université Du Sud Toulon-Var, France*, March 13, 2009, 50, https://mpra.ub.uni-muenchen.de/26004/. Verico has also described regional trade and investment integration through intra-regional trade constitute the core of the AEC. See: Kiki Verico, *The Future of the ASEAN Economic Integration* (United Kingdom: Palgrave Macmillan, 2017), 185.

Economy" under the AEC Blueprint 2025. In addition, the AEC Blueprint 2025 no longer maintains the expression of "free flow of goods", but now reads "trade in goods."[108]

Despite the re-categorization and renaming, the AEC Blueprint 2025 maintains the overall vision articulated in AEC Blueprint 2015, which is to create a deeply integrated and cohesive ASEAN that can deliver inclusive economic growth.[109] The rewording of the first pillar of the AEC Blueprint 2025 also does not signify the complete abandonment of the objective in creating a single market and production base. For ASEAN, not only is it an obligation to do so under Art. 1(5) of the ASEAN Charter in addition to objectives under the AEC Blueprint 2015 which are brought forward to this blueprint for implementation, the expression of "single market" and "production base" is used throughout the AEC Blueprint 2025 without any prior definition. For instance, subheading C.5 of the AEC Blueprint 2025 which details initiatives for the "Food, Agriculture and Forestry" sector provides that the sector needs to be "integrated with the global economy, based on a single market and production base," and B.1 which provides for an "Effective Competition Policy,"[110] states that enforceable competition rules are important to "facilitate liberalisation and a unified market and production base."[111]

To better guide and monitor the initiatives under the AEC Blueprint 2025, a Consolidated Strategic Action Plan ("CSAP") was implemented, and serves as a single reference document to inform the key action lines to be implemented.[112] Strategic measures are complemented by key action lines and specific timelines, each measure designating the sectoral work plan and sectoral body.[113] ASEAN MS are also obliged to translate the targets under the AEC blueprint to national targets.[114]

To transform ASEAN into a highly dynamic and competitive economic region, the protection of IP has been one of the main focuses under the AEC. Regional cooperation is guided by the second pillar, namely a competitive, innovative, and dynamic ASEAN. Specifically, section B3 of the pillar

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[108] Das has described the renaming of headings as the ASEAN policy makers' intention to shift from "aspirational phrases" to "necessary implementations." See: Sanchita Basu Das, "Huge Challenges Await AEC 2025," *ISEAS Yusof Ishak Institute: Perspective*, no. 48 (August 29, 2016): 2.
[109] *ASEAN Economic Community Blueprint 2025,* para. 3.
[110] *ASEAN Economic Community Blueprint 2025*, para. 56.
[111] *ASEAN Economic Community Blueprint 2025*, para. 26.
[112] *ASEAN Economic Community Blueprint 2025*, para. 82(ii).
[113] Association of Southeast Asian Nations, "ASEAN Economic Community 2025 Consolidated Strategic Action Plan," August 14, 2018, https://asean.org/wp-content/uploads/2012/05/Updated-AEC-2025-CSAP-14-Aug-2018-final.pdf.
[114] *ASEAN Economic Community Blueprint 2025*, para. 82.

provides for the strengthening of intellectual property protection, emphasizing that the approach taken for the next ten years will be centred on effective use of IP and creativity in supporting economic development in ASEAN, and for national IP systems to achieve technical and procedural convergence. Four strategic measures are laid out:[115]

(i) **Strengthen IP Offices and IP Infrastructure**

To develop a more robust IP system through improving IP services, expand work-sharing activities among national IP offices, provide training programmes, and accession to international treaties such as the Patent Cooperation Treaty ("PCT"),[116] Madrid Protocol,[117] Hague Agreement,[118] Singapore Treaty on the Law of Trademarks,[119] and other WIPO-administered international treaties.

(ii) **Develop Regional IP Platforms and Infrastructure**

New networks for integrated IP services within the region such as technology transfer offices and patent libraries are to be developed, along with the centralization of the management of the ASEAN IP portal in order to ensure IP information are accurate and regularly updated.

(iii) **Expansion of the ASEAN IP Ecosystem**

An ASEAN network of offices for IP, judiciary, customs and other enforcement agencies are to be established in enabling effective cooperation on regional IPR enforcement. Engagement with the private sector, IP associations and other stakeholders are also enhanced, and a regional accreditation is established to increase the capacity of ASEAN IP practitioners.

(iv) **Enhance Regional Mechanisms to Promote Asset Creation and Commercialisation**

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[115] *ASEAN Economic Community Blueprint 2025*, para. 30.
[116] *Patent Cooperation Treaty, June 19, 1970, done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001.*
[117] *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, done at Madrid, June 27, 1989.*
[118] *1925 Hague Agreement Concerning the International Registration of Industrial Designs, adopted in the Hague, Netherlands on 06 November 1925.* The AEC Blueprint 2025 does not specify the Acts under the Hague Agreement that needs to be acceded into.
[119] *Singapore Treaty on the Law of Trademarks, done at Singapore, March 27, 2006.*

This measure aims to improve awareness for IP to promote protection and utilisation, develop IP valuation services, promote the commercialisation of geographical indications ("GI"), and promote protection mechanisms for GI, genetic resources, traditional knowledge and traditional cultural expressions.

Section B4 further provides for the importance in promoting strong IPR protection in the region in order to drive innovation in ASEAN's productivity growth and long-term competitiveness. ATIGA continues to be underway under the blueprint, and by 2018, over 98.64% of tariff lines among all ASEAN MS have zero ATIGA tariffs.[120]

Monitoring of the progress of the AEC Blueprint 2025 falls under the purview of the ASEAN Secretariat's ASEAN Integration Monitoring Directorate (AIMD), which was set up in 2010.[121] The monitoring framework is supported by ASEANstats and the ASEAN Community Statistical System (ACSS).)[122] The "scorecard" mechanism previously utilised for the AEC Blueprint 2015[123] is replaced by a Monitoring and Evaluation Framework administered by the ASEAN Integration Monitoring Office (AIMO). As of the writing of this dissertation, detailed evaluations however have yet to be published by the ASEAN Secretariat.[124]

Overall, with the creation of the single market and production base, the AEC is projected to attain four objectives. First, manufacturers will be able to acquire materials at lower costs with the reduction of tariffs among intra-ASEAN trade, export their goods easier with the reduction of tariffs,

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[120] ERIA Study team, "Analysis of Tariff Changes," in *Impact of the ASEAN Trade in Goods Agreements (ATIGA) on the Inter-ASEAN Trade* (Jakarta, Indonesia: Economic Research Institute for ASEAN and East Asia, 2021), 43–44, https://www.eria.org/uploads/media/Books/2021-Impact-of-the-ATIGA-on-Intra-ASEAN-Trade/09_Ch.5-Analysis-Tariff.pdf.
[121] Association of Southeast Asian Nations, "Overview of the AEC Monitoring," AEC Monitoring, 2020, https://asean.org/our-communities/economic-community/monitoring-regional-economic-integration/aec-monitoring/.
[122] *ASEAN Economic Community Blueprint 2025*, para. 82.
[123] Kartika and Atje pinpointed one of the main shortcomings – ASEAN's scorecard mechanism relies on the voluntary submission of a list of non-tariff measures, and if an ASEAN MS declares that the non-tariff measure has been removed, there is no way to challenge or verify such claims. See: Pratiwi Kartika and Raymond Atje, "Towards AEC 2015: Free Flow of Goods within ASEAN," in *ASEAN Economic Community Scorecard: Performance and Perception*, ed. Sanchita Basu Das (Singapore: ISEAS Publishing, 2013), 33–38.
[124] Jayant Menon et al., "ASEAN Integration Report 2019," API Report No. 3 (Institute for Democracy and Economic Affairs, Friedrich Naumann Foundation, September 2019), http://www.ideas.org.my/wp-content/uploads/2019/09/Asean_Integration_2019_V4.pdf.

flexibility of the rules of origin, and simplified customs procedures. Second, the AEC seeks to add more transparency to ASEAN MS' regulations. This will allow the facilitation of intra-ASEAN and foreign investment would be facilitated, and the increased economic activity under the AEC will further strengthen the promotion of local R&D processes. Third, consumers may benefit from a wider choice of goods with more affordable prices. Fourth, through the establishment of a single market, it is foreseen that technology transfer would occur at a more rapid pace, thereby raising the innovative capacities within ASEAN MS.

2.2 ASEAN's Patent-Related Initiatives

Prior to the AEC, ASEAN's framework on patent protection was shaped by a multitude of agreements, declarations, and action plans.[125] This section will cover selected initiatives which are most significant in shape the ASEAN IP landscape, and how some of the initiatives have evolved and subsequently consolidated under the AEC.

2.2.1 ASEAN's Framework on Patent Protection

In this section, ASEAN's initiatives on patent protection are explored, covering (i) the ASEAN Framework Agreement on Intellectual Property, (ii) ASEAN Patent Examination Co-operation Programme, (iii) role of the ASEAN Working Group on Intellectual Property Cooperation ("AWGIPC"), and (iv) Hanoi Plan of Action. With regards to the specific implementation of goals under the AEC, the ASEAN IPR Action Plan and the ASEAN IPR Enforcement Action Plan are also explored.

i. ASEAN Framework Agreement on Intellectual Property

In December 1995, ASEAN leaders signed the ASEAN Framework Agreement on Intellectual Property, the first ever ASEAN IP framework with the aim of providing a stable foundation for economic progress and of enabling expeditious realisation of AFTA.[126] The creation of the agreement

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[125] Beyond the direct ambit of the AWGIPC and under different pillars of the AEC, several other declarations relevant to patent rights protection have been made, including the *ASEAN Declaration of Innovation in 2017* and the *ASEAN Plan of Action on Science, Technology and Innovation (APASTI) 2016-2025*.

[126] Association of Southeast Asian Nations, "Cooperation in Intellectual Property," October 3, 2012, https://asean.org/cooperation-in-intellectual-property/.

was also broadly aimed at stimulating foreign investment, technology transfers, enabling ASEAN's success in the global trading system, and offering long-term benefits of enhanced employment, economic development, and innovation.

As pointed out by Ng, the framework agreement was also signed approximately during the TRIPS Agreement[127] and had to consider three aspects: (i) to ensure compliance with minimum standards as set out by the TRIPS Agreement; (ii) to take into account the differing levels of economic development between ASEAN MS, and (iii) to act as a positive initiative in improving the technological and living standards of ASEAN MS.[128] The framework agreement was thus rooted in inter-ASEAN cooperation through an "open and outward looking attitude with a view to contributing to the promotion and growth of regional and global trade liberalisation."[129] The scope of cooperation include IP administration, cross-border enforcement and protection, networking of judicial and enforcement authorities, establishing an ASEAN database on IP registration, strengthening of IP legislation through comparative studies, and dispute resolution of IP disputes.[130]

With regard to patents rights protection, Article 1(4) of the ASEAN Framework Agreement on Intellectual Property provides that "Member States shall explore the possibility of setting up of an ASEAN patent system, including an ASEAN Patent Office, if feasible, to promote the region-wide protection of patent bearing in mind developments on regional and international protection of patent." Art. 3(2) of the same agreement further states that cooperative activities should be geared towards exploring the possibility of setting up the ASEAN patent system. While the establishment of an ASEAN patent system remains an objective, there are no clear indications as to when and how the ASEAN patent system should take form, nor was the establishment of an ASEAN patent office further discussed.[131] Based on how the agreement emphasises cooperation, it is likely that any initiative is

[127] *Agreement on Trade-Related Aspects of Intellectual Property Rights*.
[128] Ng, "ASEAN IP Harmonization: Striking the Delicate Balance," 137–38.
[129] Art 1(1), *ASEAN Framework Agreement on Intellectual Property*.
[130] Art. 3, *ASEAN Framework Agreement on Intellectual Property*.
[131] This was not brought up until the most recent Mid Term Review in 2020. Infra Chapter 2.2.2(iii) of this dissertation.

meant to be carried out through the gradual harmonisation of procedures among ASEAN MS and enable legal convergence over time.[132]

ii. ASEAN Patent Examination Co-operation Program ("ASPEC")

ASPEC is a work-sharing regional program among ASEAN MS which commenced on 15 June 2009, but currently with the exception of Myanmar.[133] ASPEC enables fast-track patenting in any of the 9 participating IP offices in ASEAN through the sharing of search and examination results. Through the ASPEC programme, the results of the search and examination of the first patent office the applicant applies to will be sent to the second patent office. The second patent office is not bound by the search and examination results of the first office, but may utilize it for reference.[134] This ease of reference allows patent examiners to develop search criteria or strategy more quickly, produce quality reports, and potentially reduce duplication of work.

ASPEC is also the first patent cooperation program within the region and operates in the English language in all participating patent offices. The program is free of charge but the local search and examination fees at patent offices still apply. Applicants who intend to file a corresponding patent application for the same invention in other participating ASEAN IP offices, and that the applications are linked by a Paris Convention[135] priority claim, and when the applicant has search and examination documents issued by any participating ASEAN IP offices when at least one claim is determined to be patentable, may utilise ASPEC. For all ASPEC requests made on or after 15 June 2021, all written

[132] See also: Weerawit Weeraworawit, "The Harmonisation of Intellectual Property Rights in ASEAN," in *Intellectual Property Harmonisation Within ASEAN and APEC*, ed. Christoph Antons, Michael Blakeney, and Christopher Heath, vol. 10 (The Hague, Netherlands: Kluwer Law International, 2004), 211.
[133] See: Intellectual Property Corporation of Malaysia (MyIPO), "ASEAN Patent Examination Co-Operation (ASPEC) – The Official Portal of Intellectual Property Corporation of Malaysia," accessed November 19, 2022, https://www.myipo.gov.my/en/asean-patent-examination-co-operation-aspec/.
[134] For an overview of the submission process, see: ASEAN Intellectual Property Portal, "ASEAN Patent Examination Co-Operation (ASPEC): Document Submission Guideline," June 2022, 1–11, https://www.aseanip.org/Portals/0/Document%20Submission%20Guideline%20for%20ASPEC%20-%20Release%20Version_June%202022.pdf?ver=2022-06-15-144110-227.
[135] *Paris Convention for the Protection of Industrial Property*, *as revised at Stockholm, July 14, 1967*.

opinion from participating ASEAN MS IP Office are acceptable as search and examination results, except for the IP Office of Thailand.[136]

The program has assumed an increasingly significant role in ASEAN: a total of 1103 ASPEC requests have been submitted as of January 2022,[137] which is a marked increase from 405 ASPEC requests in September 2018.[138] Average pendency rate is at 8.05 months and the "allowance rate at final decision" is 94.94%.[139] In addition, to promote the fourth industrial revolution and in line with the ASEAN Declaration on Industrial Transformation to Industry 4.0, declared in Bangkok on 2 November 2019,[140] ASPEC Acceleration for Industry 4.0 Infrastructure and Manufacturing ("ASPEC AIM") also prioritises Industry 4.0 patent applications and enables first office actions to be issued within 6 months. The pilot commenced on 27 August 2019 and is extended until 26 August 2023. For now, ASPEC AIM is limited to 50 applications a year.[141]

iii. ASEAN Working Group on Intellectual Property Cooperation (AWGIPC)

The ASEAN Charter[142] provides for a list of Sectorial Ministerial Bodies, divided in accordance with the forming of the ASEAN Political-Security Community, AEC, and ASEAN Socio-Cultural Community. The ASEAN Economic Ministers (AEM) is a Sectorial Ministerial Body under the AEC, and has several other sectoral bodies under its purview, one of which is the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC).

The AWGIPC was formed in 1996 and is composed of representatives from IP offices of ASEAN MS, and the chairmanship switches between ASEAN MS every two years. The AWGIPC is the primary

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[136] Intellectual Property Office of Singapore, "ASEAN Patent Examination Co-Operation Programme," accessed November 20, 2022, https://www.ipos.gov.sg/docs/default-source/protecting-your-ideas/patent/aspec-notice-and-procedures.pdf.
[137] See: ASEAN Intellectual Property Portal, "ASEAN Patent Examination Cooperation (ASPEC) Statistics," January 2022, https://www.aseanip.org/Statistics/ASEAN-Patent-Examination-Cooperation-ASPEC-Statistics.
[138] The ASEAN Secretariat, "ASEAN Integration Report 2019," 71.
[139] See: ASEAN Intellectual Property Portal, "ASEAN Patent Examination Cooperation (ASPEC) Statistics." However, the statistics did not elaborate further on what "allowance rate at final decision" constitute.
[140] See: *ASEAN Declaration on Industrial Transformation to Industry 4.0;* The ASEAN Secretariat, "Consolidated Strategy on the Fourth Industrial Revolution for ASEAN" (Jakarta, Indonesia: Association of Southeast Asian Nations, October 2021), 11–73, https://asean.org/wp-content/uploads/2021/10/6.-Consolidated-Strategy-on-the-4IR-for-ASEAN.pdf.
[141] For PCT-ASPEC, infra Chapter 4.1.1(v) of this dissertation.
[142] Infra Chapter 3.2.3 of this dissertation.

source in providing technical assistance, training, and capacity-building on IP-related matters. Initially tasked with drawing up the ASEAN Framework Agreement for Intellectual Property, and then with the implementation of the Hanoi Plan of Action. Since 2004, AWGIPC oversees the ASEAN IPR Action Plan,[143] and for now conducts meetings to discuss the ASEAN IPR Action Plan 2016-2025.[144] In addition, the working group also engages in dialogue with different partners including the World Intellectual Property Organization ("WIPO"), European Patent Office ("EPO"), Japan Patent Office ("JPO"), and the United States Patent and Trademark Office ("USPTO").

iv. Hanoi Plan of Action

The Hanoi Plan of Action implements the ASEAN Vision 2020 set out during the second ASEAN Informal Summit held on 15 December 1997. The action plan has a six-year timeframe covering 1999 to 2004, where the implementation is reviewed every three years. The plan of action provided for the enhancement of further cooperation, comprising of three main areas:[145] protection of IP rights through strengthening civil and administrative procedures, and technical cooperation related to patent search and examination;[146] facilitation of IP policy exchange between ASEAN MS, which includes the setting up of an ASEAN electronic database on IP;[147] and cooperation on enabling ASEAN MS to accede to international treaties,[148] establishment of an ASEAN Trademark and Patent filing and registration system, which includes the setting up of a regional trademark or patent office,[149] and provide for joint-cooperation on IP enforcement and protection.[150]

The Hanoi Plan of Action aimed to set up an ASEAN regional trademark and patent filing system. However, according to Ng both initiatives were delayed due to the "lack of political will" along

[143] Assafa Endeshaw, "The Momentum for Review of TRIPs and Harmonisation of Intellectual Property in ASEAN," in *Intellectual Property Harmonisation Within ASEAN and APEC*, ed. Christoph Antons, Michael Blakeney, and Christopher Heath, vol. 10 (The Hague, Netherlands: Kluwer Law International, 2004), 144.
[144] *The ASEAN Intellectual Property Rights Action Plan 2016-2025: Meeting the Challenges of "One Vision, One Identity, One Community" through Intellectual Property*.
[145] Art. 2, *Hanoi Plan of Action*.
[146] Art. 2.7.1, *Hanoi Plan of Action*.
[147] Art. 2.7.2(G), *Hanoi Plan of Action*.
[148] Art. 2.7.3(E), *Hanoi Plan of Action*.
[149] Art. 2.7.3, *Hanoi Plan of Action*.
[150] Art. 2.7.3 (I), *Hanoi Plan of Action*.

with the ease of registering IP internationally, especially through the PCT for patent applications.[151] This led to the focus on the standardisation of certain IP procedures and processes in the subsequent IP-related action plans.

2.2.2 Implementation of Goals under the ASEAN Economic Community Blueprint

Since 2004, the AWGIPC has been instrumental in preparing, implementing, and conducting periodic reviews of the ASEAN IPR Action Plan. Each action plan is examined in turn as below.

i. ASEAN IPR Action Plan 2004-2010[152]

The ASEAN IPR Action Plan 2004-2010 is part of the Vientiane Action Programme, a development program geared towards realising the ASEAN Community. The action plan was also the first to specifically push for regional IP cooperation within the broader framework of social, economic, and technological development.

Four main strategic programs are laid out under the action plan: fostering IP asset creation in ASEAN, developing a framework for simplification, harmonisation, registration and protection of IP rights, promoting greater awareness and building up IP capacity, and enhancing cooperative business development services by national ASEAN patent offices.[153] As the indicative timeframe for implementation of the 2004-2010 action plan was incomplete by 2011, section B3 of the AEC Blueprint 2015 provides continuity in that ASEAN MS would still fully implement the ASEAN IPR Action Plan 2004-2010 on top of other new initiatives.[154]

ii. ASEAN IPR Action Plan 2011-2015[155]

With the creation of the AEC at the end of 2015, a second IPR Action Plan was formulated and viewed as part of the AEC Blueprint 2015. The action plan is designed to meet the goals of the AEC,

[151] Ng, "ASEAN IP Harmonization: Striking the Delicate Balance," 142.
[152] *ASEAN Intellectual Property Right Action Plan 2004-2010.*
[153] *ASEAN Intellectual Property Right Action Plan 2004-2010, para. II(B).*
[154] *ASEAN Economic Community Blueprint, 19.*
[155] *ASEAN Intellectual Property Rights Action Plan 2011-2015.*

and maintains the flexible cooperative model that characterised previous cooperative initiatives, but further emphasises the intensification of cooperation in different focused programs. The action plan as a whole seeks "to lay the foundation for the evolution of a regional brand and profile for an ASEAN IP System under the AEC."[156] Five strategic goals are identified along with initiatives to be undertaken by a "lead country" or "country champions" to oversee and monitor implementation of the activities, the goals as summarised below:[157]

> **Strategic Goal 1:** The first goal calls for a balanced IP system that accommodates different levels of development among ASEAN MS and institutional capacity of national IP offices, enabling them to deliver timely, quality, and accessible IP services for users and producers of IP. It also focuses on improving the quality of IP registrations, disposition of IP cases where IP offices work with the judiciary and governmental institutions, and promote enforcement of IP rights within the context of development. For patents, the strategic steps include full implementation of ASPEC, capacity building for patent attorneys, and the development of a regional action plan on IP enforcement.
>
> **Strategic Goal 2:** The second goal aims to establish developed national or regional legal and policy infrastructure that would respond to shifting demands of the IP landscape. This goal implies that ASEAN MS would decide collectively on what kinds of multilateral agreements on IP to join. Specific measures on patent include accession to the PCT by 2015.
>
> **Strategic Goal 3:** The third goal strives to advance interests of the region via systematic promotion of IP creation and awareness to allow IP as a tool for innovation and development and support technology transfer, along with considerations for the preservation and protection of indigenous products, services, and works. Patent libraries within schools and universities are to be created, improved awareness on technology transfer and commercialisation, enhancing capabilities of SMEs in utilising IP, and the development of an ASEAN IP Portal.

[156] *ASEAN Intellectual Property Rights Action Plan 2011-2015*, p. 20
[157] *ASEAN Intellectual Property Rights Action Plan 2011-2015, 3-19.*

Strategic Goal 4: The fourth goal seeks to increase ASEAN's regional presence and participation in the international IP community and maximise benefits as a region. The goal also recognises the importance of formulating a single negotiating position, and includes initiatives to implement a structured cooperation with WIPO on a regional level. In addition, the goal seeks to continue its partnerships with other institutions and organisations and be stakeholder-centric, including regular consultations with private stakeholders.

Strategic Goal 5: The fifth goal concerns the enhancement of human and institutional capacities of national IP offices via intensified cooperation among ASEAN MS. Patent-related initiatives include training of patent examiners and digitised patent documents.

As compared to the previous action plan which is geared towards greater cooperation to harmonise IPR protection,[158] this action plan emphasises broader aims of developing the region's IP system while giving due regard to national socio-economic factor, and introduces the development of a regional action plan on IP enforcement.

iii. ASEAN IPR Action Plan 2016-2025

The ASEAN IPR Action Plan 2016-2025 was adopted during the AWGIPC meeting in July 2018. The action plan strives to operationalise IP related measures under the AEC Blueprint 2025, and while the AEC blueprints have not explicitly cited the ASEAN IPR Action Plan, CSAP explicitly requires ASEAN MS to abide by this 2016-2025 action plan.[159]

The action plan starts by recognising the significant progress made by ASEAN MS to align their national laws and policies to the AEC framework. As national IP regimes attain technical and procedural convergence, IP should be seen as an instrument of development and considered in terms of its linkage to socio-economic strategy, such as industrial development and trade. Compared to previous action plans, it is more explicit in recognising the relationship between effective IP regimes

[158] Blancafor notes that harmonisation was to ensure ASEAN MS' compliance with the minimum standards set forth in TRIPS. Ricardo R. Blancaflor, "Enforcement of Intellectual Property Rights," in *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, ed. Elizabeth Siew-Kuan Ng and Graeme W. Austin (United Kingdom: Cambridge University Press, 2017), 104.
[159] Association of Southeast Asian Nations, "ASEAN Economic Community 2025 Consolidated Strategic Action Plan," 16–17.

and trade, stating that the effective exploitation of IP and creativity "at some stage could be one of the contributory factors" towards increasing the volume and value of exports and increase in FDI.[160]

Several initiatives in the previous action plan are continued in the current action plan, which include the accession to international treaties such as the PCT. In 2020, the AWGIPC conducted a Mid Term Review of the action plan, amending several of the deliverables and patent-related initiatives which are summarised as follows:[161]

Strategic Goal 1: This goal seeks to develop a more robust ASEAN IP system by strengthening financial management of IP offices and infrastructures, expand work-sharing activities for patents, continued implementation of the ASPEC, and establish a database for ASEAN patents. Initiatives also include conducting comparative analysis of patent practices, update or draft national patent substantive examination manuals, and continued accession to the PCT.

Strategic Goal 2: This goal aims to promote improvement of IP services through regional platforms and infrastructures. The initiatives include establishing a regional network of patent libraries within schools and universities, online filing for patents, and notably a newly added initiative through the Mid Term Review, which is to conduct a feasibility study for an ASEAN Patent system.

Strategic Goal 3: this goal seeks to create an expanded and inclusive ASEAN IP ecosystem, which include a regional action plan on IP enforcement and an ASEAN IP network between judiciary, customs, and other enforcement agencies. For enforcement, initiatives include information awareness activities, stronger linkages between national IP offices and the judiciary to expedite disposition of IP cases, and a centralised coordinating unit providing publicly available statistical information relating to IP enforcement such as the status of IP cases. As for the ASEAN IP network, it aims to create an ASEAN directory of local and foreign technical experts to support parties in disputes by enabling IP practitioners and judicial officers in the hearing of IP dispute. The Mid Term Review also added a new initiative to this

[160] *The ASEAN Intellectual Property Rights Action Plan 2016-2025*, 2.
[161] Association of Southeast Asian Nations, "The ASEAN Intellectual Property Rights (IPR) Action Plan 2016-2025: Updates to the ASEAN IPR Action Plan (Version 2.0)," 6.

strategic goal, which is to develop ASEAN guidelines on IPR enforcement against online infringement.

Strategic Goal 4: This goal seeks to promote asset creation and commercialisation through regional mechanisms. Initiatives for this goal is mainly on geographical indications and traditional knowledge.

iv. ASEAN IPR Enforcement Action Plan[162]

Another notable initiative that ASEAN undertakes is with regard to IPR enforcement, corresponding to Strategic Goal 4 under the ASEAN IPR Action Plan 2016-2025. As noted under the AEC Blueprint, ASEAN acknowledges that IP protection can influence the volume and quality of FDIs and technology transfer, and intends to improve the enforcement of IPR by considering of the different levels of development of each ASEAN MS. Notably, one of the main objectives of the ASEAN IPR Enforcement Action Plan is to identify patterns of manufacturing, distribution, and shipment of counterfeit and pirated goods. This is carried out through collating data and information from each ASEAN MS to establish a monitoring mechanism, which would then enable ASEAN to strategically target counterfeiting and piracy within the region.[163]

Further, to enhance public awareness, predictability, coordination and networking, capacity building and competitiveness, activities such as holding regular meetings between each ASEAN MS, making available statistical information in relation to IP enforcement, documenting movements of pirated and counterfeit goods, establishing best practices for national enforcement through information sharing among agencies tasked with IP enforcement in ASEAN MS, holding workshops and symposia on enforcement issues, expanding linkages with international bodies and agencies, and developing coordination mechanisms between ASEAN MS to enhance enforcement operations and

[162] *ASEAN Intellectual Property Rights (IPR) Enforcement Action Plan.*
[163] *ASEAN Intellectual Property Rights (IPR) Enforcement Action Plan*, 7-8. ASEAN has also compiled an IP enforcement manual covering procedures across all ASEAN MS with support from the UK, see: ASEAN Secretariat, *ASEAN Intellectual Property Rights Enforcement Handbook*, 978-602-5798-86–3 (Jakarta, Indonesia: Association of Southeast Asian Nations, 2020), https://www.aseanip.org/Portals/0/ASEAN%20IPR%20Enforcement%20Handbook_with%20ISBN%20and%20Logo%20Final.pdf.

curb counterfeiting and piracy, are also carried out.[164] To enable better IPR enforcement, the AWGIPC also established the ASEAN Network of IPR Enforcement Experts ("ANIEE"),[165] which is composed of representatives from ASEAN MS, cooperating with the ASEAN Secretariat and country champions to, among all, monitor and assess the ongoing programs, facilitate information exchange, and develop enforcement training programs.[166]

2.3 Analysing Regional Patent-Related Approaches under the AEC

As observed in the previous section, IP initiatives under the AEC have been centred on strengthening cooperation between ASEAN MS, and while the AEC aims to create a single market and production base, it is only during the Mid Term Review of the ASEAN IPR Action Plan 2016-2025 that the correlation between trade and patent rights protection have been expressly addressed.[167] ASEAN's current success in lowering tariffs and enabling freer movement of goods will see the increase of trade of patent-embodied goods or patented systems. It is also important to note that ASEAN does not merely seek to allow for freer flow of goods – ASEAN intends to bank in on being a single production base, which entails intensive manufacturing processes across each MS, the movement of parts and components crossing borders more frequently.

Thus, while ASEAN has made great strides through cooperative initiatives, whether these initiatives meet the goals as provided under the AEC, however, requires further scrutiny. ASEAN's current approach has also led many scholars and commentators to express scepticism on the AEC or dismiss the significance of the integration, most of which surrounds the insufficiency in the execution of the core objectives. To provide more context to what AEC is lacking in terms of patent protection and how it affects the creation of a single market and production base, this section raises four

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[164] *ASEAN Intellectual Property Rights (IPR) Enforcement Action Plan*, 3-8.
[165] Association of Southeast Asian Nations, "Major Sectoral Bodies/Committees," 2020, https://asean.org/our-communities/economic-community/competitive-innovative-and-inclusive-economic-region/intellectual-property-rights/major-sectoral-bodies-committees/.
[166] See also: Allan Gepty, "Regional Cooperation on Intellectual Property Rights Enforcement in the Association of Southeast Asian Nations," in *Advisory Committee on Enforcement* (Coordinating Intellectual Property Enforcement at the National and Regional Level, Geneva, Switzerland: World Intellectual Property Organization, 2017), 23–27, https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_12/wipo_ace_12_5.pdf.
[167] Association of Southeast Asian Nations, "The ASEAN Intellectual Property Rights (IPR) Action Plan 2016-2025: Updates to the ASEAN IPR Action Plan (Version 2.0)," 6.

observations: (i) unclarity on AEC's conception of a single market, (ii) effects of divergent national patent laws, (iii) increased cross-border infringement through single production base, and (iv) legal uncertainty in resolving inter-ASEAN patent disputes.

2.3.1 Unclarity Surrounding Conception of a Single Market

Economic integration under ASEAN is provided under the first key objective, the creation of a "single market and production base" under the ASEAN Charter and the AEC Blueprint 2015. The AEC Blueprint 2025 then replaces the "single market and production base" heading with "highly integrated cohesive area", but the term "single market" continued to be utilised in the latest blueprint without further definitions, and the unachieved goals under the AEC Blueprint 2015 is still incorporated into the AEC Blueprint 2025. However, this rewording begs the question of whether ASEAN intends to establish a single market which mirrors that of the European single market, or that ASEAN is adopting a *sui generis* approach to economic integration.

In determining the nature and scope of regional integration, WTO law provides the international legal framework for further assessment. Relevant to the AEC would be the General Agreement on Tariffs and Trade ("GATT") where Art. XXIV.4 stipulates that contracting parties may enter into Preferential Trade Agreements ("PTAs") in order to increase trade and create closer integration between the economies of contracting parties to such agreements, and not to raise barriers of trade.[168] Two types of economic integration are distinguished under this clause, namely customs union and free trade agreement. Art. XXIV and Procedures to Implement the Transparency Mechanism on RTAs further imposes three obligations on WTO Members: (i) notify the WTO Secretariat of the PTA as early as possible in a provided format, before the application of preferential treatment between the parties, and demonstrate compliance with multilateral rules in deviating from the obligation to carry out trade in a non-discriminatory manner; (ii) liberalise substantially all trade among the

[168] Art. XXIV.4 of the GATT provides for the following: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."

constituents of the PTA; and (iii) not raise the overall level of protection and make access of products of third parties more onerous.[169]

In terms of creating a "single market," the concept was popularised during discussions on the establishment of a European market,[170] and still remains one of the key goals in EU's integration efforts. The European Commission has designated the single market strategy as a core focus with the objective of "enabling people, services, goods and capital to move more freely, offering opportunities for European businesses and greater choice and lower prices for consumers (…)."[171] In terms of patent rights protection, consolidating the region's patent system is also crucial and constitute part of the single market strategy: not only does a centralised system minimise the divergence brought forth by various national patent laws, patents are especially valuable in a knowledge-based economy and would in turn generate jobs, and improve the region's competitiveness on a global scale. This has also led to EU's initiative in establishing a unified patent court and a unitary patent.[172]

In the case of ASEAN, the ultimate objective of improving competitiveness of the region is similar to the EU.[173] However, the wording change of the core objective makes it unclear what ASEAN's conception of economic integration is, and the type of patent system required to attain its goals. To

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[169] On the three obligations, Mavroidis has distinguished them as follows: (i) notififying the WTO Secretariat constitute a procedural obligation, (ii) trade liberalisation is a substantive internal requirement, and (iii) not raising the overall levels for third parties is a substantive external requirement. See: Petros C. Mavroidis, *Trade in Goods* (United States: Oxford University Press, 2007), 153. On the transparency mechanism, see also: World Trade Organization, "Transparency Mechanism for RTAs," 2023, https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm.

[170] During Paul Hoffman's address to the Council of the Organisation of European Economic Co-operation in October 1949, he noted the substance of the integration of the Western European economy as including "the formation of a single large market within which quantitative restrictions on the movement of goods, monetary barriers to the flow of payments and, eventually, all tariffs are permanently swept away." See: Paul G. Hoffman, "Text of Statement by Paul G. Hoffman on European Economy, October 31, 1949. P. G. Hoffman Papers, Economic Cooperation Administration File. Speeches and Statements-Paul G. Hoffman, 1948-1952.," Harry S. Truman Library & Museum, 2017, https://www.trumanlibrary.org/whistlestop/study_collections/marshall/large/documents/index.php?documentid=8-5&pagenumber=3. For further background on the integration on the European market, see also: Fritz Machlup, *A History of Thought on Economic Integration* (London: The Macmillan Press Ltd, 1977), 9–12.

[171] European Commission, "The Single Market Strategy," Internal Market, Industry, Entrepreneurship and SMEs, May 5, 2022, https://ec.europa.eu/growth/single-market/single-market-strategy_en.

[172] Infra Chapter 4.2.1 of this dissertation.

[173] In terms of structural implementation, ASEAN's approach to boost IP protection in the region is classified under its second goal, "A Competitive, Innovative and Dynamic ASEAN" and not under the first goal of creating "A Single Market and Production Base" and its latest substitute heading "Creation of a Highly Integrated and Cohesive Economy."

illustrate, the creation of a single market would require free circulation of goods, services, labour, investment, and capital. There would be "no barrier, tariff or non-tariff, to the flow of these goods and services within the community and across the 10 countries."[174] A fragmented regional patent system would pose as a barrier to trade, and an ASEAN single market would entail a complete overhaul of each ASEAN MS' national patent system, eventually necessitating the centralisation of all procedural and substantive aspects in a supranational institution. A "highly integrated cohesive area" on the other hand, due to its lack of definition, could signify a lower bar to achieve.

Scholars have also pointed to the difficulties in analysing ASEAN's economic integration. Pelkmans for example opened his analysis on the AEC by noting that understanding ASEAN's economic integration model "is a genuine challenge" as ASEAN is explicit in stating that it does not intend to emulate other integration models, but does not actually state what form of integration is the AEC headed towards.[175] To better understand where ASEAN stands, reference may be made to economic integration theories for both descriptive and comparative purposes.

In Balassa's classic work in theorizing economic integration, economic integration is described as a process leading to the "suppression of discrimination between economic units of national states", and that economic integration can be "characterized by the absence of discrimination in various areas."[176] Balassa classified the integration process into five stages along a continuum of increasing integration: free trade area ("FTA"), customs union ("CU"), common market, economic union, and total economic integration.[177] All the criteria of one stage need to be fulfilled before proceeding to the next. Economic integration is also described as both a process and a state of affairs: it entails the gradual elimination of discriminatory economic barriers between States, and the absence of such barriers to trade.[178] Mere removal of such barriers is known as negative integration, whereas

[174] Romeo A. Reyes, "Part 1 of 2: ASEAN: A Single Market and Production Base," *The Jakarta Post*, June 14, 2004, 1, https://asean.org/?static_post=asean-a-single-market-production-base-by-romeo-a-reyes-the-jakarta-post.
[175] Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*, 1.
[176] Balassa, "Towards a Theory of Economic Integration," 5.
[177] Balassa, 5–6.
[178] Bela Balassa, "Types of Economic Integration," in *Economic Integration: Worldwide, Regional, Sectoral*, ed. Fritz Machlup, World Bank Reprint Series 69 (London: Palgrave Macmillan UK, 1976), 17, https://doi.org/10.1007/978-1-349-02571-8_2.

the establishment of common economic policies and institutions is known as positive integration.[179] Economic integration provides both economic and non-economic: for the economics side, utilising comparative advantage posed by each state would allow the most efficient allocation of resources, thus leading to greater productivity and lower prices, benefitting the society as a whole, whereas non-economic reasons may include political stability and security.

Balassa's classical approach has since been further modernised. In assessing the AEC, Pelkmans divided the process into six stages, namely FTA, customs union ("CU"), FTA-plus or CU-plus, deep and comprehensive FTAs or CUs, common market, and a single market.[180] Each of these stages are summarised to the extent necessary for an analysis on ASEAN's integration as below:

	Tariffs / quotas for intra-area goods	**Common External Tariff towards third countries**	**Positive Integration**	**Notes**
FTA	No	No	No	-
CU	No	Yes	No	-
FTA-Plus / CU-Plus	No	Yes (CU-Plus)	Limited	Some strive to go beyond WTO minimum requirements; Covers more trade aspects; Soft economic cooperation may be included
Deep and Comprehensive FTAs / CUs	No	Yes (CUs)	Yes	Goes beyond minimum requirements laid out by WTO including areas such as services and competition policy, and areas under WTO plurilaterals; forms of positive integration include joint monitoring, arbitration, and judicial dispute settlement
Common Market	No	Yes	Yes	Free market access in goods, services, labour, and capital with some exceptions retained; legal obligations for joint credible enforcement; common institutions which some powers to ensure effective

[179] Armand de Mestral, "Economic Integration, Comparative Analysis," in *The Max Planck Encyclopedia of Public International Law: Print Edition*, ed. Rüdiger Wolfrum (Oxford, New York: Oxford University Press, 2013), 303.
[180] Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*, 26.

				decision-making and guarantee judicial enforcement
Single Market	No	Yes	Yes	General intolerance of exceptions to market access obligations and poor enforcement, wider view of what constitutes trade distortion; possibly centralised IP system

Applying Pelkmans' classification, the AEC could be classified as an FTA-Plus aspiring to be a Deep and Comprehensive FTA, given that it has certain additions and modern market aspects, but the AEC seems to be lacking other forms of positive integration. The AEC is also not a Customs Union despite some discussions on forming one.[181] Furthermore, in terms of IP protection, it is noteworthy the category of Single Market is the only category that has a possibly centralised IP system. For now, ASEAN does not have a regional IP law such as that of the ANDEAN Community, nor does it plan to pursue a unified system proposed before the EU. For deeper integration to occur, additional forms of positive integration need to occur, such as mechanisms to resolve cross-border patent infringement issues.

Thus, while ASEAN sets out to further integrate the economy, creating a single market may have been more aspirational than practical.[182] However, according to Hsieh and Mercurio, the AEC Blueprint 2025 "suggests a step further than the previous blueprint," based on the fact that the creation of a "more unified market" by facilitating "seamless movement of goods, services, investment, capital, and skilled labour market" proves to be more attainable than the "free flow" of goods, services, investment, and skilled labour along with "freer flow" of capital.[183] Nevertheless, ASEAN's intention to engage in deepening their economic engagement is still apparent, albeit realistically not to the level as initially envisioned. It is also likely that ASEAN is embracing "open regionalism" or a more relaxed

[181] Sanchita Basu Das, Rahul Sen, and Sadhana Srivastava, "A Partial ASEAN Customs Union Post 2015?," *The Singapore Economic Review*, August 29, 2016, https://doi.org/10.1142/S0217590818400027.
[182] This observation is also shared by several scholars. Hsieh and Mercurio noted that "what the AEC envisions is intensifying its FTA-plus arrangements rather than pursuing the European version of a common market or customs union." See: Hsieh and Mercurio, "ASEAN Law in the New Regional Economic Order," 10.
[183] Hsieh and Mercurio, 12.

model of economic regionalism, seeking to gradually reduce obstacles while not raising any external barriers.[184]

The uncertain nature of ASEAN's approach has also led scholars to suggest that ASEAN should focus on the latter part of the objective – the creation of a single production base, products for exports and increase intra-firm and intra-industry trade within the region.[185] The idea behind the single production base lies in building upon existing production networks in ASEAN, utilising each ASEAN nation's diverse set of institutional capabilities, natural resources, and labour skills. A single production base allows businesses to procure intermediate and primary inputs at the lowest cost, minimising transaction cost. Accordingly, manufacturers seeking to maximize the competitive advantage of each country may break down the assembly process, and produce components across different MS. An example raised in the context of the single production base is as such:[186] a car manufacturing company which has chosen Thailand as a production base could source tires produced in Malaysia and batteries produced in the Philippines, hire skilled labour from Viet Nam, and borrow working capital from Singapore, fully utilising the competitive advantage of each ASEAN MS.

In terms of patent protection, even if focus is shifted away from the more conceptual creation of a single market to a single production base, or to enable a highly integrated economic region, cross-border patent-related issues would still occur more frequently since the creation of a single

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[184] For a brief overview of regional economic integration theories, see: Fredrik Söderbaum, *Rethinking Regionalism* (Bloomsbury Publishing, 2017), 42–45.
[185] According to Ewing-Chow and Tan, integration in ASEAN seems to be geared towards production integration rather than market integration, since ASEAN's low labour costs and abundance of raw material posits it as part of the production chain of "Factory Asia" where the final product is exported to developed countries, as consumers in ASEAN are not wealthy enough to afford such goods. See: Michael Ewing-Chow and Hsien-Li Tan, "The Role of the Rule of Law in ASEAN Integration," *Robert Schuman Centre for Advanced Studies*, no. EU Working Paper RSCAS 2013/16 (2013): 7–12. In the same vein, Kimura also proposed that the creation of an "integrated production base" should be prioritised as geographical and industrial development gaps between ASEAN MS have yet to be filled. See: Fukunari Kimura, "Reconstructing the Concept of 'Single Market and Production Base' for ASEAN beyond 2015," ERIA Discussion Paper Series, October 2013, 1–18. By 2020, ASEAN's intra-regional total trade is at 23% of total exports and 21.3% of total imports. EU's intra-regional trade in comparison, constitute 57.9% of total exports and 57.8% of total imports. However, ASEAN's intra-regional trade is still comparable or notably higher than other regional markets, such as the Gulf Cooperation Council (GCC), 9% of total exports and 11.6% of total imports, the Caribbean Community and Common Market (CARICOM), 13.6% of total exports and 8.2% of total imports, and Economic Community of West African States (ECOWAS), 12.7% of total exports and 6.4% of total imports) See: United Nations, *International Trade Statistics Yearbook*, vol. 1 (New York: United Nations, 2021), 16, 18, 23–25.
[186] Reyes, "ASEAN," 2.

production base would still involve the movement of goods and services across borders. The lack of a regional patent system would still lead to barriers in enabling cross-border trade and services in the creation of a single production base, particularly in terms of patent prosecution, dispute resolution, and enforcement.

2.3.2 Divergent National Patent Laws as Impediment to Trade

The next aspect that remains unaddressed under the AEC would be the effects of divergent national patent laws on intra-ASEAN trade. The creation of an integrated economic region under the AEC draws upon the principles of free trade which aims to increase global welfare through trade expansion and the economic efficiency maximisation.[187] Restrictions imposed on the free flow of trade are referred to as trade barriers, which could be through tariffs, or any other policy measures apart from tariff barriers that impede trade, known as non-tariff barriers. These barriers to trade create deadweight losses, resulting in higher costs for consumers in obtaining goods and services.[188] Divergent laws and regulations between jurisdictions are generally understood as barriers to trade since it limits market entry and restricts competition. For firms, complying with divergent national standards would raise the costs of trade, distort production patterns, and discourage trans-boundary arrangements.[189] In the same vein, patents also constitute a form of non-tariff barrier as diverse legislation, judicial, and policy mechanics dissuade foreign investors from entering into business.[190]

The AEC's integrated economic region aims to expand intra-ASEAN trade volumes, plug ASEAN into global supply chains, and improve the welfare for ASEAN as a whole.[191] Both the AEC

[187] David Hanson, *Limits to Free Trade: Non-Tariff Barriers in the European Union, Japan and United States* (United Kingdom: Edward Elgar Publishing, 2010), 2–4.
[188] Deadweight loss refers to loss resulting from interferences with perfect competition in the market, which affects the efficient allocation of resources. See: Paul A. Samuelson, "The Transfer Problem and Transport Costs: The Terms of Trade When Impediments Are Absent," *The Economic Journal* 62, no. 246 (1952): 294, https://doi.org/10.2307/2227005.
[189] Percy S. Mistry, "New Regionalism and Economic Development," in *Theories of New Regionalism: A Palgrave Reader*, ed. Fredrik Söderbaum and Timothy M. Shaw, International Political Economy Series (London: Palgrave Macmillan UK, 2003), 127, https://doi.org/10.1057/9781403938794_7.
[190] Arthur G. Cook, "Patents as Non-Tariff Trade Barriers," *Trends in Biotechnology* 7, no. 10 (October 1, 1989): 258–63, https://doi.org/10.1016/0167-7799(89)90043-7.
[191] Siow Yue Chia and Michael G. Plummer, *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (United Kingdom: Cambridge University Press, 2015), 78; Das, *The ASEAN Economic Community and Beyond*, 12.

Blueprint 2015 and 2025 have explicitly provided for the decrease and ultimate removal of tariffs and non-tariff barriers within intra-ASEAN trade to enable freer movement of goods and services throughout the region. While disharmonized national patent laws throughout the region constitute a trade barrier and would affect the free circulation of goods, the AEC does not categorize divergent patent laws as such, and does not strive for its removal.[192] Rather, IP has been categorized under the second pillar, focusing mainly on its role in stimulating innovation. It is likely that impediments to the free movement of patented goods are not explicitly considered under the AEC.[193]

From an international perspective, divergent national patent laws have been affirmed as a non-tariff barrier despite the difficulty in quantifying its effects.[194] The UN Conference on Trade and Development classifies intellectual property protection as one of 16 non-tariff barriers,[195] and the inclusion of intellectual property in the Uruguay Round was also premised on IP's significant impact on international trade as a non-tariff barrier.[196] Specifically, inadequate IP protection and divergent domestic IP systems prevents the free circulation of goods: lack of IP protection incentivizes counterfeits and copying, likely resulting in the net loss of incentives for innovative activities.[197] The

[192] Under Sec. III.A.1 of the AEC Blueprint 2025, with regards to the facilitation of trade in goods, the strategic measures in reducing and eliminating border and regulatory barriers do not address IPR protection. Any mentioning of measures related to IP falls under the ambit of Sec. III.B.3 and III.B.4, which addresses intellectual property as vital for innovation and technology commercialization. Lall and McEwin further affirmed that the ASEAN IPR Rights Action Plan 2011-2015 does not explain "how IPRs actually help economic integration, particularly with differing standards of actual protection (harmonization is ruled out)." Lall and McEwin further contested that "the relationship between IPRs and FDI is not conclusive," and emphasised the need to look at "IPRs as part of a broader technology policy." See: Ashish Lall and R. Ian McEwin, "Competition and Intellectual Property Laws in the ASEAN 'Single Market,'" in *The ASEAN Economic Community: A Work in Progress*, ed. Sanchita Basu Das et al. (Institute of Southeast Asian Studies, 2013), 243–44. While the references to IPR protection are not quite as exact under the blueprint, this dissertation contends that the nature of patent rights protection provides sufficient grounds to establish the connection between patents and cross-border trade.

[193] Rajec has pointed out that as there is currently no doctrine of international exhaustion, where patentees are still able to block the importation of patented goods to be sold and used domestically, there is no free trade in patented goods. See: Sarah R. Wasserman Rajec, "Free Trade in Patented Goods: International Exhaustion for Patents," *Berkeley Technology Law Journal* 29, no. 1 (2014): 320.

[194] Asian Trade Center, "Non-Tariff Barriers (NTBs) in ASEAN and Their Elimination from a Business Perspective" (Singapore, 2019), 28, https://www.eabc-thailand.org/wp-content/uploads/2019/06/NTB_Study_Report_FINAL.pdf.

[195] United Nations Conference on Trade and Development, *International Classification of Non-Tariff Measures 2019* (Geneva, Switzerland: United Nations Publication, 2019), vii, https://doi.org/10.18356/33bf0bc6-en.

[196] Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Boston: Kluwer Law and Taxation, 1993), 707–8.

[197] Literature on patent rights protection have also studied the optimisation of patent term or quality for welfare-maximising outcomes, and the means to which innovation should be protected. The general consensus nevertheless is that patent rights protection helps to incentive at least certain kinds of

differences in levels of IP protection would also influence inventors' decision on whether to produce or export goods and services to another country, and divergent national patent laws clog up trade due to the variations on how the rights are defined and enforced, which distort free trade patterns.[198]

How divergent patent laws affect trade may also be understood in more specific terms through an institutional perspective. The acquisition and granting of patents are mostly done on a country-by-country basis. Given the immutability of the inventions, this by itself constitutes fragmentation, and that the duplicity would result in higher transaction costs thus lowering the efficiency of markets. From the perspective of a business seeking to enter a market, the general understanding and advice offered is to assess whether the commercialisation or use of a product or process without infringing the IP rights of others, known as the "freedom to operate." For patents, this would be to assess the risk of patent infringement liability, the process usually carried out by searching granted patents and patent-pending applications. While businesses are able to ascertain the extent to which the product or process can be manufactured or commercialised, the more complex a patent system is, the more costly it would be to conduct such analyses, thus constituting a potential limitation.

From a substantive patent law perspective, one of the ways patent rights may pose as a non-tariff barrier to trade within the context of the AEC relates to the determination of whether the first act of selling within the ASEAN region exhausts the patentee's right over the commercial exploitation over the good. Patent laws of countries generally confer exclusive rights upon patentees to control the distribution of the patented goods up until the product is first put on the market. This is known as the "first sale doctrine," where patent rights cannot be used to prevent the circulation of genuine products, such as subsequent acts of resale, rental, lending, or other commercial use by third parties. The scope

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innovation. See e.g. T. Randolph Beard et al., "Quantifying the Cost of Substandard Patents: Some Preliminary Evidence," *Yale Journal of Law and Technology* 12 (2010): 240–68; Benjamin N. Roin, "Intellectual Property versus Prizes: Reframing the Debate," *University of Chicago Law Review* 81, no. 3 (June 1, 2014): 999–1078.

[198] Hemel and Ouellette proposed that inadequate IP protection would incur information costs on the side of the importer, who may choose to not import goods than to risk a potential lawsuit. See: Daniel J. Hemel and Lisa Larrimore Ouellette, "Trade and Tradeoffs: The Case of International Patent Exhaustion," *Columbia Law Review* 116 (2016): 21. Ivus has also described that differences in intellectual property protection distorts natural trading patterns, negatively affecting trade between countries. See: Olena Ivus, "Trade-Related Intellectual Property Rights, Trade Flows and National Welfare," in *Handbook on International Trade Policy*, ed. William A. Kerr and James D. Gaisford (United Kingdom, 2008), 166.

of the exclusive right to distribute is challenged when genuine patented goods which have been distributed by the patentee or licensee in another market are imported to be sold in a domestic market where such distribution has yet to occur. The genuine goods in this case are otherwise known as parallel imports or grey-market imports.

In determining whether the right has been exhausted, where the product is first put on the market is determinative. Countries have generally adopted three different approaches in determining when the patentee's right to control distribution is exhausted: once the product has been placed on the market anywhere in the world (international exhaustion), or within a specific regional market (regional exhaustion), or only in the domestic market (national exhaustion). For regions or countries adopting regional or national exhaustion, a patentee will then be able to block the importation of the patented goods into the regional or domestic market.

At an international level, there are no agreements that prescribe for specific exhaustion regimes. Art. 6 of the TRIPS Agreement expressly precludes the agreement from being used to address IP rights exhaustion, further reinforced by the Doha Declaration.[199] Countries are free to adopt their own exhaustion regime, and national exhaustion is essentially a territorial barrier created by the government to restrict international distribution of goods. Thus, in the context of ASEAN's regional integration, national exhaustion segments the market and directly contradicts free trade principles since it creates a barrier to trade in preventing the movement of genuine goods within the regional market.[200] While there is a conflict between free trade principles and the exclusive rights of the patentees, the very basis of the AEC is to remove trade barriers that will impede the process. The free movement of patented goods necessitates at least an ASEAN-wide regional exhaustion principle,[201]

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[199] *Declaration on the TRIPS Agreement and Public Health (adopted on 14 November 2001).*

[200] On this, Markus made the further distinction of noting that countries may also permit parallel imports, but ban parallel exports to lower prices in the domestic market, and that countries may also ban parallel imports but permit parallel exports to encourage export opportunities for local distributors. He further notes that no governments have yet to make such distinctions. See: Keith E. Maskus, "Parallel Imports in Pharmaceuticals: Implications for Competition and Prices in Developing Countries," 2001, 3, https://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf.

[201] The same rationale has been adopted by the European Union where the IP rights conferred are deemed exhausted within the single market once the goods are placed on the market within the EU, with the consent of the right holder. In the case of *Centrafarm and Adriaan de Peijper v Sterling Drug Inc (C-15/74)*, the Court of Justice of the European Union (CJEU) stated the following: "The exercise, by the patentee, of the right which he enjoys under the legislation that of a Member State to prohibit the sale, in that State, of a product protected by the patent which has been marketed in another Member State by the

where patentees cannot prevent the importation of genuine goods once the patented goods are put into the market of any ASEAN MS.

Among ASEAN MS, each MS has adopted different approaches in assessing exhaustion with regards to parallel imports.[202] To illustrate, the national patent laws of Cambodia,[203] Thailand,[204] and Viet Nam[205] provides for international exhaustion. Singapore follows a hybrid approach which provides for international exhaustion,[206] except for pharmaceuticals which reflects that of national exhaustion since importation is not allowed unless the product has been sold or distributed in Singapore.[207] The opposite however is seen in the Philippines and Indonesia. Indonesia adopts national exhaustion[208] but specifically provides an exception for pharmaceutical products that have been legally marketed outside of the country. Similarly, the national exhaustion regime applies in Philippines for patents, but international exhaustion applies to "drugs and medicines".[209]

Thus, in the absence of a common policy on exhaustion, enforcement towards genuine goods within the region would be dealt with differently. The effects of divergent approaches to exhaustion is perhaps best illustrated on the case of EU's market.[210] To enable free movement of goods, the Art. 34 of the TFEU provides that quantitative restriction on imports and all measures having equivalent

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patentee or with his consent is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the Common Market." The *Andean Community Decision № 486 (Art. 54)* and the *Bangui Agreement Instituting an African Intellectual Property Organization (OAPI), Act of December 14, 2015 (Art. 7(1)(a) of Annex I)*, both regional agreements, took it a step further to institute international exhaustion among all its member states. See also: World Intellectual Property Organization, "Draft Reference Document on the Exception Regarding the Exhaustion of Patent Rights" (Standing Committee on the Law of Patents, Geneva, Switzerland: WIPO Secretariat, 2022), 16–17, https://www.wipo.int/edocs/mdocs/mdocs/en/scp_34/scp_34_3.pdf.

[202] See also: World Intellectual Property Organization, "Draft Reference Document on the Exception Regarding the Exhaustion of Patent Rights."

[203] Art. 44, *Law on Patents, Utility Models and Industrial Designs (2003).*

[204] Art. 36(7), *Thailand Patent Act of 11 March B.E. 2522 (1979) as amended by Act (No. 3) B.E. 2542 (1999) on March 21, 1999*

[205] Art. 125(2)(b), *Law on Intellectual Property, No. 50/2005/QH11, (Nov. 29, 2005)*.

[206] Section 66(2)(g), *Patents Act 1994.*

[207] Sec. 66(3), *Patents Act 1994.*

[208] Art. 19(1), (2), 160, and 167, *Law of the Republic of Indonesia, No. 13 (July 28, 2016), on Patents*.

[209] Sec. 72(1), *Intellectual Property Code of the Philippines, Rep. Act No. 8293 (1997), as amended by the Rep. Act No. 10372 (2013)*.

[210] Article 34, *Consolidated Version of the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) (Mar. 30, 2010) as amended following the entering into force of the Treaty of Lisbon on December 1, 2009. Treaty of Lisbon, 2007 O.J. (C 306) (Dec. 13, 2007)*

effects are prohibited between MS.[211] Ideally, the creation of a single market would require all ASEAN MS to adopt the principle of international exhaustion, as regional exhaustion does not resolve the issue where a patentee puts the patented goods in a foreign market, but attempts to block the importation of genuine goods through a parallel patent in another ASEAN MS. On the other hand, there could be important policy considerations to which ASEAN intends to leave it open the question open to its MS, particularly for governments to set prices and allow price discrimination within certain market segments, or to allow for more foreign products to enter the market. This might be most apparent in the case of pharmaceuticals whereby parallel imports would prevent the government from effectively instituting differential price controls in the access to medicines.[212]

On this, Calboli argued that national trade interests of each ASEAN MS is of a higher priority as compared to enabling effective free movement of goods within the region,[213] but called national exhaustion a "disguised barrier" to legitimate trade within ASEAN as domestic enforcement of IP rights should not "interfere with the free movement of goods across ASEAN as long as those goods are genuine," lest the AEC will not enjoy a functioning internal market, despite legitimate reasons to retain inconsistent status quo.[214] In essence, the lack of recognition of divergent national patent laws as a non-tariff barrier does not adequately match the very objective in the establishment of a single market and production base. The effects of divergent national patent laws would still obstruct trade within ASEAN and should be addressed.

[211] Art. 36 of the TFEU provides an exception to Art. 34 for "the protection of industrial and commercial property" as long as they do not amount to "arbitrary discrimination or disguised restriction on trade between Member States." See also: *Merck and Co Inc. vs Stephar BV and Petrus Stephanus Exler (C-187/80).*
[212] Duncan Matthews, "WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?," *Journal of International Economic Law* 7, no. 1 (March 2004): 23–24, https://doi.org/10.1093/jiel/7.1.73; Frederick M. Abbott, "The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference," *The Journal of World Intellectual Property* 5, no. 1 (2005): 34–35, https://doi.org/10.1111/j.1747-1796.2002.tb00147.x.
[213] Irene Calboli, "The ASEAN Way or No Way? A Closer Look at the Absence of a Common Rule on Intellectual Property Exhaustion in ASEAN and the Impact on the ASEAN Market," *U. Pa. Asian L. Rev. 363*, May 1, 2019, 371, https://papers.ssrn.com/abstract=3474490.
[214] Calboli, 390.

2.3.3 Single Production Base Facilitates Cross-Border Infringement Activities

Protection of patent rights falls under the second objective of the AEC, which aims to create a competitive, innovative and dynamic ASEAN. Emphasis is placed on technology adaptation and diffusion to spur innovation, and to build ASEAN's long-term competitiveness through national and cross-border initiatives through promoting strong IPR protection in the region.[215] However, widespread patent infringement activities through the supplying of components across the region in the formation of a single production base would potentially diminish the objective of strengthening IP systems under the AEC.

The AEC aims to integrate supply and value chains across ASEAN, expanding vertical intra-industry trade in parts and components, intermediate goods, and final products.[216] Through the AEC, ASEAN aims to provide ideal market conditions for investors seeking to establish pan-regional operations in Southeast Asia, with each ASEAN MS offering different competitive advantages ranging from low-cost labour to intermediate manufacturing capacities and more advanced logistics and services.[217] In particular, there are currently more than 1600 registered economic zones across each ASEAN MS,[218] where business activities are subjected to different rules than that of the rest of the economy.[219] These economic zones serve as important policy tools to promote intraregional trade

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[215] *AEC Blueprint 2025*, para. 32-34.
[216] Santos-Paulino, "The Asian Economic Integration Cooperation Agreement: Lessons for Economic and Social Development," 9.
[217] Jonathan Woetzel et al., "Southeast Asia at the Crossroads: Three Paths to Prosperity" (McKinsey Global Institute, 2014), 73, https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Asia%20Pacific/Three%20paths%20to%20sustained%20economic%20growth%20in%20Southeast%20Asia/Southeast_Asia_at_the_crossroads_Three_paths_to_prosperity_Full%20report.ashx.
[218] For an overview of the types of economic zones in Southeast Asia, see: The ASEAN Secretariat and United Nations Conference on Trade and Development, "ASEAN Investment Report 2017: Foreign Direct Investment and Economic Zones in ASEAN" (Jakarta, Indonesia, October 2017), 102–3.
[219] Among ASEAN MS, Brunei, Singapore, and Thailand adopt primarily a centralised approach to economic zone development, whereas Malaysia, Indonesia, and Viet Nam adopt a more decentralised system with no government body in charge, which leads to some difficulties in estimating the numbers of economic zones. See: The ASEAN Secretariat and United Nations Conference on Trade and Development, 99–100; United Nations Industrial Development Organization, "Economic Zones in the ASEAN: Industrial Parks, Special Economic Zones, Eco Industrial Parks, Innovation Districts as Strategies for Industrial Competitiveness" (Viet Nam, August 2015), 79, https://www.unido.org/sites/default/files/2015-08/UCO_Viet_Nam_Study_FINAL_0.pdf.

and competitiveness of the manufacturing sector, allowing multi-national enterprises to utilise the locational advantages of ASEAN MS and establish production networks for manufacturing activities.[220]

The manufacturing of components is particularly relevant in ASEAN's case. A significant portion of ASEAN's trade involves the cross-border trade of parts and components through the CEPT scheme, which encouraged the profitable fragmentation of production in the region. In 2016, the production of intermediate goods sits at 56% out of all ASEAN exports.[221] This is particularly well-researched in the automotive industry: the production of parts and components are scattered across selected ASEAN MS for the assembly of specific types of vehicles for wider distribution regionally and globally.[222] Further, electrical parts and components also account for the largest share of intra-ASEAN commodity trade, which are also exported to China as East Asia's hub for assembling electronic and electrical equipment.[223] Placing production close to the market and plugging each MS into the ASEAN regional production network would reduce transport costs to the unit value of the products, thus increasing overall price competitiveness.

Further, the single production base is particularly important for ASEAN particularly in the production of parts and components, and further assembly of goods is projected to attract a higher level of FDI within the region, promote technology transfer, and subsequently increase the overall economic development of the region.[224] Plummer and Cheong have also observed that the preferred

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[220] See e.g. OECD-UNIDO, "Integrating Southeast Asian SMEs in Global Value Chains: Enabling Linkages with Foreign Investors" (Paris, 2019), 99–102, https://www.oecd.org/investment/Integrating-Southeast-Asian-SMEs-in-global-value-chains.pdf.

[221] James Villafuerte et al., "Building Complementarity and Resilience in ASEAN amid Global Trade Uncertainty," 0 ed., ADB Briefs (Manila, Philippines: Asian Development Bank, October 2018), 3, https://doi.org/10.22617/BRF189578-2. For a comprehensive overview of the breakdown of export of goods in ASEAN including parts, components, and accessories, see: The ASEAN Secretariat, *ASEAN Statistical Yearbook 2021*, 67–105.

[222] Ishikawa notes the following example: Toyota produces "diesel engines and body panels in Thailand, steering and radiators in Malaysia, transmissions and meters in the Philippines, and gasoline engines and clutches in Indonesia," which are then "supplied to each other using preferential tariffs(…)" See: Ishikawa, "The ASEAN Economic Community and ASEAN Economic Integration," 24–41. For an overview of how automotive assemblers leverage the AFTA-CEPT scheme in their complementary parts supply system, see also: World Trade Organization and IDE-JETRO, "Trade Patterns and Global Value Chains in East Asia: From Trade in Goods to Trade in Tasks," 2011, 17, https://www.wto.org/english/res_e/booksp_e/stat_tradepat_globvalchains_e.pdf.

[223] Among the top ten intra-ASEAN exports of goods in 2020, 42.7% of total trade involves goods along with parts and accessories of said goods, and 41.1 for intra-ASEAN imports. See: The ASEAN Secretariat, *ASEAN Statistical Yearbook 2021*, 69.

[224] From 2011-2012, components have accounted for 73.4% of total network exports of Southeast Asia. See: Prema-chandra Athukorala, "Southeast Asian Countries in Global Production Networks," in *ASEAN*

sector for FDI investors in Southeast Asia lies in the electronics and auto parts manufacturing sectors,[225] the two sectors which are also included under AEC's priority integration list.[226] The goal underlying the creation of a single production base under the AEC is thus to empower ASEAN MS to play to their competitive advantage in the manufacturing of goods. By establishing a value chain across the region, each step of the process would be established in the most cost-efficient location, and the manufactured parts and components would move freely across borders to be assembled into a final product. This maximises the economies of scale, collective efficiency, and ultimately form regional innovation systems.[227]

With the lowering of trade barriers and production costs, the ASEAN single production base would open up doors to patent infringement, where potential infringers may strategically divide their manufacturing activities across different MS to circumvent national patent laws. This would make the halting of cross-border infringement difficult, and potentially jeopardise AEC's objective in creating an innovative region. ASEAN's success in lowering tariffs and enable more rigorous cross-border trade would also encourage the production of infringing goods with minimal legal repercussions. Patent infringement occurs when a defendant performs an act which falls under the exclusive rights conferred upon the patentee – for product patents, the making, using, offering for sale, selling, or importing.[228]

As the scope of the exclusive right and the protection conferred by a national patent is generally understood to be limited to the boundaries of the domestic jurisdiction, acts of infringement occurring outside the jurisdiction may be difficult to halt. By producing only the parts and components required to assemble the patented good, and then shipping and assembling it in another ASEAN MS where a corresponding patent does not exist, or omitting an element of patent-infringing nature from

Economic Community: A Model for Asia-Wide Regional Integration?, ed. Bruno Jetin and Mia Mikic (United Kingdom: Palgrave Macmillan, 2016), 86.
[225] Cheong and Plummer, "FDI Effects of ASEAN Integration," 1–2.
[226] The other sectors identified are agro-based products, healthcare products, rubber-based products, building and construction materials, wood-based products, and digital trade standards and conformance. See: Association of Southeast Asian Nations, "Priority Areas of Cooperation," Standard and Conformance, 2020, https://asean.org/our-communities/economic-community/standard-and-conformance/priority-areas/.
[227] *AEC Blueprint 2025*, para. 22-24.
[228] Art. 28, *TRIPS Agreement*.

the good where the good is then exported elsewhere to be combined with the element, infringers are able to assemble it into a product that would have been infringing in the origin country.

With the expansion of global trade, some jurisdictions have identified this circumvention of patent law as a problem, and in the absence of a global patent law system, these jurisdictions have prescribed the act of exporting or importing components to be assembled into an infringing good as infringing.[229] For instance, patentees in the US are able to seek compensation from component suppliers based in the US even if the direct infringement is carried out extraterritorially. The act of exporting components from the US which is then combined overseas into a product amounting to patent infringement if carried out in the US, is deemed infringing under §271(f);[230] and the act of producing a component overseas which is then imported into the US to be combined into an infringing product, possibly amounts to inducement infringement under §271(b).[231] In Germany, the supplying

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[229] Suzuki has divided the forms of trans-boundary patent infringement into three categories: (1) cross-border transactions where the offer to sell occurs at a different country than the eventual manufacturing and sale, which may further involve additional parties; (2) the exportation of components to a foreign country, which is then assembled into an product deemed infringing in the exporting country; and (3) the importation of components from a foreign country to be assembled into an infringing product in the importing country. This particular section focuses on scenarios (2) and (3), and whether the local exporter in scenario (2) and the exporter in a foreign country in scenario (3) may be found liable for infringement in the local courts. These categories are further explored in Chapter 3 (infra 3.1.2). See: 鈴木将文 [Suzuki Masabumi], '国境をまたがる行為と特許権の間接侵害の成否' [Cross-Border Acts and the Establishment of Indirect Infringement], In パテント *2014* 67, no. 12 (2014): 116.

[230] In the US, 35 US Code §271(f)(1) considers whoever that "supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patent invention" which "actively induces the combination of such components outside the United States" to be liable for infringement. §271(f)(2) provides for infringement liability if the component is "especially made or especially adapted for use in the invention" and "not a staple article or commodity" that is suitable for substantial non-infringing use, where there is knowledge that the component would be combined outside the United. The extent to which a component is considered "substantial" under §271(f)(1) has been determined by the Supreme Court in *Life Technologies Corp. v. Promega Corp*, 580 US ___ (2017), where the supply of a "single component of a multicomponent invention for manufacture abroad does not give rise to §271(f)(1) liability."

[231] §271(b) provides that "whoever actively induces infringement of a patent" would be liable as an infringer. This section does not provide for a territorial limitation in finding patent infringement, and has been raised by patentees to raise actions against infringing acts committed abroad. However, intent to induce on the side of the infringer needs to be found, and direct infringement under §271(a) needs to be established before §271(b) may be applied as second liability cannot exist when direct infringement is not found. See: *Novartis Pharm. Corp. v Eon Labs Mfg., Inc., 363 F.3d 1306 (Fed. Cir. 2004).* While the statutory reading of §271(b) provides that inducement covers conduct carried abroad, the scope of inducement remains muddied due to conflicting judgements on determining the foreign reach of inducement. See: *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc., 246 F.3d 1336, 1343 (Fed. Cir. 2001)*; *Shockley v. Arcan, Inc., 248 F.3d 1349 (Fed. Cir. 2001); MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp., 420 F.3d 1369 (Fed. Cir.2005);DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1305 (Fed. Cir. 2006)*; Bernard Chao, *Reconciling Foreign and Domestic Infringement*, Rochester, NY, SSRN Scholarly Paper ID 1931643 (Social Science Research Network, 21 September 2011), 618–36; Lynda J.

of a component which constitutes an essential element of an invention, from Germany to abroad to be assembled into an infringing product, constitutes direct infringement under Sec. 9 of the German Patent Act, and indirect infringement if the product is intended for supply to Germany under Sec. 10.[232] The act of producing a component overseas which is then imported into Germany to be combined into an infringing product may also constitute tortious conduct. Most jurisdictions however, do not categorise such acts as infringing - in the case of Japan for instance, while indirect infringement is provided under Art. 101 of the Japanese Patent Act,[233] the exportation of means from Japan to abroad is permitted under statutory laws.

Among ASEAN MS, patent laws are strictly territorial, and there are no ascertainable statutory or case laws which established patent infringement on the supplying of components. Given that English cases hold persuasive authority in the courts of Malaysia and Singapore, which are both common law jurisdictions, reference may be made to cases related to the selling of "kit of parts."

In *Virgin Atlantic Airways v Delta*,[234]a summary judgement application which involved the consideration of whether a "kit of parts" is infringing upon a UK patent when assembled outside the UK, Arnold J ruled that infringement is established if the "kit of parts" is complete, although statutory laws provide that the invention needs to be put into effect in the UK.[235] In the event where the kit is incomplete and the missing part or parts need to be provided, there is no infringement as the disassembled form does not deal with the claimed product in the UK. While it is arguable that if the "kit of parts" is a complete unit, exporting it may be infringing in the UK, the position of English courts on the exportation of a kit of parts remain unsettled. The summary judgement was further appealed

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Oswald, 'The Intent Element of Inducement to Infringe under Patent Law: Reflections on Grokster', *Michigan Telecommunications and Technology Law Review* 13, no. 1 (2006): 228–33.

[232] Under Section 10 of the German Patent Act, contributory infringement is found when the means relating to an essential element of an invention are offered and supplied in Germany, and that the means are suitable and intended for using the invention In Germany. In the *Funkuhr II* decision by the Bundesgerichtshof, the court explained that while the act of supplying abroad does not trigger Section 10, the provision would apply if the ultimate goal is for the use of the invention in Germany. Federal Court of Justice (BGH), 30 January 2007, GRUR 2007.

[233] *Patent Act (Act No. 121 of 13 April 1959).*

[234] [2010] EWHC 3094.

[235] Sec. 60(2), *Patents Act 1977*.

in *Virgin Atlantic Airways v Delta Air Lines*; the Court of Appeal however, did not endorse Arnold LJ's reasoning, and ultimately decided that the case should proceed to full trial.[236]

Given the uncertainty and diversity of jurisdictions among ASEAN MS alongside the increased ease of goods moving across borders, an infringer may lower the risk of infringing upon a patent by further breaking down the production process, strategically picking several countries to source or produce each separate component, and proceed to assemble it elsewhere where the invention is not protected. These goods will then circulate within the single market, and patentees can only resort to blocking the importation of the goods in markets where the invention is protected. Similarly, a party intending to infringe upon a process or method patent in one country may also attempt to divide the steps across ten ASEAN MS to be availed from patent infringement.[237]

Further, the movement of parts and components across borders to be assembled into a product patented in another ASEAN MS may potentially weaken existing national patent systems or even delay the establishment of national patent systems among Least-Developed Country Members ("LDCs"), who have a transitionary period until 2023 in establishing a patent system. Becoming a manufacturing hub for potential infringers under AEC's single production base may encourage some ASEAN MS to lax their patent laws or delay the establishment of a patent system in order to accommodate activities which may be infringing in other MS. These in turn would undermine the goals set out under the AEC Blueprint, which aims to strengthen the IP laws across the region collectively.

[236] In [2010] EWHC 3094, as the court reasoned that the defendant's kit is capable of being arranged differently to the product claimed, a declaration of non-infringement was granted summarily. Upon appeal in [2011] EWCA Civ 162 however, the declaration of non-infringement was discharged, but the proposition that the manufacturing of a complete kit of parts in the UK to be assembled elsewhere as infringing was not endorsed. Jacob LJ stated that as the status of considering the manufacturing of an incomplete kit of parts is not well settled in Europe, the question is not suitable for determination on a summary judgement application. See: Birss et al., *Terrell on the Law of Patents*, 426–27.

[237] In the US for instance, the case of *NTP v Research in Motion* involves a dispute over the infringement of five process patents owned by NTP, where the transmission of radio frequency occurs between the US and Canada. The Federal Circuit is confronted with the issue of whether the physical location of the components involved in the transmission put the conduct by the defendant outside the territorial scope of §271, which the court ultimately finds in the negative.

2.3.4 Legal Uncertainty in Resolving Cross-Border Patent Disputes

With the increasing trade in patented goods and components under the AEC, it is foreseeable that cross-border patent infringement would occur more frequently, along with an increase in patent disputes involving foreign elements. The manner in which court actions are being carried out, and diverse positions on determining infringement across the courts in separate ASEAN MS will also give rise to various procedural and substantive legal questions.

Art. 4*bis* of the Paris Convention denies the mutual dependency of patents, and that patents issued in each country are independent of one another. The corollary to this principle is that the registration and maintenance of the patents need to be carried out separately across jurisdictions, and multiple parallel patents would be granted for the same or similar invention. In the case of a regional economy, this approach to patent protection is seen to fragment the functioning of a single market. For ASEAN, it is technically possible to obtain domestic patents from all ten ASEAN MS, and the process remains difficult, costly, and time-consuming.[238] Myanmar for instance has just established a Myanmar Intellectual Property Office, but have yet to issue any patents as of the writing of this thesis;[239] and even in a country with a patent system such as Thailand, pharmaceutical and complex chemical patents may take over ten years to be issued.[240]

Even if a patentee manages to obtain patents from all ASEAN MS, a strict interpretation of Art. 4*bis* provides that the territorial nature of patents are intertwined with notions of sovereignty and property rights, and maintained in the interest of international comity – courts in country A will not claim jurisdiction over property rights established by country B.[241] However, as observed in the

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[238] The costs associated with obtaining patents from all ASEAN MS is explored further in Appendix IV. In most cases, in addition to the costs of registering and maintaining national patents, it is required to hire local patent attorneys or representatives to aid in the prosecution process at national offices, and to translate the patents into the national language, which incurs further costs.
[239] While it is technically possible to obtain patents in Myanmar, statistics compiled by the World Intellectual Property Office has shown that no patents have been registered in Myanmar from 2012-2021, although Burmese nationals have filed two patents abroad in 2021. See: World Intellectual Property Organization, "Myanmar," Statistical Country Profiles, December 2022, https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=MM.
[240] South-East Asia IPR SME Helpdesk, *IP Factsheet: Thailand*, Country Factsheets, (2016), 8.
[241] Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development," Intellectual Property and Human Rights (Geneva, Switzerland: World Intellectual Property Organization, October 28, 1998), 5, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=7604.

previous section, the national patent laws of some states do attempt to capture infringing acts divided across jurisdictions based on a local patent, and through the act of exporting part of a patented product. This gives rise to two practical questions: (i) what would ASEAN courts do in situations where simultaneous proceedings are brought before several national courts, or (ii) if the assets of the alleged infringer are located outside of the state where the alleged infringement occurred?

Among ASEAN MS, the general approach to infringement is for any of the infringing acts as prescribed in its statutory law – product patents for instance, the making, using, offering for sale, selling, or importing[242] - to occur within its territory. One of such examples would be the Singapore Patents Act, explicitly requires the act to occur within Singapore.[243] Another example would be the Malaysia Patents Act, which expressly states that the importation, offer to sell, sell, or use any foreign patent granted for the same or essentially the same invention as a patent granted in Malaysia would not constitute an infringement.[244] Given this strict territorial approach, it is likely that a court would not stay their proceedings despite simultaneous proceedings overseas.

Further, while a patentee in an ASEAN MS may prevent the importation of a good at the domestic market, if the defendant is based in another jurisdiction, the patentee would encounter difficulties in pursuing remedies.[245] As of now, there have been no ascertainable instances where ASEAN courts have ruled upon a patent granted by a different country. Parallel patents would also be interpreted differently by different ASEAN MS, which adds to the unpredictability of patent litigation.[246] ASEAN's practical aversion towards extraterritorial application of domestic patent laws

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[242] Art. 28, *TRIPS Agreement*.
[243] Sec. 66, *Patents Act 1994.*
[244] Sec. 58A, *Patents Act 1983 (Act 291)*.
[245] Courts of ASEAN MS have rarely granted remedies based on or in consideration of a foreign court or arbitral proceeding. In one rare case before the Malaysian Court of Appeal, the court granted a Mareva injunction to aid arbitration proceedings in Singapore, the first ever reported case where the seat is outside Malaysia. See: *Interactive Brokers LLC v Neo Kim Hock & Ors [2014] 8 CLJ 747.* Singapore courts also do not generally grant cross-border injunctions, and that a worldwide Mareva injunction will only be considered in exceptional cases. See: Jason Chan and Lam Liza, "Patent Litigation in Singapore: Overview," Thomson Reuters Practical Law, February 1, 2022, http://uk.practicallaw.thomsonreuters.com/w-014-9923?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[246] In Malaysia for instance, in the case of *Med 8 Sdn Bhd & 4 Ors ("Med 8") v B. Braun Melsungen AG*, Braun sued Med 8 for infringing its Malaysian patents, which Med 8 responded with a counter-claim for invalidation. The foreign proceedings and decisions in Australia, Germany, Japan and India were cited in Med 8's defence and counter-claim, claiming that since Braun's parallel patents have been invalidated in their respective jurisdictions, Braun's Malaysian patent must be invalidated as well. However, Med 8's

would also prompt local courts to exclude foreign infringement activity in the consideration of the infringement upon a national patent.

As for (ii), an option for patentees to recoup their damages when the assets of the infringers are located elsewhere would be to rely on reciprocal enforcement of judgments between the ASEAN MS. Brunei,[247] Malaysia,[248] and Singapore[249] are reciprocating countries and have each enacted local legislation to recognise and enforce foreign judgments, with some exceptions in place, such as the lack of jurisdiction by the foreign court, fraudulent foreign judgment, or when the enforcement of the judgement is contrary to public policy of the forum.[250] Given ASEAN MS' general stance on the territorial approach of patent law protection, and the fact that patents are a right granted by a sovereign state and embodies important policy considerations, there is a likelihood that monetary judgements arising from the infringement of a national patent may not be enforced by the foreign counterpart. Furthermore, the remedies available under the Act are limited to monetary damages as injunctions are usually not granted in such situations.

In addition to the above, other problems to be overcome in initiating action in another ASEAN MS include the patentee's familiarity with the law, legal culture, courts, and language of the foreign jurisdiction. While general principles under tort law, such as that of a joint tortfeasor may be applicable to a party contributing to the infringement, indirect or secondary patent infringement are largely unaddressed among the patent legislations of ASEAN MS.

Apart from litigation, arbitration has emerged as a viable option to resolve IP-related disputes in which upon the agreement of the parties, the dispute is submitted to a sole arbitrator or tribunal

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submission was dismissed on the grounds that standard of evidential proof for invalidation in foreign jurisdictions is different from that of Malaysia.

[247] *Reciprocal Enforcement of Foreign Judgments (Revised edition 2000)*.

[248] *Reciprocal Enforcement of Judgments Act 1958 (Revised 1972)*.

[249] Singapore has two relevant statutory laws on this: *Reciprocal Enforcement Of Commonwealth Judgments Act 1921 (2020 Revised Edition)* which applies to judgments from superior courts in the Commonwealth countries and the U.K.; and the *Reciprocal Enforcement Of Foreign Judgments Act 1959 (2020 Revised Edition)* between Singapore and other foreign courts.

[250] Apart from the statutory laws, recognition of foreign judgments may also be carried out under common law. Malaysian laws require the following: fixed sum of debt, if the judgment is final and conclusive, and the court has competent jurisdiction. Singapore on the other hand has expanded the recognition to both money and non-money judgments, certain interlocutory orders and civil judgments from other recognised courts. Further, Singapore is also a party to *the Hague Convention on Choice of Court Agreements on 1 October 2005*, and its ratification in Singapore by way of the *Choice of Court Agreements Act 2016 (No 14 of 2016)*, Part 3 of which applies to foreign judgment.

who will render a binding decision.[251] For patent disputes, arbitration is generally confined to cases that involve a prior contractual agreement before any alleged infringement occurred, such as licensing or technology transfer agreements,[252] but referral to an arbitral tribunal by way of a submission agreement may be carried out after the dispute has arisen. All ASEAN MS are also contracting states to the New York Convention[253] which governs the enforcement of arbitral awards.[254]

However, the arbitrability of patent rights remain contentious across jurisdictions. Disputes in relation to patent rights could be on infringement, ownership, or validity of the patent, and more often than not, licensing disputes are deemed to be arbitrable due to the underlying breach of contract. Infringement, ownership or validity disputes however is further complicated by whether the relevant jurisdiction permits the type of arbitration involved. The historical understanding is that a patent is a public right[255] granted by a sovereign state, who acts as both the "gatekeeper and grantor" of the registered patent right.[256] Governments have a vested interest in regulating the monopolistic aspects of patents, and may ensure that such rights are only used as intended and not in ways that contravene its public policy. The grant of a registered right such as that of a patent is thus "intimately connected to a jurisdiction's specific procedures and intellectual property institutions;"[257] for instance, in cases

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[251] According to the WIPO Arbitration and Mediation Center, patent disputes constitute the majority of all administered IP cases (29%). See: World Intellectual Property Organization, "WIPO Mediation, Arbitration, Expert Determination Cases and Good Offices Requests," WIPO Caseload Summary, 2022, https://www.wipo.int/amc/en/center/caseload.html.
[252] Matthew A. Smith et al., "Arbitration of Patent Infringement and Validity Issues Worldwide," *Harvard Journal of Law & Technology* 19, no. 2 (2006): 304–5.
[253] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*
[254] For the list of Contracting States, see: New York Arbitration Convention, "Contracting States," accessed January 28, 2023, https://www.newyorkconvention.org/countries.
[255] Whether patent right constitute public or private rights remain an issue of contention, particularly in the intersection between areas of patent administrative law and the enforcement of patent rights. In *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC - 138 S. Ct. 1365 (2018),* the US Supreme Court reasoned that patent rights are public rights and can be revoked by an executive agency tribunal. On the other hand, it is widely acknowledged that patent right enforcement needs to be brought by their private holders. The Preamble of TRIPS Agreement is quite clear on this, noting that "intellectual property rights are private rights."
[256] Steven A. Certilman and Joel E. Lutzker, 'Arbitrability of Intellectual Property Disputes', in *Arbitration of International Intellectual Property Disputes*, ed. Thomas D. Halket (United States: JurisNet, LLC, 2012), 67.
[257] Marie-Elodie Ancel et al., "International Law Association's Guidelines on Intellectual Property and Private International Law ('Kyoto Guidelines'): Applicable Law," ed. Toshiyuki Kono, Axel Metzger, and Pedro de Miguel Asensio, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, International Law Association's Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines"), 12, no. 1 (2021): 47.

concerning the validity of the patent, patents may be viewed as involving important public rights and interests, and the arbitration of patents may be prohibited or of limited enforceability under national laws.[258]

There are several advantages in utilising arbitration for patent disputes, but limiting the effects to *inter partes.* In the event of complex infringing activities occurring across multiple jurisdictions, parties would likely be able to consolidate and resolve the entire dispute in a single proceeding, instead of enforcing each patent separately before the jurisdictional courts. In addition to confidentiality of the proceedings, arbitrator(s) chosen by the parties would likely have the requisite technical expertise in relation to the subject matter, especially when patentability standards are in dispute. Patent challenges can invoke the existence of prior art which would render obvious the claimed invention or demonstrate the absence of the necessary inventive step, which involve analysis and understanding of technical literature well suited to an arbitral tribunal with corresponding technical expertise or experience.[259]

However, the *inter partes* effect is precisely the downside to arbitrating patent disputes since the relevant patent claims are not automatically invalidated with *erga omnes* effect. Art. V(2)(a) of the New York Convention provides that courts are permitted to refuse the enforcement of an award if a subject matter of the dispute is deemed not arbitrable, and Art. V(2)(b) also provides that awards that are contrary to the public policy of that country can be refused. Thus, if patent rights are construed as embodying important public policy concerns by the enforcing state, then there is a possibility for awards to be refused recognition. Further, there is no international framework for the enforcement of

[258] The Commentary on WIPO Arbitration Rules challenges this perspective, noting that (i) limiting IP validity determination on an *inter partes* basis would not impact third parties, and thus do not affect public policy, and (ii) even if public policy is concerned, the arbitration laws of many countries follow an "internationalised" approach as to what constitutes public policy, which is limited to only the most egregious conduct including drug-trafficking, slavery, corruption, and money laundering. Cf. Phillip Landolt and Alejandro García, "Commentary on WIPO Arbitration Rules," *WIPO Arbitration and Mediation Center*, 2017, 33–34.

[259] Other validity issues may include whether claims are directed to patentable subject matter, or constitute an abstract idea, or does not have industrial applicability. See: Steven A. Certilman and Joel E. Lutzker, "Arbitrability of Intellectual Property Disputes," in *Arbitration of International Intellectual Property Disputes*, ed. Thomas D. Halket (United States: JurisNet, LLC, 2012), 76.

interim arbitral award, and courts have not always considered interim reliefs granted by a tribunal, or an emergency arbitrator, as a final award which needs to be granted.[260]

The ASEAN Way also provides some insights into how ASEAN MS would view the arbitrability of a patent – whether a national patent can be subject local arbitration laws, and whether another ASEAN MS patent can also be subject to local arbitration laws. Among ASEAN MS, Singapore expressly permits the arbitration of disputes relating to an IP issue, including the validity of a patent,[261] which shows a willingness to consider the grant of a patent as an expression of sovereign right.[262] The Singapore International Commercial Court similarly allows for the arbitrability of Singapore patents. However, the justiciability of a foreign patent remains in question, and is likely that the utilisation of arbitration will be limited to contracts such as that of licensing agreements, where determination of the patent validity would have only an *inter partes* effect. Whether considerations of the principle of non-intervention would apply here remains to be seen.

Summary of Chapter 2

This Chapter has provided a brief historical perspective on the development of ASEAN as an organisation from a security alliance to its current expanded role in driving economic integration through the AEC. While the AEC intends to create a single market and production base and calls for stronger patent rights protection, this Chapter demonstrated that the patent-related initiatives are simply insufficient – not only is the conception of a single market unclear, the AEC does not address divergent national patent laws as an impediment to trade and the free movement of goods. Furthermore, the current IP initiatives are incapable or addressing or halting the spread of cross-

[260] For an succinct overview of interim relief in the context of IPR enforcement, see: Althaf Marsoof, "Intersections Between Intellectual Property and Dispute Resolution," in *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives*, ed. Irene Calboli and Maria Lillà Montagnani (United States of America: Oxford University Press, 2021), 242–44, https://doi.org/10.1093/oso/9780198826743.003.0015.
[261] Sec. 26B, *International Arbitration Act 1994.*
[262] Beyond ASEAN MS, the Swiss Federal Supreme Court has also affirmed that arbitral tribunals are empowered to determine the validity of industrial property rights, and that the IP Office will implement the decision with regards to the registries accordingly. See: David Rosenthal, "IP & IT Arbitration in Switzerland," in *Arbitration in Switzerland: The Practitioner's Guide*, ed. Manuel Arroyo (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2013), 1135–36, https://www.loc.gov/catdir/toc/fy14pdf04/2013404013.html. Hong Kong has also in 2017 amended its Cap. 609 Arbitration Ordinance to clarify that IPR disputes can be resolved by arbitration.

border patent infringement within the region, causing legal uncertainty in resolving cross-border patent disputes and thus undermines AEC's goals in advancing economic integration.

Chapter 3. ASEAN Way and its Effect on Regional Patent Rights Protection

The AEC promises stronger IPR protection. However, the fundamental challenge lies in ascertaining to what extent ASEAN seeks to integrate its markets, and how an ASEAN patent system should take shape in complementing the economic integration efforts. Despite its broad and ambitious goals, the AEC does not fall squarely into any categories of prevailing regional integration classifications. At first glance, the AEC mimics that of the European Economic Community, which fell under one of the three pillars of the EU under the Treaty on European Union ("TEU"),[263] but the actual implementation seems to be more of that of a comprehensive FTA. This disconnect underlines precisely the difficulty in identifying how ASEAN's intended patent regime is shaped under the AEC, and what can be done to further coordinate its initiatives and economic goals.

ASEAN is also not the first to include patent-related initiatives on a regional scale. The EU, Gulf Cooperation Council ("GCC"), ARIPO, and IAPO are all examples of regional organizations which have varying levels of success in implementing a region wide patent system. The question then evolves into twofold: what is asked of countries on an international level in terms of patent rights protection, and why have countries opted for a regional approach to patent protection? Further, how different is ASEAN as compared to other regional approaches, and is there an explanation for the AEC's lack of coordination between its goals and initiatives? To that end, this Chapter attempts to first establish the link between regional economic integration and the protection of patent rights in light of the global IP framework. This is followed by an assessment of ASEAN's norm – the ASEAN Way which characterises how cooperative efforts are carried out in ASEAN, and finally, how the ASEAN Way impedes the creation and implementation of an ASEAN patent system.

3.1 Regional Economic Integration and the Protection of Patent Rights

Regionalism as a concept refers to a primarily state-led process to build and sustain formal regional institutions and organisations or establish informal cooperation in an identifiable geographical region in close proximity.[264] In the same vein, regional economic integration is generally

[263] The EU eventually abandoned the three pillar structure under the TEU on December 2009 through the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entry into force on 1 December 2009.
[264] For further conceptual clarifications on regionalism, regionalization, and regional order, see e.g.: Börzel and Risse, "Introduction: Framework of the Handbook and Conceptual Clarifications," 3–15; Andrew Hurrell, "Explaining the Resurgence of Regionalism in World Politics," *Review of International Studies* 21, no. 4 (1995): 331–58. While regional cooperation can be formal or informal, this dissertation adopts a working definition of regionalism as the establishment of organisations with a regional character to fulfil purposes laid out in an agreement. This is also inline with Klučka and Elbert's definition of "institutional regionalism." See: Ján Klučka and L'udmila Elbert, *Regionalism and Its Contribution to General International Law*, 1st ed. (Košice: Pavol Jozef Šafárik University in Košice, 2015), 41–59.

formed and formalised through agreements and treaties where governments commit to reducing or eliminating barriers in the exchange of goods, services, capital, and people within the region.[265]

To understand how patent rights relate to regional economic integration efforts, this section first describes the global framework of economic integration with reference to regionalism theory followed by pinpointing how patent rights correlate with the overall regional economic integration process and how regional norms are relevant in shaping the institutional and substantive undertakings.

3.1.1 Preferential Trade Area under the GATT/WTO

The multilateral trading system is first formalised by the 1947 General Agreement on Tariffs and Trade ("GATT") and its successor, the World Trade Organization ("WTO") in 1995: the GATT dealt primarily with the trade in goods, and the WTO expanded the scope to include trade in services and intellectual property. One of the main objectives of the multilateral trading system is to eliminate barriers to trade and discriminatory treatment in international trade;[266] and in that regard, the WTO provides institutional support to multilateral trade agreements through administering agreements signed and ratified by WTO member states, serving as a forum for trade negotiations, and provide for a dispute settlement mechanism.

Parallel to the growth of multilateral trade, PTAs between WTO MS have also increased sharply. As of the writing of this dissertation, member states of the WTO have made 582 RTA notifications with 355 currently in force.[267] In the words of Bulmer-Thomas, "almost every country in the world has chosen to meet the challenge of globalisation in part through a regional response."[268] The fundamental debate surrounding regional economic integration has been whether such arrangements threatens the multilateral trading system – given that non-discrimination in trade

[265] Hurrell, "Explaining the Resurgence of Regionalism in World Politics," 337.
[266] See: Preamble, *Marrakesh Agreement Establishing the World Trade Organization*.
[267] World Trade Organization, "RTAs Currently in Force (by Year of Entry into Force), 1948-2022," Regional Trade Agreements Database, December 15, 2022, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.
[268] Victor Bulmer-Thomas, "Regional Integration in Latin America and the Caribbean," *Bulletin of Latin American Research* 20, no. 3 (2001): 363.

constitute the cornerstone of multilateralism, allowing for PTAs seem counterintuitive when certain members would have preferential access to other markets.[269] This is observed under Art. 1 of the GATT, now subsumed under WTO Agreement,[270] which provides for the Most-Favoured-Nation ("MFN") clause, forbidding WTO MS from engaging in discriminatory trade policies between each other.

As explored in Chapter 2.3.1, one of the primary goals for the multilateral trade system is to reduce trade barriers, and in line with Art. XXIV of the GATT, while PTAs do offer preferential access to its contracting states, PTAs as a whole could contribute to further reductions in trade barriers on a global scale provided that the participating countries do not raise tariffs or barriers against other non-participating countries. The Transparency Mechanism for Regional Trade Agreements is also adopted to assess if the proposed RTAs are in compliance with WTO Rules. Further, Art. XXIV is subsequently amended to include non-FTAs or CUs with the addition of Part IV and the Enabling Clause in 1979, which permits one-way partial tariffs to be granted by developed countries to developing countries, and two-way partial trade preferences can be exchanged between developing countries.[271] Members are also required to notify the formation of new preferential groupings to the GATT working parties before 1995, and then the WTO's Committee on Regional Trade Agreements from 1995 onward.

The Doha Declaration similarly reinforces regional exceptions to the multilateral trading system. Paragraph 4 of the Doha Declaration states that the WTO acts "as the unique forum for global trade rule-making and liberalisation, while also recognising that regional trade agreements ("RTAs") can play an important role in promoting the liberalisation and expansion of trade and in fostering

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[269] Bhagwati, Krishna and Panagariya for instance argued that PTAs derail multilateral liberalisation, causing distortions and the fragmentation of trade. See: Jagdish N Bhagwati, Pravin Krishna, and Arvind Panagariya, *The World Trade System: Trends and Challenges*, 2017, 8–19, https://doi.org/10.7551/mitpress/9780262035231.001.0001. and Jagdish Bhagwati, "Regionalism versus Multilateralism," *The World Economy* 15, no. 5 (1992): 535–54, https://doi.org/10.1111/j.1467-9701.1992.tb00536.x.

[270] *Marrakesh Agreement Establishing the World Trade Organization*.

[271] The ASEAN Preferential Trading Area (APTA) is an example, and ASEAN countries have exchanged partial tariff preferences through this framework. The ASEAN Free trade Area while named as an FTA, is arguably not a genuine FTA but rather concluded under the Enabling Clause provision. See: Arvind Panagariya, "The Regionalism Debate: An Overview," *The World Economy* 22, no. 4 (1999): 480, https://doi.org/10.1111/1467-9701.00214.

development.” Through the Doha work programme, WTO member states also agreed to clarify and apply WTO provisions into their RTAs while taking into consideration the developmental aspects.[272]

There are several perspectives on why states prefer a regional approach rather than a multilateral approach.[273] First, the regional approach is seen to be more practical than a multilateral approach to addressing contemporary trade issues. The multilateral trading system has been at an impasse for years and states have shifted to other avenues, including regionalism for results.[274] Further, the multilateral system and has been criticised on the grounds that trade discussions are generally long, slow, and difficult, with a strong bipolar division between developed and developing countries.[275] The TRIPS Agreement for instance, by mandating the granting of patents and exclusive rights for 20 years, is seen to have incurred significant economic costs to developing countries from using patentable knowledge largely held by developed countries despite transitionary measures and compulsory licenses.[276] For developing countries, multilateralism is dysfunctional since the interactions between states are unequal[277] - a strong regional presence then becomes a necessity to

[272] World Trade Organization, “Doha Work Programme,” Ministerial Conference, Sixth Session (Hong Kong, December 22, 2005), para. 26, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=70196&CurrentCatalogueIdIndex=0..

[273] Bulmer-Thomas highlighted the different rationale driving regionalism: for example, US’s interest in regionalism lies in pursuing an agenda that goes beyond what could be attained at the multilateral level, incorporating labour and environmental standards into trade policies, whereas the EU mode of regionalism is driven to create a single economic space. See: Bulmer-Thomas, “Regional Integration in Latin America and the Caribbean,” 364.

[274] Laurence Helfer, “Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking,” *Yale Journal of International Law* 29 (January 1, 2004): 20–22.

[275] See e.g. Susan C. Schwab, “After Doha: Why the Negotiations Are Doomed and What We Should Do About It,” *Foreign Affairs* 90, no. 3 (2011): 104–17.

[276] See e.g. Frederick M. Abbott and Carlos M. Correa, “World Trade Organization Accession Agreements: Intellectual Property Issues,” SSRN Scholarly Paper (Rochester, NY, May 30, 2007), 27–32, https://papers.ssrn.com/abstract=1915338; Kevin P. Gallagher, “Understanding Developing Country Resistance to the Doha Round,” *Review of International Political Economy* 15, no. 1 (2008): 69–70. Yu et al has provided a more recent take on this debate by noting the rise of middle income countries and cautions against the “oversimplification of the binary North-South debate on intellectual property law and policy(…)” see: Peter K. Yu, “Intellectual Property, Global Inequality and Subnational Policy Variations,” SSRN Scholarly Paper, Legal Studies Research Paper Series, Research Paper No. 21-04 (Rochester, NY, January 5, 2021), 2–21, https://papers.ssrn.com/abstract=3760413.

[277] An illustration of this would be the under-utilisation of the WTO dispute settlement process by developing countries, citing the lack of participation due to lack of WTO legal expertise, inability to enforce rulings through retaliation, and the lack of domestic methods to note and inform trade barriers faced to WTO lawyers. See e.g. Hunter Nottage, “Developing Countries in the WTO Dispute Settlement System,” *GEG Working Paper, No. 2009/47, University of Oxford, Global Economy Governance Programme (GEG)*, 2009, 1–29; James Smith, “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement,” *Review of International Political Economy* 11, no. 3 (2004): 542–69.

allow developing countries to "become more equal partners." [278] Mistry has also argued that regionalism became a prerequisite in reconstructing multilateralism to be more equal and work more effectively.[279] When countries negotiate as trading blocs at the multilateral level, the task of achieving consensus logically becomes simpler when the number of parties negotiating are reduced.[280]

Second, states enter into PTAs for insurance against failed multilateral trade talks and to increase bargaining power.[281] Global trade negotiations are rigid and slow, and following the Single European Act in 1986, regionalism was spurred globally. According to Mansfield and Reinhardt, states are more likely to form PTAs when (i) GATT/WTO membership increases, (ii) a multilateral negotiating round is underway, (iii) they were recently part of a GATT/WTO dispute, and (iv) they obtained an unsatisfactory resolution in the dispute.[282] Part of how the GATT/WTO promotes an open multilateral trading system is through sponsoring multilateral trade negotiations, and for participating member states, being part of a PTA would lend greater voice within multilateral trade talks. PTAs also acts as insurance against the changing conditions within GATT/WTO that could potentially threaten states' economic interest: if access to the crucial overseas markets can be established through PTAs, failure to reach an agreement in multilateral trade talks become less costly. States who are embroiled in GATT/WTO dispute would also be incentivised to enter into PTAs with third parties to safeguard countervailing access to markets and additional bargaining power.

Third, the proliferation of regional integration also triggers a "domino effect:" deeper integration of a bloc invites membership requests from countries who were previously content to be non-members. Economic integration provides preferential access to its members, and as the bloc enlarges, non-membership threatens the profits of non-member exporters who face a cost of disadvantage in an increased number of markets. As a result, this tilts government stances towards pro-membership in order to avoid damage and secure new business opportunities, and as more

[278] On this, Mistry views multilateralism as dysfunctional since it is used by the OECD and G7 governments to serve their own needs at the expense of developing countries in a multilateral regime, obstructing their economic development progress and marginalising them. See: Mistry, "New Regionalism and Economic Development," 133–36.
[279] Mistry, 137–38.
[280] Mestral, "Economic Integration, Comparative Analysis," 307.
[281] The faltering Doha rounds was also attributed to countries attempting to avoid difficult decision-making process on an international level when bilateral and regional agreements on the other hand can deliver commercial results. See e.g. Schwab, "After Doha: Why the Negotiations Are Doomed and What We Should Do About It," 113.
[282] Edward D. Mansfield and Eric Reinhardt, "Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements," *International Organization* 57, no. 4 (2003): 830–58.

countries seek after such memberships, this sets of a domino effect across the globe, amplifying the spread of regionalism.[283]

3.1.2 Regional Economic Integration and Legalisation

As permitted under the global multilateral trade framework, members to the GATT/WTO have entered into RTAs to gain preferential access within regional markets. As highlighted by Balassa's classification in Chapter 2.3.1 on the variations of economic integration, RTAs can be geared towards tariff reductions, or can also institute obligations going beyond multilateral requirements across multiple policy areas.[284] RTAs may also incorporate IP-related provisions,[285] and could go as deep as prescribing for technical and legal assistance,[286] exhaustion regimes,[287] or even more stringent enforcement measures.[288]

The administration and implementation of collective objectives under RTAs are generally overseen by regional institutions to ensure governance and effective administration of the RTAs.[289] These regional institutions generally have supranational authority, which involves the transfer of at

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[283] Richard E. Baldwin, "A Domino Theory of Regionalism," SSRN Scholarly Paper (Rochester, NY, September 1, 1993), 1–19, https://papers.ssrn.com/abstract=252201. See also: Mansfield and Reinhardt, "Multilateral Determinants of Regionalism," 857.

[284] Aaditya Mattoo and Michele Ruta, "Regional Trade Agreements," Text/HTML, World Bank, 2018, https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements.

[285] For an overview of how RTAs incorporate IPR-related provisions, see: Raymundo Valdés and Maegan McCann, "Intellectual Property Provisions in Regional Trade Agreements: Revision and Update," *WTO Staff Working Paper*, no. No. ERSD-2014-14 (2014), https://www.econstor.eu/bitstream/10419/104752/1/797426418.pdf.

[286] Art. 9.1 of the ASEAN-Australia-New Zealand Free Trade Agreement for instance recognises the differences between capacities in some parties in IP, and thus "where a Party's implementation of this Chapter is inhibited by capacity constraints, each other Party shall, as appropriate, and upon request, endeavour to provide co-operation to that Party to assist in the implementation of this Chapter."

[287] Art. 17.9.4 of the US-Australia Free Trade Agreement for instance provides the ability for patentees to prohibit the international exhaustion of patent rights.

[288] Article 125.3 of the Japan –Switzerland Economic Partnership Agreement necessitates "stricter or separate penalties to offences listed in subparagraphs 1(a), 1(b) and 1(d) committed in connection with corporate activities or on a commercial scale," the subparagraphs referring to infringement of several IP rights, undisclosed information, and unfair competition.

[289] This is generally referred to as "old regionalism" which is primarily Euro-centric and stands in contrast to "new regionalism," which goes beyond analysing protectionist trading schemes or security cooperation and expands the existing institutional and trade theories. See generally: Klučka and Elbert, *Regionalism and Its Contribution to General International Law*, 30–38; Fredrick Söderbaum, "Old, New, and Comparative Regionalism: The History and Scholarly Development of the Field," in *The Oxford Handbook of Comparative Regionalism*, 2016, 16–39, https://doi.org/10.1093/oxfordhb/9780199682300.013.2; Raimo Väyrynen, "Regionalism: Old and New," *International Studies Review* 5, no. 1 (2003): 25–51.

least some authority and sovereignty rights to the regional level - also known as supranationalism.[290] Academic literature have also sought to explore how economic integration fits within the general trend towards regionalism. [291] In the initial stages of regionalism studies, focus was placed mainly on the European integration process and on the role of the organisation. According to Nye, regionalism was understood as "the formation of interstate associations or groupings on the basis of regions" in the descriptive sense, and "the advocacy of such formations" in the doctrinal sense.[292] Studies then went beyond a purely organisational approach to regionalism to capture the mechanisms affecting state behaviour in entering into regional arrangements, expanding into the concept of regime which encompasses a set of "implicit or explicit principles, norms, rules, and decision-making procedures(…)"[293] Norms as standards of behaviours expressed through rights and obligations are also studied under the umbrella of the regime since it influences state behaviours.

As the study of regionalism return to the study of organisation,[294] the question then became how and why states act through formal international organisation, [295] which in turn spurred comparative studies on the institutional designs of different organisations.[296] The basic concepts are pooling and delegation: pooling refers to the "joint exercise of sovereignty rights" and sharing of decision-making among governments, such as majority decisions where states surrender the right to veto specific decisions; whereas delegation refers to the "transfer of authority and sovereignty rights to supranational organizations."[297] Regional organisations may vary widely in terms of pooling and

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[290] Börzel and Risse, "Introduction: Framework of the Handbook and Conceptual Clarifications," 8.
[291] This dissertation utilises the concept of "regionalism" rather than "regionalisation" which generally refers to transnational relations between non-state actors. Especially in the case of patent-granting, formalised procedures and institutions are generally required to give rise to a patent right. On the conceptual difference between regionalism and regionalisation, see e.g. Hurrell, "Explaining the Resurgence of Regionalism in World Politics," 334; Söderbaum, *Rethinking Regionalism*, 3.
[292] Joseph S. Nye, *International Regionalism: Readings* (Boston, MA: Little Brown, 1968), vii.
[293] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no. 2 (1982): 186.
[294] On this reverse, see: Shintaro Hamanaka, "Legalization of International Economic Relations: Is Asia Unique?," *IDE Discussion Paper* 681 (December 2017): 3–6.
[295] See e.g. Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations," *The Journal of Conflict Resolution* 42, no. 1 (1998): 3–29.
[296] Koremenos et al identified five major dimensions within which institutions may vary: membership rules, scope of issues covered, centralisation of tasks, rules for controlling the institution, and flexibility of arrangements. See: Barbara Koremenos, Charles Lipson, and Duncan Snidal, "The Rational Design of International Institutions," *International Organization* 55, no. 4 (2001): 763.
[297] Börzel and Risse, "Introduction: Framework of the Handbook and Conceptual Clarifications," 8.

delegation. Further, regionalism studies begun exploring the regionalism beyond the European integration process, and whether regionalism is based on geographical factors or whether there is a foundation based on norms and values. ASEAN also became an important empirical case study as a process of regional integration underpinned by shared norms.[298]

Another framework to understand how regional integration is shaped by institutions would be the concept of legalisation by Abbott et al, which rates whether the rules and commitments are binding upon the member countries based on the dimensions of obligation, precision, and delegation:[299] (i) obligation refers to the extent to which the states are legally bound by rule or commitment; (ii) precision refers to whether the rules are unambiguous in defining the conduct required, authorised, or proscribed, and (iii) delegation means whether authority can be granted by a third part to implement, interpret, and apply the rules, to resolve disputes, and the possibility of prescribing further rules.[300] The three dimensions are not restricted to rigid dichotomy, but of degree and gradation: an institution can have any level of obligation, precision, and delegation suited to their needs.[301] At one end of the spectrum, "hard legalization" would point to the maximization of all three dimensions, or at the very least obligation and delegation.[302] If a binding legal obligation were to lack precision or delegation, then it would be characterised as either partial or soft legalisation.

To illustrate the wider context of the effects of hard legalisation and soft legalisation, Davidson pinpoints the following functions of a legal system in a society: as rules for orderly interactions among members of the society, and as mechanism for settling disputes with regards to rules established by that society and the interpretation of those rules.[303] The underlying assumption has always been that hard laws are superior to soft laws since hard laws meet both functions better and provide for greater legal certainty through clear prescription of rules and enforcement mechanisms. In the context of economic integration, hard legalisation of its organisations and institutions also influences state behaviour and conduct to a greater extent. However, hard legalisation is rigid and resistant to change, and the cost of delegating sovereignty and state power makes it difficult to achieve. Soft legalisation on the other hand, by allowing for flexibility, could be a better option in governing ever-changing state behaviour. Depending on the objectives, economic integration across regions is similarly shaped by

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[298] Jörn Dosch, "The ASEAN Economic Community: Deep Integration or Just Political Window Dressing?," *TRaNS: Trans-Regional and -National Studies of Southeast Asia* 5, no. 1 (January 2017): 29–30, https://doi.org/10.1017/trn.2016.28.
[299] Kenneth W Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 3 (2000): 401–19.
[300] Abbott et al., 401–19.
[301] Abbott et al., 401, 404.
[302] Abbott et al., 401–6. Abbott et al. further points out that the TRIPS Agreement is posited to the right-hand end points, strong on all three elements.
[303] Paul J Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation," *Singapore Year Book of International Law* 8 (2004): 167.

varying degrees of legalisation, and by retaining soft legalisation, institutional development could be more flexible especially if the MS intend to advance national interests through political bargaining.[304]

3.1.3 Patent Rights Protection and Regionalism

As noted in the previous section, IPR-related provisions one of the core elements in RTAs. At this juncture, the multilateral IP framework bears revisiting to demonstrate the development of the regional approach to patent rights protection.

Prior to the TRIPS Agreement, global IP administration was carried out by WIPO through specific conventions, such as that of the Paris Convention and Berne Convention. However, with the emergence of IP as a key asset on revenue maximisation and investment, industries heavily dependent on IPR protection began to see global IP administration under WIPO as insufficient since enforcement and policing of IPR under the WIPO framework was non-existent. On the other hand, addressing IP's trade-related aspects under the WTO framework opens up the option of utilising the WTO dispute settlement mechanism and the possibility of punishing noncompliance via trade sanctions. Further, as observed from the preamble of the TRIPS Agreement as Annex 1C of the WTO Agreement, which calls for the removal of "distortions and impediments to international trade,"[305] distortions in the case of IP could be understand in the manner in which foreign IPRs are disadvantaged by local governmental restrictions, which then undermines the value of the foreign IPR and affects ideal market conditions. These trade-related aspects of IP then gave rise to the TRIPS Agreement as Annex 1B promulgated at the WTO, while WIPO assumes a secondary role and administer conventions, provide technical assistance, and a platform for discussions on IP issues.[306]

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[304] Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case," *International Organization* 54, no. 3 (2000): 550–63.

[305] Trade distortion as explained by a WTO document states the following: "trade is distorted if prices are higher or lower than normal, and if quantities are produced, bought, and sold are also higher or lower than normal – i.e. than the levels that would usually exist in a competitive market." See: World Trade Organization, ed., *Understanding the WTO*, 5th ed. (Geneva, Switzerland: World Trade Organization, Information and External Relations Division, 2015), 26, https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

[306] Frederick M. Abbott, "The WTO Trips Agreement and Global Economic Development," *Chicago-Kent Law Review* 72, no. 2 (1996): 385–87.

There are three main takeaways of the TRIPS Agreement: the establishment of minimum standards for IPR protection; the role of WTO as a new international organisation overseeing those standards; and the availability of dispute settlement mechanism to address grievances.[307] The TRIPS Agreement was also a result of seven years of negotiations and bargaining between developed and developing countries. In exchange for more access to major industrialised markets and increased technology transfer, developing countries are required to abide by their commitments under the TRIPS Agreement. Some concessions were also made by developed countries to protect the interests of developing countries, including five-year transition periods for developing countries and ten years for least developed countries.[308] Implementation of the TRIPS Agreement was also left to the MS in accordance with their own legal system and practice.[309]

The arguments for the heightened level of IPR protection under the TRIPS Agreement has been widely acknowledged on both moral and utilitarian grounds: an innovator has inherent rights to their innovation, and the lack of a cohesive patent protection system would discourage innovation if innovators are not rewarded for their invention. The familiar maximalist logic would be that the stronger patent protection, the greater the benefits accrued to the public. On the other hand, the trade perspective also gave rise to concerns over developing countries being disadvantaged by developed countries who hold most of the patents, and since imitation or copying IP protected goods would be cheaper.

Addressing IP issues as trade issues has also spawned voluminous literature and scholarly studies across areas of studies. In particular, economic studies have demonstrated that the linkages between IPRs, investment and trade are highly complex. The functioning of patents systems are generally assessed on the dynamic efficiency of patents – the benefits and costs of patents, and the optimal level of protection to ensure that higher costs in the short run would encourage innovation and increase social welfare in the long run.[310] The temporary protection granted under a patent is

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[307] Infra Chapter 4.1.1(ii) of this dissertation.

[308] Paragraph 4 of the subsequent Doha Declaration also emphasised that the TRIPS Agreement should be interpreted in light of the protection of public health, and reaffirms the right of WTO members to allow for flexibility for that purpose.

[309] Art. 1.1, *TRIPS Agreement*.

[310] See e.g. Janusz A Ordover, "A Patent System for Both Diffusion and Exclusion," *Journal of Economic Perspectives* 5, no. 1 (February 1, 1991): 43–60, https://doi.org/10.1257/jep.5.1.43; Corinne Langinier

meant to promote R&D activities, without which the inventor would solely bear the costs of the knowledge-creating activity while the profits are broadly shared. This would create secrecy and prevent dissemination of information. Granting the inventor exclusive rights to the use of knowledge for a period of time, and enforcing the protection of such rights in exchange for disclosing details of the invention would allow inventors to recoup their costs, enable the dissemination of knowledge, and further encourage inventors to engage in inventive activities. This creates a trade-off where temporary monopoly rents given the patentee's ability to increase prices is exchanged of future growth prospects. However, in a practical sense, how patents can be leveraged and implemented as an innovation policy tool depends on factors such as the length, breadth, and overall quality of patents, and instituting a patent system without considering local conditions would not necessarily lead to further economic development.[311]

Under the multilateral framework for patent protection via TRIPS Agreement, the trend towards regionalism has similarly influenced patent rights protection.[312] First, multilateralism in the protection of IPR is challenged by the slow speed of intergovernmental processes and international cooperation, along with the overall rigidity of the treaty-making process and lack of flexibility.[313] With rapid technological development driving business responses, non-multilateral cooperation at the bilateral, plurilateral and regional levels becomes preferable when only a smaller number of states need to agree.[314] Simultaneous participation by states in various RTAs under a multilateral system

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and GianCarlo Moschini, "The Economics of Patents," in *Intellectual Property Rights in Animal Breeding and Genetics*, ed. Max Frederick Rothschild and Scott Newman (New York, United States of America: CABI Publishing, 2002), 31–50.

[311] On the economics of the patent system, see e.g. Richard Gilbert and Carl Shapiro, "Optimal Patent Length and Breadth," *The RAND Journal of Economics* 21, no. 1 (1990): 106–12, https://doi.org/10.2307/2555497; David Encaoua, Dominique Guellec, and Catalina Martínez, "Patent Systems for Encouraging Innovation: Lessons from Economic Analysis," *Research Policy* 35, no. 9 (November 1, 2006): 1423–40, https://doi.org/10.1016/j.respol.2006.07.004.

[312] According to Gurry, shifts in the international landscape including cooperation at the bilateral, plurilateral and regional levels pose a challenge for the multilateral approach. See: World Intellectual Property Organization, "Francis Gurry on the Challenges for Multilateralism in the Field of Intellectual Property," *WIPO Magazine*, October 2016, https://www.wipo.int/wipo_magazine/en/2016/05/article_0001.html.

[313] José Angelo Estrella Faria, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage ?," *Uniform Law Review* 14, no. 1–2 (2009): 9–10, https://doi.org/10.1093/ulr/14.1-2.5.

[314] Denis Croze, "Integrating Intellectual Property Systems in Light of Plurilateral and Regional Agreements," in *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, ed.

creates a web of overlapping agenda, with countless bilateral and RTAs now including IP issues as trade issues and raising the standards under the TRIPS Agreement. While multilateralism lends legitimacy for rule-making on an international level, treaties are notoriously difficult to be concluded and has led to a standstill for the multilateral approach on IP norm-setting. The failure of the Substantive Patent Law Treaty ("SPLT") where negotiations were put on hold in 2006 also exemplified the difficulty of multilateral approaches since TRIPS.[315]

Second, the manner in which multilateral negotiations are conducted is characterised by countries opting to voice their positions in a regional capacity. TRIPS was a prominent effort on multilateral norm-setting of IP, and throughout the formal and informal meetings during the TRIPS negotiations, countries formed flexible alliances across different issues: while developing countries are required to implement changes to their IP regimes, north-north negotiations were driven by differences in legal systems, whereas the north-south divide was prominent on issues such as compulsory licensing.[316] Among these alliances were also regional grouping driven negotiations - ASEAN, Andean group, and the African group sought to coordinate positions in advance during the formal and informal meetings of the TRIPS negotiations made statements as a collective grouping, and conduct negotiations with other groupings.[317] This include both formal and informal negotiations with the EU, who were willing to reduce its export subsidies for agricultural products which undercuts

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Elizabeth Siew-Kuan Ng and Graeme W. Austin (United Kingdom: Cambridge University Press, 2017), 32–33.

[315] Jerome H. Reichman and Rochelle Cooper Dreyfuss, "Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty," *Duke Law Journal* 57, no. 85 (2007): 85–130.

[316] Negotiators on the TRIPS Agreement also supported that the negotiations were not solely of North-South nature, but rather temporary alliances would be struck between countries for specific issues. See e.g: John Gero, "Why We Managed to Succeed in TRIPS," in *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, ed. Jayashree Watal and Antony Taubman (Geneva, Switzerland: World Trade Organization, 2015), 95–98; Peter Carl Mogens, "Evaluating the TRIPS Negotiations: A Plea for a Substantive Review of the Agreement," in *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, ed. Jayashree Watal and Antony Taubman (Geneva, Switzerland: World Trade Organization, 2015), 104; Thu-Lang Tran Wasescha, "Negotiating for Switzerland," in *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, ed. Jayashree Watal and Antony Taubman (Geneva, Switzerland: World Trade Organization, 2015), 159–62.

[317] See e.g. Thomas Cottier, "Working Together towards TRIPS," in *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, ed. Jayashree Watal and Antony Taubman (Geneva, Switzerland: World Trade Organization, 2015), 87–88; Adrian Otten, "The TRIPS Negotiations: An Overview," in *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, ed. Jayashree Watal and Antony Taubman (Geneva, Switzerland: World Trade Organization, 2015), 55–78.

prices and decreases the export potential from developing countries, in return for the developing countries to accept the TRIPS Agreement.[318]

The third point here relates to the implementation of multilateral standards – particularly, patent offices administering standards set by legislatures, executive, and the courts. As jurisdictions began to opt for universal standards in determining the requirements of obtaining a patent, increasing the level of cooperation with other patent offices would reduce duplication of patent search and examination work, lower administrative costs for the governments, ensure better compliance with the multilateral framework, simplified and lower fee structure for patentees, and expand the geographical scope of patent protection.[319] Substantively, regardless of where a patent is granted, under the multilateral framework a patent needs to fulfil the requirements of novelty, inventive step, and demonstrate manufacturing capability. While countries can determine how the patentability requirements under TRIPS are implemented, these standards have mostly converged. Most if not all existing regional offices were also established in order to deepen the cooperation between member states, and pooling of human and financial resources would especially empower states within the region who have just begun in setting up their patent legislation and lack practical experience in protecting industrial property. Furthermore, the regional treaties establishing regional patent offices are also in most circumstances tied to an underlying regional economic policy to drive further regional integration and development.[320]

Regional economic integration also coincides with the enforcement of patent rights. First, economic integration generally involves some degree of reduction in tariffs and non-tariff measures.[321] While the role of intellectual property as a barrier to trade is complex and not easily

[318] Abbott, “The WTO Trips Agreement and Global Economic Development,” 386.
[319] See e.g. V. I. Blinnikov, “The Eurasian Patent Organization: The First Five Years,” *World Patent Information* 23, no. 3 (September 1, 2001): 273, https://doi.org/10.1016/S0172-2190(01)00026-6.
[320] For a history of the establishment of EAPO and its significance in advancing economic interests of the region, see e.g.: Blinnikov, 269–75; Eurasian Patent Organisation, “EAPO: A History of Establishment and Development,” 2015, https://www.eapo.org/en/publications/reports/report2015/history.html. For ARIPO and OAPI, see e.g. United Nations Economic Commission for Africa, African Development Bank, and African Union, *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About* (Addis Ababa, Ethiopia: Publications Section, Economic Commission for Africa, 2017), 145–49, https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf; Southern African Development Community, “SADC Needs to Improve and Enforce Intellectual Property Rights Frameworks and Regulations | SADC,” October 7, 2022, https://www.sadc.int/latest-news/sadc-needs-improve-and-enforce-intellectual-property-rights-frameworks-and-regulations.
[321] According to WTO, non-tariff measures contribute more than two times as much as tariffs to the restrictions on overall market access. See: World Trade Organization, “Trade and Public Policies: A Closer

quantifiable,[322] IP is widely acknowledged as a non-tariff measure.[323] UNCTAD has classified IPR as non-tariff measure under classification N, and for patents, it relates to the substantive aspects in the protection of patents, procedures for patent acquisition and maintenance, and exhaustion of patent rights.[324] In a broad sense, the deeper the commitment to economic integration, the more trade barriers are reduced or eliminated.

3.2 Significance of the ASEAN Way

As noted, different economic integration initiatives are shaped by varying degrees of legalisation. When countries enter into treaties, obligation, precision and delegation are observed: to what extent are the agreements are binding and precise, and the rule interpretation and adjudication are delegated. Additionally, development of the regional institution could also be influenced by other cultural and political variables, as intended by the MS.[325]

Using Abbott et al's concept of legalisation, Kahler assessed Asian institutions, including ASEAN, and noted that Asian institutions are generally on the lower end of all three conditions but would opt for higher levels of legalisation if it is instrumental and strategic to advancing national goals and taking into account of sovereignty costs.[326] In evaluating ASEAN in terms of pooling and delegation, Lenz and Marks have similarly ranked ASEAN's institutional design as low in both pooling and delegation – a high degree of pooling is largely dependent on the available budget and policy-making, whereas a high degree of delegation generally implies that the decision-making structure of the regional institution becomes more authoritative.[327]

Look at Non-Tariff Measures in the 21st Century," World Trade Report 2012, 2012, 135–38, https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2d_e.pdf.

[322] This is in comparison with other barriers, such as import ban, certificates of importation, and standards for certain product categories. See e.g. European Commission, "Report from the Commission to the Parliament and the Council on Trade and Investment Barriers," 2018, https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157929.pdf.

[323] World Trade Organization, "Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century."

[324] United Nations Conference on Trade and Development, *International Classification of Non-Tariff Measures 2019*, 65–69.

[325] Kahler, "Legalization as Strategy," 550–63.

[326] Kahler, 562.

[327] Tobias Lenz and Gary Marks, "Regional Institutional Design: Pooling and Delegation," in *The Oxford Handbook of Comparative Regionalism*, ed. Tanja A. Börzel and Thomas Risse (Oxford, United Kingdom: Oxford University Press, 2016), 515–16, 528–31, https://doi.org/10.1093/oxfordhb/9780199682300.013.1.

As a region with mostly newly independent states, ASEAN's formative years established an approach to regional cooperation which centres on the respect for independence, sovereignty, territorial integrity, and non-interference in the internal affairs of ASEAN MS. There is a strong attachment to the principles of state sovereignty and a bias towards legalised institutions.[328] This in turn characterises ASEAN MS's mode of diplomacy, which is to maintain a process of interaction and cooperation and general aversion towards legal and compliance, emphasising consensus-building, consultation, informality, intergovernmentalism, and non-confrontational bargaining styles; the practice taken in whole is colloquially known as the "ASEAN Way."

Against this backdrop, academic literature has centred primarily on ASEAN's norm and its effects on institutional development on a regional scale. While European regionalism is characterised by binding legal instruments, the ASEAN Way stands in contrast as a non-legalistic approach and preference for unwritten and informal mode of cooperation. The ASEAN Way has been upheld by ASEAN leaders as a prevailing mode of cooperation. As a result, most of ASEAN's instruments are non-binding, and the institutional function of the ASEAN Secretariat is greatly limited. However, things took a turn with the promulgation of the ASEAN Charter in 2007, which constitutionalises the basic principles of ASEAN. Whether this spell the end of the ASEAN Way has been explored and debated by policy makers and scholars alike.

3.2.1 Historical and Theoretical Underpinnings

ASEAN is a region of great diversity in terms of its economic, political, cultural aspects. As noted in Chapter 2, ASEAN was established against the backdrop of strong regional tension during the period of early post-independence where confrontations on regional legitimacy between Indonesia, Malaysia, Singapore, and the Philippines were frequent. The *Konfrontasi* period from 1962 to 1966 in which Indonesia challenged the legitimacy of the Malaysian state, and by extension, Singapore, along with territorial disputes between the Philippines and Malaysia leading to the suspension of diplomatic

[328] See e.g. Kahler, "Legalization as Strategy," 561–63; Lay Hwee Yeo, "From AFTA to ASEAN Economic Community - Is ASEAN Moving Towards EU-Style Economic Integration?," in *Comparative Regional Integration: Europe and Beyond*, ed. Finn Laursen (Ashgate Publishing, Ltd., 2013), 215–25.

ties have embroiled the region in political uncertainty. Most ASEAN MS were also at the early stages of decolonisation, and with the intensification of the Vietnam War and ideological divides, nation-building itself was already a challenge.[329] Earlier attempts at establishing intergovernmental institutions were unsuccessful, and even after ASEAN was successfully established, major obstacles prevented ASEAN's further development as a regional institution.[330]

In the wider context of regionalism, regional organisations arise from the demand for a new form of governance beyond nation-states, its institutional capacity and governance mechanisms further advanced by new initiatives.[331] In its heyday, ASEAN was established primarily to attain a security function: ASEAN would act as a regional forum to alleviate political pressures and prevent escalation of volatile situations,[332] where this intramural approach in turn would allow for confidence building and preventive diplomacy.[333] ASEAN was not meant to be "a creature of formal treaty," but rather "a solemn declaration built on the *spirit of togetherness.*"[334] At the end of the Cold War, ASEAN MS continued to confer upon ASEAN new functions rather than dissolving it, but, the fear for the loss of sovereignty drove ASEAN MS to keep ASEAN's institutional functions to a minimum. This

[329] Beeson for instance has noted that the historical experience of the ASEAN region has been shaped by Western imperialism and external forces which "distort" the course of economic development in Southeast Asia, reflecting "the imperial interests in faraway London, Paris or Amsterdam" which continue to prevail in the region even with the eventual decolonization. See Mark Beeson, "ASEAN's Ways: Still Fit for Purpose?," *Cambridge Review of International Affairs* 22, no. 3 (September 2009): 335, https://doi.org/10.1080/09557570903137776.
[330] For an overview of ASEAN's leitmotif, see e.g. Mely Caballero-Anthony, "Mechanisms of Dispute Settlement: The ASEAN Experience," *Contemporary Southeast Asia* 20, no. 1 (1998): 42–45.
[331] For an overview of scholarly debates surrounding regionalism, see: Söderbaum Fredrik, "Early, Old, New and Comparative Regionalism: The Scholarly Development of the Field," *KFG Working Paper Series, Kolleg-Forschergruppe (KFG) "The Transformative Power of Europe", Freie Universität Berlin.*, no. 64 (October 2015): 5–23, https://refubium.fu-berlin.de/bitstream/handle/fub188/18003/WP-64-Soederbaum_WEB.pdf?sequence=1&isAllowed=y.
[332] Antolik notes that ASEAN provides an escape from "distasteful realities," including intramural differences or external problems. Thus, the Association "speaks in positive language," and "points to opportunities and benefits that economics and cultural cooperation can bring. See: Michael Antolik, *ASEAN and the Diplomacy of Accommodation* (Routledge, 2020), 155." Acharya has also pointed out that the ASEAN Way was due to the overriding preoccupation with security, particularly internal security. See: Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*, 5–10.
[333] ASEAN MS' recognition of the primary source of threat as being from internal security may be observed from the ASEAN Concord, which upholds principles of regional and national resilience to safeguard the interests of each ASEAN MS and the region. Regional resilience will be achieved through each ASEAN MS' national resilience through nation-building. For an overview of ASEAN's role in the regional political and economic arena, see e.g.: Kurus, "Understanding ASEAN: Benefits and Raison d'Etre," 823–31.
[334] Tan Sri Ghazali Shafie, "Politics in Command," *Far Eastern Economic Review* 155, no. 42 (October 22, 1992): 30.

reservation began to change with the joining of Cambodia, Lao PDR, Myanmar and Viet Nam, to which ASEAN's function gradually expanded through an accretion process of negotiating and entering into bilateral, trilateral, and multilateral negotiations.

Since the 1980s, ASEAN has also played an increasingly significant role in resolving internal conflicts, notably the Cambodian dispute in the 1980s. This in turn earned ASEAN greater international recognition as a functional organisation, and steered academic literature from a mere descriptive and chronological narrative for ASEAN to theorising the organisation's role within the region and function in order to account for its durability and further expansion.[335] Research on ASEAN also explores the factors contributing to ASEAN's lack of formal bureaucratic institutions as compared to other regional organisations, and how ASEAN could still attain some degree of success despite its institutional limitations.

The most notable and unique conceptualisation of ASEAN's institutional rules and procedures has been that of the ASEAN Way. This term was initially popularised by the political actors in the 1990s who are involved in ASEAN's diplomatic relationship, notably by foreign ministers of ASEAN MS as "a form of 'appeal' to external actors that ASEAN had a characteristic way of dealing with its diplomatic relations" during ASEAN's participation at regional forums such as the APEC and ARF.[336] Since then, the ASEAN Way has assumed a life of its own in both academic literature and political documents, and is understood as encompassing legal, political, social, and cultural aspects.

Scholars studying ASEAN have also frequently pointed out the contradictory aspects of ASEAN's approach: consistent failures in the implementation of goals, and yet a strong insistence on limiting institutional support for proper implementation of the goals. In terms of patent-related literature in ASEAN, the ASEAN Way has been invoked to both explain ASEAN's IP policies and justify ASEAN's reserved approach to patent rights protection. In order to prescribe potential solutions for

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[335] Yukawa has noted that prior ASEAN studies did not attempt to conceptualise or theorise ASEAN, but was limited to either the chronological narration of ASEAN history, or the description of ASEAN's role in maintaining the diplomatic relationship between each MS. See: Taku Yukawa, "Analysing the Institutional and Normative Architecture of ASEAN: Reconsidering the Concept of the 'ASEAN Way,'" 東洋文化研究所紀要, no. 162 (December 2012): 339, https://doi.org/10.15083/00026869.

[336] Yukawa has noted that while the term ASEAN Way was used in 1974 and 1989 respectively, it did not gain traction until the start of the annual foreign ministerial conventions in 1994. See: Yukawa, 323.

ASEAN in enhancing patent rights protection under the AEC, it is vital to understand the significance of the "ASEAN Way:" functioning of ASEAN as a regional organisation and how ASEAN's legal instruments are prescribed and enforced.

The ASEAN Way has also inspired theoretical attempts in explaining the trajectory of ASEAN's development as a regional organisation in terms of its institutional and normative setting. To illustrate, Acharya has notably demarcated the ASEAN Way into legal-rational and socio-cultural norms:[337] ASEAN adopts legal-rational norms reflecting the Westphalian state system which include the key principles of respect for sovereignty and non-interference, and translates them into socio-cultural norms in the context of ASEAN's culture and history.[338] Yukawa on the other hand, delineates the conceptualisation of the ASEAN Way into two different perspectives: the institutional design perspective notes that ASEAN MS are subjected strictly to a set of rules in the official decision-making process, such as that of non-interference and consensus seeking; whereas the normative perspective points to the ASEAN Way as a set of norms shaped through the behavioural choices and socialisation of ASEAN MS over time, a collective identity formed from the perspective of what is appropriate from the perspectives of ASEAN MS.[339]

3.2.2 Pre-ASEAN Charter: ASEAN Way as a Code of Conduct

Before the ASEAN Charter came into force, ASEAN's main constitutive documents are namely the ASEAN Declaration and the TAC. Both of these documents provide for ASEAN's role as an intergovernmental organisation. Contours of the ASEAN Way can be seen in ASEAN's founding document, the ASEAN Declaration, which notes "the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their people and for posterity the blessings of peace, freedom and prosperity."[340]

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[337] See: Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*, 27.
[338] Acharya, 27.
[339] Yukawa, "Analysing the Institutional and Normative Architecture of ASEAN: Reconsidering the Concept of the 'ASEAN Way,'" 336.
[340] *ASEAN Declaration*, 4.

The ASEAN Way of community building and regional cooperation promotes regional autonomy and collective self-reliance.[341]The emphasis on cooperation is notable as it sets the tone for the cooperation process. ASEAN would not have a supranational institutional setting, but one based on informal cooperation and dialogue. Institutional wise, the machinery prescribed under the ASEAN Declaration is narrow. ASEAN is governed by ASEAN MS' foreign ministers through convening ASEAN Ministerial Meeting Special Meetings of Foreign Ministers; and the resulting cooperation agenda from those meetings would be implemented by a semi-permanent cohort of Standing Committee, Ad-Hoc Committees and Permanent Committees along with National Secretariats in ASEAN.[342]

Ten years later, the original five ASEAN MS signed their first treaty - the Treaty of Amity and Cooperation in Southeast Asia ("TAC"),[343] which is also open to accession by other states. The TAC is highly significant in prescribing key principles in the conduct of its members, and has been noted as having "the most conspicuous legal ground for the ASEAN Way."[344] The TAC brings forth and reiterates the emphasis on cooperation where each contracting party will strive "to achieve the closest cooperation on the widest scale,"[345] within the explicit setting of perimeters of behaviour in maintaining regional relationships, the fundamental guiding principles as provided under Art. 2:[346]

a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
b. The right of every State to lead its national existence free from external interference, subversion or coercion;
c. Non-interference in the internal affairs of one another;

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[341] Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*, 55.
[342] *ASEAN Declaration,* 3.
[343] *Treaty of Amity and Cooperation in Southeast Asia*.
[344] Sungjoon Cho and Jürgen Kurtz, "Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime," *The American Journal of Comparative Law* 66, no. 2 (August 24, 2018): 252, https://doi.org/10.1093/ajcl/avy026. Deinla has also noted that "ASEAN has invested peculiar meanings" under the concepts of the TAC "which are otherwise generally recognized by the international community as norms of international law." See: Deinla, *From ASEAN Way to the ASEAN Charter*, 8.
[345] Art. 8, *Treaty of Amity and Cooperation in Southeast Asia.*
[346] Dosch has also summarised the TAC to four broad principles: (i) open regionalism, (ii) cooperative security, (iii) soft regionalism, and consensus. See: Jörn Dosch, "Southeast Asia and the Asia-Pacific: ASEAN," in *The New Global Politics of the Asia Pacific*, ed. Michael K. Connors, Rémy Davidson, and Jörn Dosch (London and New York: Routledge, 2004), 54.

d. Settlement of differences or dispute by peaceful means;

e. Renunciation of the threat or use of force;

f. Effective cooperation among themselves.

Art. 2(a)-(c) is a clear adoption of the Westphalian state system: sovereign states have the right to define their plural identities in a manner of their choice, including political, social, and economic systems.[347] The UN Charter also laid down similar principles for international interaction, upholding sovereign and sovereign equality as a basic constitutional doctrine of international law.[348] This understanding is affirmed and incorporated into the TAC.[349] Further, the TAC binds its contracting parties against forcible and non-forcible intervention.[350]

As for Art. 2(d), parties are also required to settle disputes through friendly negotiations,[351] and if that should fail, ministerial representatives from the parties would recommend dispute resolutions in line with "good offices, mediation, inquiry or conciliation", and take appropriate measures to prevent further deterioration of the dispute.[352] In this context, the ASEAN Way also includes procedures in conflict management. This is exemplified by ASEAN's role as a forum for regional diplomacy: issues that are considered too sensitive are dealt with through quiet diplomacy or bilateral summits.

Art. 2(f) is also characteristic of the ASEAN Way where effective cooperation is carried out through consensus building and selection of issues. Procedurally, the Art. 14 and 15 of the TAC introduces a formal machinery to for peaceful resolution of disputes: a "High Council" comprising of

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[347] *UN General Assembly Resolution 2625.*
[348] Art. 2, *UN Charter*. The UN Charter constitutes the first major effort in providing a firm and unambiguous effort in codifying a sovereign state's right to non-interference and self-determination. See: Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (Chicago, London: University of Chicago Press, 2014), 8, 215.
[349] Seah further notes that ASEAN Way welds "global legal doctrine to 'legal conditions," given that the principle of non-interference in particular is embodied in the UN Charter. See: Daniel Seah, "The ASEAN Charter," *The International and Comparative Law Quarterly* 58, no. 1 (2009): 199.
[350] Apart from ASEAN MS, a protocol amending the TAC denoted that accession to the TAC is open to other countries (Art. 18). The TAC now counts Japan, the US, and most recently the Republic of Peru among its parties. See e.g. ASEAN, "Signing Ceremony of the Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia (TAC) by the Republic of Peru," Association of Southeast Asian Nations, August 21, 2019, https://asean.org/?flickr=signing-ceremony-instrument-accession-treaty-amity-cooperation-southeast-asia-tac-republic-peru.
[351] Art. 13, *Treaty of Amity and Cooperation in Southeast Asia.*
[352] Art. 15, *Treaty of Amity and Cooperation in Southeast Asia.*

ministerial representatives would take cognizance of the disputes, and recommend appropriate resolution of such disputes. This regional mechanism however has never been utilised,[353] and ASEAN MS's modus operandi in managing disputes still lies in the use of informal mechanisms to resolve conflict.[354]

In terms of consensus building, ASEAN adopted a unique diplomatic way in addressing specific issues, drawn from Malay cultural practices: reaching *muafakat* (consensus) through *musyawarah* (consultation).[355] Dialogue and consultation enables the search for consensus.[356] Decisions reached via consensus also represents the sovereign equality between ASEAN MS,[357] and pursuing unstructured and informal communication allows ASEAN leaders to overcome sensitive issues.[358] This makes the decision-making process one of "friends and neighbours" rather than adversaries. As ASEAN was a young grouping which recognised internal security threats and each ASEAN MS were still in the process of establishing its own bilateral relations, the approach was geared towards establishing a longer term, more slow-paced, and gradual conciliatory decision-making process, allowing each ASEAN MS to make autonomous decisions without clearly revealing divisions that would otherwise be apparent through formal decision-making procedures, such as balloting. This in turn translates into an institutionalised expression to which the operative norm in which ASEAN

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[353] Mantāphọn has highlighted several caveats to the dispute resolution mechanism under the TAC, which include the political nature in contrast to a legal approach of the process, the inapplicability of the mechanism unless "direct negotiations" between ASEAN MS have being conducted, and its voluntary nature. See: Withit Mantāphọn, *The Challenge of Law: Legal Cooperation among ASEAN Countries* (Bangkok: Institute of Security and International Studies, Chulalongkorn University, 1987), 19.

[354] See: Caballero-Anthony, "Mechanisms of Dispute Settlement: The ASEAN Experience," 50–52.

[355] Jayakumar has also noted that decisions in ASEAN "are made by consultation and consensus." Furthermore, "all members have an equal say but when decisions are made, the consensus is respected." See: Association of Southeast Asian Nations, "Opening Statement by H.E. Professor S.Jayakumar Minister for Foreign Affairs of Singapore," July 24, 1997, https://asean.org/opening-statement-by-h-e-professor-s-jayakumar-minister-for-foreign-affairs-of-singapore/.

[356] Pushpa Thambipillai and Jayaratnam Saravanamuttu, *ASEAN Negotiations: Two Insights* (Institute of Southeast Asian Studies, 1985), 5.

[357] Seah, "The ASEAN Charter," 199–200.

[358] Thambipillai notes that ASEAN was established "to contain and gradually override members' regional hostilities," where consensus-based decision-making processes is to lay the foundation for greater cooperation. See: Pushpa Thambipillai, "Challenges to the ASEAN Way: Musyawarah and Non-Interference," *Kajian Malaysia* XVIII, no. 1 & 2 (2000): 157–62. Some authors have also noted this diplomacy as originating from colonisation diplomacy in the region, which was "personalistic, informal, and non-contractual." See e.g. Gillian Goh, "The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management," *Stanford Journal of East Asian Affairs* 3, no. 1 (Spring 2003): 113–15.

leaders maintained dialogue was "a pace comfortable to all," and "advancing as fast, or as slowly, as the most reluctant or least confident member allows it."[359]

Further, in conducting discussions among ASEAN MS, ASEAN leaders would also handpick commonly acceptable and non-controversial issues, while excluding issues that could cause disagreement even if such issues are important. At this point, it bears repeating that ASEAN was established by way of a simple declaration and did not have lofty objectives. Maintaining a spirit of "good neighbourliness" to strengthen bilateral relationships outweighed other concerns. Thus, issues that were discussed were chosen specifically to strengthen regional bonds, which usually are issues of common interest; and issues deemed "sensitive" which could create negative feelings among the MS were excluded. However, the downside to the process is that it is often lengthy due to the absence of rules and procedures, and involves several behind-the-scenes meetings among officials to maintain outward unity and friendliness.[360] This approach has in turn shaped how interaction occurs under ASEAN, each ASEAN MS engaging in cautious diplomacy and consultative processes, often postponing or compartmentalising difficult issues to not let it interfere with other areas of cooperation,[361] and utilises indirect approaches to resolving conflicts.

As observed, the ASEAN Way is strongly attuned to the notion of the Westphalian state, the traditional conception related to the view that the authority of the state is supreme within its territorial boundaries and should also be legally immune from intervention by external forces.[362] Central to these elements of the Westphalian notion of sovereignty is the preservation of territorial and political integrity: sovereignty underlines the exclusiveness of state power over its territory and the principle of non-intervention[363] in the internal affairs of the state. Sovereignty and non-

[359] Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Institute of Southeast Asian Studies, 2006), 18.
[360] Thambipillai and Saravanamuttu notes that the concepts find roots in traditional, village politics in certain parts of Indonesia. See: Thambipillai and Saravanamuttu, *ASEAN Negotiations*, 11–27. The same concepts was the modus operandi of the short-lived MAPHILINDO, and then adopted by ASEAN as a shared value. See also: Deinla, *From ASEAN Way to the ASEAN Charter*, 9.
[361] Narine, *Explaining ASEAN*, 31.
[362] Ruggie for instance, asserts that sovereignty "consists of the institutionalisation of public authority within mutually exclusive jurisdictional domains." John Gerard Ruggie, "Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis," in *Neorealism and Its Critics*, ed. Robert O. Keohane, Political Economy of International Change (New York: Columbia University Press, 1986), 143.
[363] This dissertation does not delineate non-intervention and non-interference and uses both terms interchangeably in accordance with the majority of ASEAN-related literature. While some interpretations

interference are particularly sacrosanct to ASEAN MS in order to retain the sovereign inviolability of the nation-state,[364] and this understanding is often invoked by ASEAN MS in the consideration of advancing regional integration.[365] Any comments made on another ASEAN MS's domestic issue was also "the ultimate sign of disapproval in the ASEAN code of conduct,"[366] and each ASEAN MS are also required to bear in mind the effects of their domestic policies on another ASEAN MS.[367] Thus, ASEAN's approach has also been characterised as "sovereignty-reinforcing regionalism,"[368] in contrast to a supranational approach which requires the surrendering of some sovereignty,[369]

In addition, the process of cooperation was more important than institutionalisation. In its heyday, ASEAN did not have structured institutions in place for regional cooperation. National secretariats were formed at foreign ministries who would coordinate regularised meetings among ASEAN leaders until 1976, where the ASEAN Secretariat was established in Jakarta. Even so, the Secretariat was mainly viewed as a "registry," mainly coordinating and not initiating.[370] The highest decision-making body was the ASEAN Leader's Summit, who during the annual summits, would set the agenda which then defines the operational mandates of the ASEAN Secretariat and Office of the Secretary-General. The Summit was also where treaties, protocols, and agreements were signed by

refer to interference as including lower intensity activity, there is also no universal agreement on this. For reference to the distinction, see: Sean Watts, "Low-Intensity Cyber Operations and the Principle of Non-Intervention," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 5, 2014), 7–12, https://doi.org/10.2139/ssrn.2479609.

[364] For a realist perspective on the principle of non-interference, see e.g. David Martin Jones and M. L. R Smith, *ASEAN and East Asian International Relations: Regional Delusion* (Cheltenham-Northampton: Edward Elgar, 2007), 167–68.

[365] Severino has pointed out that ASEAN's responses stemmed from "a feeling of vulnerability to outside (…) intervention and pressure that may come from fellow members or outside powers. See: Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 25.

[366] See: Thambipillai, "Challenges to the ASEAN Way: Musyawarah and Non-Interference," 159. In the discussions of a security community in Southeast Asia, Acharya notes four aspects to the principle of non-interference, which relates to political instability and invasions among ASEAN MS within the region: (1) refraining from criticising actions of a member government towards its own people; (2) criticising actions of states which breached the non-interference principle (3) denying support to rebel groups, and (4) promoting subversive activities in other MS. See: Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*, 72.

[367] Antolik, *ASEAN and the Diplomacy of Accommodation*, 2016, 156.

[368] Tom Ginsburg, "Eastphalia and Asian Regionalism" 44 (2010): 861.

[369] Martin Loughlin, "The Erosion of Sovereignty," *Netherlands Journal of Legal Philosophy* 45, no. 2 (December 2016): 57–81, https://doi.org/10.5553/NJLP/.000048.

[370] Thambipillai, "Challenges to the ASEAN Way: Musyawarah and Non-Interference," 162.

each Southeast Asian heads of states. Implementation of treaties was also carried out on a national basis in accordance with the states' own statutory laws.

During the initial decades for ASEAN, there was also no formal judicial oversight.[371] While the ASEAN Leader's Summit could have assumed some oversight functions such as hearing petitions on compliance with ASEAN's instruments, ASEAN leaders have upheld the principle of non-interference and refused to do so. The emphasis on cooperation and informality meant that legal instruments were also not utilised as frequently; and if they do, they tend to be soft laws rather than hard laws.[372] The TAC for instance is broadly worded in open-ended terms with limited enforcement provisions, with the available recourse being more consultations.

This persisted until the late seventies where ASEAN industrial projects were rolled out. Performance targets, operational timetables, and policy conformity are set, and national secretariats would work with the ASEAN Secretariat and relevant Southeast Asian administrative agencies. However, in specific instances for the purposes of economic liberalisation, ASEAN has opted for precise language - AFTA for instance is precise in designating the minimum levels of reduction across tariff lines. In a characteristically ASEAN fashion, the commitments are still kept non-binding, which makes the enforcement of such commitments difficult. Delegation is also necessarily linked to obligation and precision – the absence of binding rules to be interpreted or adjudicated denotes a low demand for formal dispute settlement mechanisms.

During the 1990s, changing geopolitics and swift economic developments changed the dynamics to how ASEAN functioned. Pragmatism began to overtake the perceived ASEAN Way if expansion of goals of cooperation meant more national gains.[373] By the early 1990s, ASEAN MS have attained a general agreement to establish a regional free trade area, and with the expansion of

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[371] Desierto referred to the ASEAN Declaration and the TAC as a "hybrid treaty-constitution" status, noting that ASEAN cooperation in this pre-charter era had more legislative and executive function, but not formal judicial oversight. See: Diane A. Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," *Columbia Journal of Transnational Law* 49 (2011): 286–87.

[372] Hard law and soft law differ in the extent to which the obligations created are binding, the precision of those laws, and delegation by the obligations to interpret and implement the law. See: Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–22.

[373] Thambipillai, "Challenges to the ASEAN Way: Musyawarah and Non-Interference," 163.

membership to Cambodia, Lao PDR, Myanmar, and Viet Nam, there is a stronger desire to accommodate different ideologies and political systems. With the increase in regional meetings and more issues brought into light, the traditional modes of dialogue and communication carried out behind closed doors were not effective in enabling functional cooperation. ASEAN began to adopt more transparent processes, moving from "carefully worded post-ministerial declarations and statements" to "live press conferences."[374] In addition, the term ASEAN Way was also cited less frequently since it carried a negative connotation and was seen as something to be overcome.[375] The consensus model was also modified by Singapore's proposal of the "five minus one model," which allows for the advancement of regional processes even when not all ASEAN MS decide to participate, but would not oppose other ASEAN MS from pursuing it.

The principle of non-interference was specifically challenged by Thailand and the Philippines. Thailand's former Prime Minister for instance in 1991 has urged for a change in the ASEAN Way and called for a "constructive engagement" approach to specifically enhance dialogue with Myanmar.[376] Thailand then attempted to introduce an approach in allowing for MS to openly discuss a state's domestic affairs that has impact outside their own borders through the "flexible engagement" approach,[377] which also found support by the Philippines. However, both initiatives were turned down at the time by other ASEAN MS to protect the traditional stance and adherence to the principle of non-interference.[378]

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[374] Thambipillai, 163.
[375] Yukawa, "Analyzing the Institutional and Normative Architecture of ASEAN: Reconsidering the Concept of the 'ASEAN Way,'" 320.
[376] In Jones' interview with the Indonesian Foreign Minister, it was noted that the proposal was turned down solely due to its namesake, and that it does not differ from the constructive engagement arrangement. See: Lee Jones, "ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement," *Asian Security* 4, no. 3 (September 23, 2008): 276, https://doi.org/10.1080/14799850802306484.
[377] Nayan Chanda and Shada Islam, "In the Bunker," *Far Eastern Economic Review; Hong Kong* 161, no. 32 (August 6, 1998): 24.
[378] During this period, ASEAN's more "progressive members" intended to include new principles such as that of respect for human rights and democracy, but were turned down by the "conservative members" of ASEAN who wanted strict adherence to the existing principles. See: Chanda and Islam, 24–25. Interestingly, Yukawa has also suggested that the "ASEAN Way" was frequently used by conservative members of ASEAN as a rhetoric to defend themselves against challenges on the principle of non-interference, particularly during the late 1990s. See: Taku Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," *The Pacific Review* 31, no. 3 (2017): 11, https://doi.org/10.1080/09512748.2017.1371211.

To summarise, the ASEAN Way prior to the ASEAN Charter was codified in principles prescribed under the TAC, and supplemented and further reified by the conduct of ASEAN MS' approach of consensus-seeking and informal decision-making. This results in shallow institutionalisation and modest goals, where cooperation relied on respecting subjective point of views and general principles rather than on the normative force of explicit binding rules. In other words, emphasis on the ASEAN Way results in non-binding obligations and weak implementation, which means that obligation and delegation are both low, and ASEAN's legal instruments have a mix of low to medium precision. On an intra-regional basis, the ASEAN Way was successful in transforming once hostile ASEAN MS to developing close co-operative relationship, and served as ASEAN's own expression of self-determination from other dominant Western superpowers.[379] However, aspects of the ASEAN Way became increasingly challenged by ASEAN MS as a higher level of cooperation was desired in advancing national and regional interests.

3.2.3 Post ASEAN Charter: Legalisation over ASEAN Way?

ASEAN began to move towards further legalisation starting from the 1990s and concluded several economic-related agreements.[380] In 2005, ASEAN MS has put forth the consideration for formal integration during the 11th ASEAN Summit in Kuala Lumpur and expressed a shared desire for integration towards a rules-based community underscored by the rule of law.[381] A formalised document to list ASEAN's key principles thus became a necessity. Signing of an ASEAN Charter was first noted in the Vientiane Action Programme. After ASEAN leaders signed the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, an Eminent Persons Group consisting of senior ASEAN statesmen then examined and made recommendations for an ASEAN Charter, and

[379] The normative context of the ASEAN Way as opposed to perceived Western values is best observed from a speech delivered by then Prime Minister of Singapore, Lee Kuan Yew: "We have made progress in an Asian manner, not through rules and regulations, but through musyawarah and consensus. We have developed a mutual appreciation for differences in culture, and learned to make allowances for differences in style." See: National Archives of Singapore, "Speech by Prime Minister Lee Kuan Yew at the Opening of the 15th ASEAN Ministerial Meeting on 14 June 1982 at DBS Auditorium," June 14, 1982, 2, https://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19820614.pdf.
[380] Kahler, "Legalization as Strategy," 549–71.
[381] Deinla, *From ASEAN Way to the ASEAN Charter*, 13–17.

followed by the Cebu Declaration on the Blueprint of the ASEAN Charter.[382] The Charter was then adopted on the 40th anniversary of ASEAN and entered into force on 15 December 2008.

The ASEAN Charter has been hailed for its constitutional significance. For ASEAN leaders, the charter represents a "historic milestone for ASEAN, representing our common vision and commitment to the development of an ASEAN Community."[383] For most of ASEAN-related studies, the Charter has been a mix of optimism and scepticism - while the Charter gave renewed relevance to ASEAN's vision which would springboard further development,[384] the normative development is mediocre and mostly self-congratulatory.[385] It did however to some degree lessen the usual criticisms against ASEAN's lack of accountability and transparency for non-compliance on international obligations.

In relation to prior legal instruments, the Charter prevails in the event of conflict or inconsistency,[386] and all other ASEAN legal instruments would continue to have bound ASEAN MS unless otherwise terminated. The Charter contains fourteen main principles, retaining norms in the TAC such as that of respect for sovereignty, territorial integrity, and non-interference, in addition to introducing new principles such as that of multilateral free trade, democratic government, and the protection of human rights, as provided under Art. 2(2):

"ASEAN and its Member States shall act in accordance with the following Principles:

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[382] For an overview of the events leading up to the ASEAN Charter, see e.g.: The ASEAN Secretariat, "A New ASEAN by ASEAN Secretariat," ASEAN, 2007, https://asean.org/?static_post=a-new-asean-by-asean-secretariat-3; Jones, "ASEAN's Albatross," 271–93.
[383] ASEAN, "Chairman's Statement of the 13th ASEAN Summit, 'One ASEAN at the Heart of Dynamic Asia' Singapore, 20 November 2007," Association of Southeast Asian Nations, June 13, 2012, https://asean.org/chairmans-statement-of-the-13th-asean-summit-one-asean-at-the-heart-of-dynamic-asia-singapore-20-november-2007/.
[384] See e.g. Simon Chesterman, "Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person ASEAN Feature," *Singapore Year Book of International Law* 12 (2008): 199–212; Michael Ewing-Chow, "Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?," *Singapore Year Book of International Law* 12 (2008): 225–38; Eugene K. B. Tan, "The ASEAN Charter as Legs to Go Places: Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia," *Singapore Year Book of International Law* 12 (2008): 171–98.
[385] See e.g. Hiro Katsumata, "The ASEAN Charter Controversy Between Big Talk and Modest Actions," RSIS Commentaries (Singapore: Nanyang Technological University, November 15, 2007), 1–3, https://doi.org/10.1355/9789812308849-004; Michelle Staggs Kelsall, "The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?," *East-West Center*, Analysis from the East-West Center, no. 90 (September 2009): 1–7; John Arendshorst, "The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter," *Northwestern University Journal of International Human Rights* 8 (2010 2009): 102–21.
[386] Art. 52(1), *ASEAN Charter*.

(a) Respect for the independence, sovereignty, equality, territorial integrity and national identify of all ASEAN Member States;

(b) Shared commitment and collective responsibility in enhancing regional peace, security and prosperity

(c) Renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

(d) Reliance on peaceful settlement of disputes;

(e) Non-interference in the internal affairs of ASEAN Member States

(f) Respect for right of every Member State to lead its national existence free from external interference, subversion and coercion;

(g) Enhanced consultations on matters seriously affecting the common interest of ASEAN;

(h) Adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) Respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

(j) Upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

(k) Abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

(l) Respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity;

(m) The centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged outward-looking, inclusive and non-discriminatory; and

(n) Adherence to multilateral trade rules and ASEAN's rules-based regime for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy."

From the above, it can be observed that key principles of the TAC, namely primacy of the sovereign state, principle of non-interference, and peaceful dispute resolution are reiterated. Cooperation is now "enhanced consultations,"[387] and adherence to rules is now explicitly codified.[388] The Charter also emphasises the importance of "amity and cooperation" and "unity in diversity." In addition, Art. 20(1) provides that decision-making in ASEAN "shall be based on consultation and consensus," but subsection 3 qualifies it by stating that it does not "affect the modes of decision-making as contained in the relevant ASEAN legal instruments." Clearly, norms from ASEAN's formative instruments are retained, and the Charter explicitly notes that it would prevail in the event of a conflict with the rights and obligations of an earlier agreement. [389] While the Charter did not break away from its past instruments, the Charter has been noted as a "constitutional moment" for ASEAN, given its precedence over other legal instruments and that it prescribes the contours of the legal and institutional framework.[390] The TAC on the other hand while binding, was open to accession by non-ASEAN MS.

In terms of ASEAN's capacity, Art. 3 of the ASEAN Charter confers upon legal personality for ASEAN as an "inter-governmental organisation."[391] Through the ASEAN Charter and the Agreement

[387] The requirement of consultation and consensus-seeking is further codified under Art. 20, 22-26 of the ASEAN Charter*.*
[388] Art. 2(2)(h), *ASEAN Charter*.
[389]*ASEAN Charter*, Preamble; Woon, *The ASEAN Charter: A Commentary*, 39.
[390] According to Dieserto, the ASEAN Charter "presages as a subtle paradigm shift towards deliberate constitutionalization of a distinct regional identity, one governed by democratic values in the Southeast Asia region. See: Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," 274. Vanoverbeke similarly referred to the ASEAN Charter as a "first step in a possible debate on global constitutionalism, as it promotes legal norms." See: Dimitri Vanoverbeke, "Are We Talking the Same Language?: The Sociohistorical Context of Global Constitutionalism in East Asia as Seen from Japan's Experiences," in *Global Constitutionalism from European and East Asian Perspectives*, ed. Anne Peters et al. (Cambridge: Cambridge University Press, 2018), 220, https://doi.org/10.1017/9781108264877.007.
[391] According to Woon, ASEAN is explicitly stated as an "inter-governmental organisation" to prevent the assumption of supranational elements. This is due to the reluctance on the side of ASEAN MS to share sovereignty in any way, and to limit the creation of independent institutions in ASEAN. See Woon, *The ASEAN Charter: A Commentary*, 77–78.

on the Privileges and Immunities of the Association of Southeast Asian Nations, ASEAN can enter into contracts, acquire and dispose of property, and engage in legal proceedings under domestic law.[392] From the perspective of international law, ASEAN is a rule-based organisation and a "concrete polity made up of state and non-state constituencies" when confronted with urgent regional issues,[393] and may also exercise its capacities to enter into agreements.[394] On this, whether foreign states or international entities will actively choose to enter into agreements directly with ASEAN remains an open question.[395] The 2011 Rules of Procedure for Conclusion of International Agreements by ASEAN only covers rights and obligations for ASEAN as a distinct entity from its MS, and does not apply to international agreements concluded by ASEAN MS collectively which creates obligations upon individual ASEAN MS.[396]

In an intergovernmental fashion, the ASEAN Summit comprising of heads of state is the "supreme policy making body,"[397] taking over the role of policy-making from the foreign ministers. The Secretary-General does not have decision-making power and is tasked with facilitating and monitoring the progress in the implementation of ASEAN agreements.[398] The ASEAN Summit also replaces the pre-Charter ASEAN Leader's Summit, and now has considerably more legislative, executive, and to some extent quasi-judicial powers: the ASEAN Summit "shall deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to MSs and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies,"[399] and also "address emergency situations affecting ASEAN by taking appropriate

[392] Art. 2(1), *Agreement on Privileges and Immunities*. Chesterman further argues that it is much less about what status ASEAN claims under international law, but rather what it can do: ASEAN in its current form does not reduce the need for bilateral diplomacy between non-member states or international entities with the MS, and rather adds another layer of diplomacy. See: Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN*, Integration through Law: The Role of Law and the Rule of Law in ASEAN Integration (United Kingdom: Cambridge University Press, 2015), 207–11.
[393] Dieserto noted that ASEAN is particularly so when confronted with issues regarding international investment and trade, human rights, collective security, religion, and cultural diversity. See: Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," 274. 274
[394] Art. 41, *ASEAN Charter*.
[395] Woon, *The ASEAN Charter: A Commentary*, 77.
[396] Rule 1(b) and Rule 2, *Rules of Procedure for Conclusion of International Agreements*. A notable treaty entered into directly by ASEAN would be the *Joint Declaration on Comprehensive Partnership between the Association of Southeast Asian Nations (ASEAN) and the United Nations (UN).*
[397] Art. 7, *ASEAN Charter.*
[398] Art. 11, *ASEAN Charter.*
[399] Art. 7(2)(b), *ASEAN Charter.*

actions."[400] While decision-making under the ASEAN Charter is still based on consultation and consensus, the change as compared to the TAC is that "flexible participation" in the form of ASEAN minus X[401] may be applied, provided that there is consensus to do so: ASEAN MS who are uninterested may opt-out while agreeing that other ASEAN MS may opt-in.

The ASEAN Charter further establishes the ASEAN Coordinating Council of foreign ministers, three Community Councils, and 37 other ASEAN Sectoral Ministerial Bodies. These subsidiaries hold to some extent legislative and executive powers, but the ultimate authority lies with the ASEAN Summit who has administrative authority to "instruct the relevant Ministers in each of the Councils concerned to hold ad hoc inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils."[402] While establishing new bodies, the ASEAN Charter also builds upon existing administrative linkages with the national secretariats continuing its functions. The ASEAN Summit meetings are also held twice annually, as compared to the pre-charter ASEAN Leader's Summit which is was only held annually.

In terms of the ASEAN Charter's explicit noting of adherence to law, there are no supranational elements under the Charter. Prior to the ASEAN Charter, ASEAN has built up its own body of legal instruments, consisting of negotiated international treaties or agreements applied to specific regulatory areas, which are subsequently ratified in each ASEAN MS. With the ASEAN Charter, law-making under the ASEAN Charter is carried out via ASEAN Summits. However, such efforts are generally in the form of declarations, concords, blueprints, and programs of actions, which are essentially soft law instruments and mere political documents which simply announces the desire of the ASEAN MS to cooperate with limited to no binding effect.[403] As seen in Chapter 2, legal instruments driving economic integration consisted mainly of blueprints, and even if ASEAN adopts any hard law instruments with binding effects, it generally only requires parties to consider a certain objective or solely to agree to cooperate.

Relevant to the analysis on ASEAN's economic integration, Art. 1(5) of the ASEAN Charter provides that ASEAN shall "create a single market and production base which is stable, prosperous,

[400] Art. 2(d), *ASEAN Charter.*
[401] Art. 21(2), *ASEAN Charter.*
[402] Art. 7(2)(c), *ASEAN Charter.*
[403] Paul J. Davidson, "The Role of International Law in the Governance of International Economic Relations in ASEAN," *Singapore Year Book of International Law* 12 (2008): 216.

highly competitive and economically integrated", which is a reference to the creation of the AEC.[404] This is an unprecedented initiative in the history of ASEAN Cooperation.[405] In the event of economic disputes, Art. 24 provides that economic disputes "shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism."[406] Disputes that do not involve the application of an ASEAN instrument "shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation". Art. 25 further stipulates that "appropriate dispute settlement mechanisms, including arbitration, be established for disputes involving any ASEAN instrument." Most importantly, the ASEAN Charter provides for rules-based economic integration and an explicit reference to the adherence of multilateral trade rules and ASEAN's rules-based regimes.

As demonstrated, the ASEAN Charter in essence codified the existing cooperative networks, and established new institutions, processes, and mechanisms within ASEAN. Prior to the charter, only about 30 per cent of ASEAN's agreements were implemented,[407] and the charter signified genuine legalisation and institutionalisation towards more effective engagement with the international legal order.[408] Given the ASEAN Way decision-making process, scope of responsibilities and obligations were not clearly defined by law as informality was paramount to maintain peace. The breakthrough of the ASEAN Charter lies in the explicit codification and introduction to the modalities of the law in governing the relationship between ASEAN MS, which ideally transforms informal approaches to rule-based approaches. Dispute resolution processes is now codified, as opposed to quiet diplomacy;

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[404] Kazushi Shimizu, "The ASEAN Charter and the ASEAN Economic Community," *Economic Journal of Hokkaido University* 40 (2011): 84; Woon, *The ASEAN Charter: A Commentary*, 43.
[405] Hernandez has pointed out that ASEAN's way of achieving regional stability prior to the ASEAN Charter is attained through declarations of intent, rather than a charter. See: Carolina G. Hernandez, "Institution Building through an ASEAN Charter," *Panorama: Insights into Southeast Asian and European Affairs* 1 (2007): 9. Chia and Plummer also referred to the charter as the first among ASEAN discourse to bring forward the establishment of an ASEAN legal and institutional framework. See: Chia and Plummer, *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions*, xi.
[406] Despite this requirement, ASEAN MS are not obliged to settle disputes through the Enhanced Dispute Settlement Mechanism ("EDSM") and as WTO member states, ASEAN MS may utilise the WTO dispute settlement system instead. Particularly, Art. 1(3) of the 2019 Protocol on EDSM stipulates that the provisions "are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States," and that an ASEAN MS "involved in a dispute can resort to other fora at any stage" prior to submitting a request to establish a panel under the EDSM.
[407] Tommy Koh et al., "Charter Makes ASEAN Stronger, More United and Effective.," *The Straits Times*, August 8, 2007, 2.
[408] Tan Hsien-Li, "Regional Organizations," in *The Oxford Handbook of International Law in Asia and the Pacific*, ed. Simon Chesterman, Hisashi Owada, and Ben Saul (New York, United States of America: Oxford University Press, 2019), 49.

dialogue and consensus-seeking processes is now more transparent with the ASEAN minus X approach – the pre-Charter Leader's Summit observed strict consensus, but the ASEAN Summit now is empowered to devise alternative forms of decision-making when consensus cannot be reached.

Analysed under the Abbott et al legalisation scale, a high level of rule-making would have binding regulations and centralized enforcement, whereas a low level would be a forum for mainly negotiation. For dispute settlement, a high level of legalisation would indicate binding third-party decisions and general jurisdiction, whereas a low level would be pure political bargaining among the parties.[409] While the ASEAN Summit has been endowed with additional functions, there is not much visibility into whether such powers are actually exercised. Implementation of ASEAN's goals are left to each ASEAN MS which results in broader areas of discretion, and any disputes submitted to the ASEAN mechanism while prescribed is ultimately rendered in the form of recommendations and suggestions.[410] ASEAN under the ASEAN charter in essence, functions in substance on an institutionalised bargaining basis through ASEAN as a forum, where consensus and dialogue remains paramount. Thus, obligation, delegation and precision would be medium at best, but still demonstrates a move towards further legalisation from the pre-Charter era.[411]

3.3 Challenges to ASEAN's goals

The ASEAN Charter has demonstrated ASEAN's intent to deepen regional cooperation through notable changes through increased adoption of legally binding instruments and treaty language. However, elements of the ASEAN Way remain anchored in the legal framework which translates to the insufficient implementation.[412]

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[409] Abbott et al., "The Concept of Legalization," 415.
[410] See: Art. 14, *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* and Art. 26, ASEAN Charter.
[411] According to Davidson, ASEAN's increasingly formalised rules on dispute settlement and binding legal instruments to create a more conducive environment for investment signifies a departure from ASEAN Way towards further legalisation. See: Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation," 165–76.
[412] With regards to the role of principles and norms in shaping integration efforts, Aggarwal and Chow took on an analytical approach on two very different issues ASEAN faces: trade liberalisation and the control of haze. In their analysis, they utilised a governance structure consisting of four levels and dissected the key components of the GATT/WTO. The schematic places meta-regime above other elements in the order of international regimes, national actions, and interactions. Meta-regime refers to principles and norms, which guides and affects rules and procedures of international regimes. The international regimes then shape unilateral measures or ad-hoc bilateral accords at the national level,

As noted by Jones, "what distinguishes ASEAN's norms is not their content, but their implementation in a framework of regional interaction."[413] To ascertain the future of resolving cross-border patent disputes as part of ASEAN's economic integration, the first step would be to delve into the normative bases that gave rise to the "ASEAN Way." While the ASEAN Way is more descriptive of ASEAN's cultural disposition and the preferred mode of diplomacy, it points to each ASEAN MS' understanding of sovereignty collectively.[414] More importantly, ASEAN is not a supranational authority that has its own distinct way of carrying out decisions – it is an intergovernmental organisation where ASEAN MS project their understanding of sovereignty. An overzealous and uncritical understanding of maintaining the relevance of the stance might impede further efforts on resolving matters of regional concern.

3.3.1 Emphasis on Sovereignty and Weak Legalisation

The ASEAN Way is based on the traditional Westphalian concept of sovereignty:[415] each sovereign state is autonomous and has the right to determine its own domestic authority structures without the interference of external actors[416] and largely entrenched in preserving state sovereignty and non-intervention.[417] The principle itself goes back to the concept of sovereign equality and its necessary corollary, the basic obligation of states to not interfere in the domestic affairs of other

subsequently affecting the interactions of trade and financial flow. See: Vinod K. Aggarwal and Jonathan T. Chow, "The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation" (S. Rajaratnam School of International Studies, 2009), 2–7, JSTOR, https://www.jstor.org/stable/resrep17183.

[413] Jones, "ASEAN's Imitation Economic Community: The Primacy of Domestic Political Economy," 13.

[414] Sutherland has also linked ASEAN Way and assertions of regional identity with Viet Nam's external sovereignty and its domestic legitimacy. See: Claire Sutherland, "Another Nation-Building Bloc? Integrating Nationalist Ideology into the EU and ASEAN," *Asia Europe Journal* 3, no. 2 (July 1, 2005): 147–56, https://doi.org/10.1007/s10308-005-0141-0; Claire Sutherland, "Reconciling Nation and Region: Vietnamese Nation Building and ASEAN Regionalism," *Political Studies* 57, no. 2 (2009): 2–3, https://doi.org/10.1111/j.1467-9248.2008.00736.x.

[415] Ginsburg has described ASEAN MS' focus on sovereignty as a fundamental under international law, adopting a "hyper-Westphalian approach. Ginsburg, "Eastphalia and Asian Regionalism," 870.

[416] Stephen D. Krasner, "Organized Hypocrisy in Nineteenth-century East Asia," *International Relations of the Asia-Pacific* 1, no. 2 (August 1, 2001): 177, https://doi.org/10.1093/irap/1.2.173.

[417] In describing ASEAN's position, Corthay has in referred to non-interference as a "doctrine" in the ASEAN context rather than as a "principle" under international law. See: Eric Corthay, "The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention" 17, no. 2 (2016): 2–41.

sovereign states. The principle of non-intervention also reflects international customary law, and constitute a binding obligation to all members of the international community.

When ASEAN was first established, the founding members apart from Thailand have just regained their independence from colonial rule and thus rejected any notions of surrendering parts of their sovereignty. This is further complicated by the differences in ethnic, linguistic, and religious identities across the region which made the formation a common regional identity challenging.[418] In order to attain any progress in regional cooperation, the ASEAN Way was necessary. Through mutual respect of sovereignty and non-interference, decision-making in ASEAN is done via consensus and "guarantees the manifestation of self-determination and an autonomous decision-making process" for every ASEAN MS.[419] This in turn, enabled dialogue and reinforced political stability in Southeast Asia,[420] which then enabled ASEAN MS to focus on national and economic development.[421]

While the ASEAN Way has fostered a neutral environment in the region, it has also restricted what ASEAN can do. As expressed by Pelkmans, insistence on sovereignty "as an *a priori* for many policy domains affected by deeper integration" is tantamount to "a denial of the 'depth' of economic integration."[422] Institutional strengthening and substantive rule of law are crucial in providing a stable framework for interstate relations, and enable better implementation and compliance of commitments.[423] Even with the promulgation of the ASEAN Charter, the ASEAN Way continues to influence ASEAN's institutional arrangement and the strength of its legal instruments.[424] ASEAN

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[418] Narine, *Explaining ASEAN*, 206–8.
[419] Acharya has noted the principle of non-interference as the "single most important principle underpinning ASEAN regionalism." See: Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*, 70–74. See also: Winfried Huck, "Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability," *ZaöRV*, no. 80 (2020): 115.
[420] See e.g. Sartika Soesilowati, "Sovereignty in ASEAN's Regional Order-Building," *Indonesian Journal of Social Sciences* 2, no. 2 (July 2010), http://journal.unair.ac.id/IJSS@sovereignty-in-asean%E2%80%99s-regional-order-building-article-4119-media-35-category-8.html; Timo Kivimäki, "East Asian Relative Peace and the ASEAN Way," *International Relations of the Asia-Pacific* 11, no. 1 (January 1, 2011): 57–85, https://doi.org/10.1093/irap/lcq016.
[421] Kurus, "Understanding ASEAN: Benefits and Raison d'Etre," 829.
[422] Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*, 11.
[423] Deinla further argued that ASEAN integration can be understood as "state-controlled, limited, uneven, evolutionary and resting on a soft legal framework."Deinla, *From ASEAN Way to the ASEAN Charter*, 192–93.
[424] According to Cho and Kurtz, the ASEAN Way although was "entrenched in the ASEAN structure at an earlier point in time," it has "left an irreversible and indelible impact on subs institutional development under the auspices of ASEAN." See: Cho and Kurtz, "Legalizing the ASEAN Way," 252.

remains an intergovernmental organisation, and the integration process is horizontal in nature where governments retain pre-existing linkages to ASEAN institutions,[425] and according to Cockerham, ASEAN's institutional development has been a balancing exercise between cooperation for mostly economic benefits and state sovereignty.[426]

Additionally, the charter is relatively weak in substantively promoting the rule of law. The law-making process in ASEAN is still characterised by consensus-making through *muafakat* and *musyawarah*, an arrangement that works in a village setting but does not translate well into the complexities of interests at the international level which require greater certainty.[427] ASEAN's propensity to progress with issues that can be agreed upon and preference for informality also translates into a lack of legal instruments, administrative bodies, and legal institutions,[428] and explains why it took forty years for the ASEAN Charter to be materialised. Furthermore, in terms of dispute resolution, instead of having an ASEAN-wide court of justice to develop a consistent body of ASEAN Law, ASEAN continues to rely on the High Council of the TAC and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism ("EDSM"), both of which have never been utilised. Dispute resolution process under the ASEAN framework continues to be premised on the ASEAN Way in line with Art. 22(1) of the ASEAN Charter, which states that ASEAN MS "shall endeavour to resolve peacefully all dispute in a timely manner through dialogue, consultation, and negotiation."

One of the more confusing aspects arising out of ASEAN's integration process is the similarity of its three pillars to the European Union's three pillars prior to the Lisbon Treaty – the European Communities (European Coal and Steel Community, the European Economic Community, and the

[425] Dieserto used the term "horizontal embeddedness" to describe the ASEAN arrangement, where "national governments and domestic institutions maintain pre-existing linkages to ASEAN institutions, under an 'abbreviated' hierarchy with the ASEAN Summit as the supreme governing body of the organisation." See: Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," 280.
[426] Geoffrey B. Cockerham, "Regional Integration in ASEAN: Institutional Design and the ASEAN Way," *East Asia* 27, no. 2 (June 1, 2010): 184, https://doi.org/10.1007/s12140-009-9092-1.
[427] Report by the South Centre has also highlighted "elite level consensus building" as a characteristic of ASEAN, since most agreements and declarations have been negotiated by the highest officials with limited input from citizens or organisations representing civil society. See: South Centre, "The ASEAN Experience: Insights for Regional Political Cooperation," Analytical Note (Geneva, Switzerland: South Centre, February 2007), 54, https://www.southcentre.int/wp-content/uploads/2013/07/AN_REG1_The-ASEAN-Experience_EN.pdf.
[428] Thambipillai, "Challenges to the ASEAN Way: Musyawarah and Non-Interference," 168.

European Atomic Energy Community), common foreign and security policy, and cooperation in the fields of justice and home affairs. The three pillars of the ASEAN Community on the other consists of the AEC, the ASEAN Socio-Cultural Community, and the ASEAN Political-Security Community. In comparing EU and ASEAN integration, Blizkovsky and Merino's demonstrated that while the principles and values underlying the integration process is similar,[429] there are substantive differences in the institutional set-up and working methods, including (i) different Secretariat capacity, parliamentary bodies, role of the court etc., (ii) consensus via consultation in ASEAN in contrast to qualified majority voting and co-decision in the EU; (iii) strong rule of law in the EU while ASEAN remains political; (iv) comparatively lower budget for ASEAN (9 million USD) as compared to the EU (300 million USD trust fund); and (v) harmonisation of law constituting a key instrument in the EU but not ASEAN.[430] Jetschke further explained that ASEAN's failure to implement key projects and inefficient design is due to its mimicry of the EU/EEC coupled with aspects of network governance: ASEAN functions as a "network organization," which mode of governance involves among all, non-hierarchical and knowledge-based policymaking that facilitate the flow of ideas, free communication and consensus-building processes; and while ASEAN has adopted the nomenclature and labelling from the EU/EEC model, ASEAN still retains a "light institutional design" due to its strong commitment to non-interference.[431]

In addition, while ASEAN is now conferred legal personality, the organisation in practice does not have any independent right of action, and all decisions are still overseen by the ASEAN MS through the ASEAN Summit.[432] In contrast, the EU for instance has exclusive concept of competences when it comes to treatymaking power – if the matter falls under the EU's exclusive scope, only the EU can negotiate and conclude treaties, which would have direct effect on its MSs and override national

[429] The parameters are as follows: (i) peace, security, stability, (ii) security cooperation, (iii) single market, (iv) economic and social cohesion, and (v) values, such as that of democracy, good governance, rule of law, human rights. See: Petr Blizkovsky and Alberto De Gregorio Merino, "ASEAN and The European Union: From Strong Regional Integration to Closer External Links | Asia-Europe Institute, Universiti Malaya," *AEI Insights* 2, no. 1 (January 2016), https://aei.um.edu.my/asean-and-the-european-union-from-strong-regional-integration-to-closer-external-links.
[430] Blizkovsky and Merino.
[431] Anja Jetschke, "Institutionalizing ASEAN: Celebrating Europe through Network Governance," *Cambridge Review of International Affairs* 22, no. 3 (September 1, 2009): 407–22, https://doi.org/10.1080/09557570903107688.
[432] Woon, *The ASEAN Charter: A Commentary*, 77–78.

legislations. ASEAN's power in this regard is restricted and is only legally obliged to "endeavour to develop common positions and pursue joint actions"[433] through meetings to discuss and converge stances prior to negotiations, and to "take all necessary measures" to implement ASEAN treaties.[434] The ASEAN Secretariat also serves only as a facilitator and conference organiser, in contrast to an EU-type agency. The Secretary-General while assuming a ministerial rank[435] and can speak for ASEAN is "still kept on a very tight leash."[436]

Despite ASEAN's consistent emphasis on sovereignty and the principle of non-interference, ASEAN's former Secretary-General, Severino, has been a vocal opponent of the ASEAN Way. Severino noted that the principle of non-interference is not absolute; it is "not a doctrine that is adhered to and applied on dogmatic or ideological grounds", but rather a pragmatic need to prevent national interests from being enforced by external pressure against perceived national interest.[437] The principle of non-intervention is also not inherently unique to ASEAN.[438] Drawing upon instances of actual state practice, Jones observed that the principle of non-interference while enshrined in ASEAN documents should not be viewed as a "cast-iron 'cherished principle' or a norm that has 'socialised' member states(…)"[439] In fact, there have indeed been several instances where ASEAN MS have interfered with the domestic affairs of other MS when their own national interests are at stake. One of the examples would be the haze pollution brought about by land and forest fires in Indonesia, which when raised by Singapore at the United Nations General Assembly, was construed by Indonesia as interference since Indonesia

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[433] Art. 41(4) and (7), *ASEAN Charter*; Rule 1, *Rules of Procedure for Conclusion of International Agreements by ASEAN*.
[434] Art. 5(2), *ASEAN Charter.*
[435] Art, 7(2)(g), *ASEAN Charter*.
[436] Woon, *The ASEAN Charter: A Commentary*, 78.
[437] Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 94.
[438] Rodolfo C. Severino, "Sovereignty, Intervention and The ASEAN Way (3 July 2000)," ASEAN, July 3, 2000, https://asean.org/?static_post=sovereignty-intervention-and-the-asean-way-3-july-2000.
[439] Lee Jones, "ASEAN's Unchanged Melody? The Theory and Practice of 'Non-Interference' in Southeast Asia," *The Pacific Review* 23, no. 4 (August 13, 2010): 497, https://doi.org/10.1080/09512748.2010.495996.

sees the haze as a domestic issue.[440] Another example would be criticisms by ASEAN ministers on Myanmar in 2005, urging the release of political prisoners.[441]

While there has been a subtle shift of the ASEAN Way throughout the years, the practical effect is that ASEAN's role as an organisation remains limited. Even with the ASEAN Charter, ASEAN still emphasises the notion of sovereignty, deliberately avoided the creation of a supranational regional institution, and is unwilling to further empower its regional institutions to achieve its intended goals. ASEAN's refusal to reconsider the principle of non-intervention will continue to paralyse further developments of the organisation.[442]

3.3.2 Informality Leads to Inconsistent Practices

Informality under the ASEAN Way has also influenced the role of ASEAN's institutions and the strength of its legal instruments. Institutions can be formal or informal: formal institutions are legally codified, whereas informal ones can emerge from practice over time. ASEAN explicitly designed its formal institutions to be informal.[443] For years, ASEAN have adopted an informal approach to its legal instruments, notably through the use of universal concepts and ambiguous language to allow ASEAN MS to hold their own interpretations. This informal approach to law-making allows for the ease of amendment and any ensuing ratifications between the member states,[444] and the flexibility allows "displays of solidarity, shows strength and cohesion at the moment but leaves no definite restriction on the future."[445] Informal arrangements and quiet bargains are also less prominent and can minimise

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[440] Daniel Heilmann, "After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness as a Regional Environmental Governance Tool," *Journal of Current Southeast Asian Affairs* 34, no. 3 (2015): 114–16.
[441] Charles Dunst, "The Myanmar Coup as an ASEAN Inflection Point," *Journal of Indo-Pacific Affairs*, no. Special Issue (August 2021): 38.
[442] Shaun Narine, "State Sovereignty and Regional Institutionalism in the Asia Pacific," *Working Paper*, Working Paper Series, March 2005, 14, https://pdfs.semanticscholar.org/39db/5a60a50ad898c94cf1a95e2fff9a37f2a3aa.pdf.
[443] Amitav Acharya and Alastair I. Johnston, "Conclusion: Institutional Features, Cooperation Effects, and the Agenda for Further Research on Comparative Regionalism," in *Crafting Cooperation: Regional International Institutions in Comparative Perspective*, ed. Amitav Acharya and Alastair I. Johnston (Cambridge: Cambridge University Press, 2007), 244–70, https://doi.org/10.1017/CBO9780511491436.
[444] Charles Lipson, "Why Are Some International Agreements Informal?," *International Organization* 45, no. 4 (1991): 500–501.
[445] Antolik, *ASEAN and the Diplomacy of Accommodation*, 2020, 156.

public scrutiny, and a loose structure omits the need for lengthy and potentially unproductive procedures.[446]

The downside to ASEAN's informal approach is its inability to empower its legal instruments and enforcement mechanisms in attaining common regional goals. While ASEAN strives to be a rules-based regional association, the ASEAN Charter is understood as merely codifying ASEAN's existing practices of the "ASEAN Way."[447] The continued focus on consensus instead of a majority-led process makes the formalisation of national commitment less likely – for example, if one ASEAN MS disagrees with the drafting or interpretation of an ASEAN legal provision, the clause would need to be reduced to the lowest common denominator, which results in a broadly drafted clause with significant legal lacunae and unclarity. The ASEAN Charter for instance pose significant constitutional ambiguities with regards to its dispute resolution process: Art. 22 provides that "Member States shall *endeavour* (emphasis added) to resolve peacefully all disputes in a timely manner through *dialogue, consultation and negotiation* (emphasis added)," and only when such disputes are "unresolved" can they be referred to the ASEAN Summit.

The lack of secondary instruments to supplement legislative interpretation leaves wide discretion still for ASEAN MS. Implementation of ASEAN's goals is thus carried out from a subjective point of view in contrast to the normative force of legally binding rules. The ASEAN Integration Report 2019 for instance, requires ASEAN MS only to "translate regional commitments into national-level commitments, milestones, and targets that can be readily enforced, observed, and measured."[448] Whether these obligations are incorporated into constitutional or statutory obligations becomes an issue of contention.[449]

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[446] Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law," *Nordic Journal of International Law* 70, no. 3 (January 1, 2001): 416–17, https://doi.org/10.1163/15718100120296647. The agenda and format of the ASEAN Summit for instance is not explicitly prescribed under the charter.

[447] Davidson further noted that the ASEAN Charter as a representation of a paradigm shift as ASEAN was intended to be a kind of social community, instead of a legal community. See: Paul J. Davidson, "The Role of Law in Governing Regionalism in Asia," in *Governance and Regionalism in Asia*, ed. Nicholas Thomas (United Kingdom: Routledge, 2009), 230.

[448] The ASEAN Secretariat, "ASEAN Integration Report 2019," xxii.

[449] Desierto has similarly identified the lack of direct effect of the ASEAN Charter as there are no precise terms for implementation, and that the constitutions of ASEAN MS often do not specify whether treaties are self-executing or not. See: Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," 299–305.

There is also no clear typology for ASEAN's legal instruments. To illustrate, Art. 288 of the TFEU lists five specific instruments available for European institutions to carry out their tasks, namely (i) regulations, (ii) directives, (iii) decisions, (iv) recommendations and (v) opinions; each of which carry different weight.[450] The ASEAN Charter on the other hand does not explicitly categorise the legal instruments, but notes the presence of treaties, conventions, agreements, concords, protocols, declarations, and "other instruments." The matrix of ASEAN Legal Instruments, ASEAN's official legal instruments database also does not prescribe clear definitions for each title, noting that "there are various understandings and interpretations of what is considered international legal instruments" and focuses only on instruments where consent to be bound is expressed.[451] However, the matrix explicitly excludes *statements* and *declarations* as they are "issued or adopted by ASEAN Member States that appear to reflect their aspirations and/or political will."[452]

To further ascertain the typology of ASEAN's legal instruments, Aziz and Dehousse made four observations on 300 inter-ASEAN documents across diverse nomenclature with over 33 different titles:[453] (i) *agreements, framework agreements, arrangements, conventions, protocols,* and *treaties*, and in certain instances *memoranda of understanding* which explicitly notes its binding effect and post-1998 *ministerial understandings* are generally legal instruments; (ii) *concords*, *declarations,* and *blueprints* which are politically significant but "'soft law' at best;" (iii) *resolutions* are generally not

[450] While there are additional documents developed through practice, such as interinstitutional agreements, resolutions, and conclusions, the hierarchy provided under the TFEU is clearly demarcated. Specifically, Art. 288 provides that a regulation is "binding in its entirety and directly applicable in all Member States." A directive is binding "as to the result to be achieved" but "shall leave to the national authorities the choice of form and methods." A decision is "binding in its entirety," unless it specifies to whom it is addressed to, and "shall be binding on them." Recommendations and opinions have no binding force. For an overview of the use of legal instrument in the EU, see e.g. Steffen Hurka and Yves Steinebach, "Legal Instrument Choice in the European Union," *JCMS: Journal of Common Market Studies* 59, no. 2 (March 2021): 278–96, https://doi.org/10.1111/jcms.13068.
[451] Association of Southeast Asian Nations, "ASEAN Legal Instruments," accessed January 30, 2023, https://agreement.asean.org/explanatory/show.html.
[452] Association of Southeast Asian Nations. Fukunaga has further pointed out a confusing usage of *protocol*, which constitute nearly half of ASEAN's legal instruments – *protocol* has been used to amend *agreement*, which seemingly makes *protocol* primary legislation. However, *protocol* is also used to amend *arrangements* and *understandings*, both of which appear to be supplementary documents. See: Yoshifumi Fukunaga, "Use of Legal Instruments in the ASEAN Economic Community Building," *Journal of Contemporary East Asia Studies* 10, no. 1 (January 2, 2021): 67–68, https://doi.org/10.1080/24761028.2021.1905199.
[453] For a complete list of the titles, see: Davinia Abdul Aziz and Renaud Dehousse, "The Instruments of Governance of ASEAN," in *The ASEAN Way in a Comparative Context - ASEAN Governance, Management and External Relations* (2nd Plenary onASEAN Integration Through Law, Jakarta, Indonesia, 2013), 2.

legal in character, and (iv) entry into clauses varied greatly without abiding by standard clauses in treaty law.[454] The line between hard and soft law is also blurred in terms of form and substance – even for hard law instruments, obligations are often worded to circumscribe their binding effect. An example would be the ASEAN Framework Agreement on Intellectual Property, which as explored in Chapter 2.2.1(i) merely require ASEAN to "explore the possibility of setting up of an ASEAN patent system, including an ASEAN Patent Office, if feasible (…)." On the other hand, soft law instruments while political in nature often carry more institutional significance – the AEC blueprints for instance provide for more detailed obligations and commitments such as setting up standing monitoring bodies, even though the obligations are still broadly worded.[455]

Apart from the prescriptive aspects, ASEAN-based dispute resolution instruments and mechanisms have yet to be utilised by any ASEAN MS. In many instances, ASEAN MS were able to resolve disputes through quiet diplomacy and an informal approach.[456] However, ASEAN MS are not entirely averse towards legal action.[457] An important point to note however is that even when ASEAN MS opt for a formalised approach, rather than resolving the dispute under the EDSM, ASEAN MS demonstrated a preference towards submitting it for resolution under the multilateral framework.[458] This under-utilisation due to ASEAN MS' unwillingness to test uncharted waters in turn impedes meaningful development of the mechanism's operational efficiency.[459]

[454] Abdul Aziz and Dehousse, 2–3.
[455] Abdul Aziz and Dehousse, 3–4.
[456] Woon pointed out an instance where a dispute between Singapore and the Philippines was settled amicably after mutual consultations between the trade ministers, and the Philippines paid some compensation to Singapore. This was carried out without utilising the WTO dispute settlement system. See: Woon, *The ASEAN Charter: A Commentary*, 179.
[457] Between ASEAN MS, sovereignty disputes involving various islands, notably between Indonesia and Malaysia (Pulau Ligitan and Pulau Sipadan), and Malaysia and Singapore (Pedra Branca/Pulau Batu Puteh) were submitted to the International Court of Justice on November1998 and July 2003 respectively.
[458] The Philippines challenged Thailand's fiscal and custom measures imposed on cigarettes through the WTO dispute settlement mechanism in the case of DS371, 2008. Another more recent case would be Dispute DS496, 2015 where Viet Nam challenged Indonesia's safeguard measures on imports of flat-rolled iron or steel products.
[459] Woon, *The ASEAN Charter: A Commentary*, 179–80.

Summary of Chapter 3

This Chapter explored how regionalism impacts the approach towards patent rights protection, which was driven by (i) the lack of flexibility and slow process of multilateralism, (ii) preference for countries to enter into regional groupings and form a common position even during multilateral talks, and (iii) provide overall stronger protection for patent rights at lower costs with the establishment of a regional patent system. To understand why ASEAN remains resistant against instituting an ASEAN patent system, this Chapter then turns to understanding the norm underlying ASEAN's integration – the ASEAN Way, which emphasis the territorial sovereignty and the principle of non-intervention. While the ASEAN Way has to some extent shifted towards greater legalisation, it continues to impact what ASEAN can do: ASEAN's organs remain underpowered, its legal instruments open-ended, and its own dispute settlement never been utilised. These limitations all contribute to the lack of a supranational authority overseeing the implementation of the AEC, and by extension, the lack of an ASEAN patent system.

Chapter 4. Charting the Way Forward for ASEAN

Since its inception, ASEAN has transformed from "an embryonic security dialogue body,"[460] to a regional organisation endowed with more functions to carry out greater economic goals. When the ASEAN Charter was signed during the13th ASEAN Summit in 2007, ASEAN leaders have realistically noted that "implementation will be the key to the realisation of the vision outlined in the ASEAN Charter."[461] In contrast to past adherence on the ASEAN Way, the ASEAN Charter calls for greater adherence to the rule of law, which seeks to pave the way for greater economic integration: the rule of law has a positive correlation with the trade and economic development[462] as clear, publicised, and stable laws, access to justice and dispute resolution mechanism and availability of remedies[463] provides contractual certainty and some degree of confidence for business decision-making.[464]

In order to implement what is required under the ASEAN Charter in establishing the AEC, at the ASEAN Way has slowly given way to greater formalisation and legalisation. While challenges still remain as highlighted in Chapter 3.3, the fact that ASEAN Charter calls for a greater adherence to the rule of law along with the creation of a single market and production base opens up more options for ASEAN to consider how an ASEAN patent system would take shape, rather than continue the reliance on non-binding intergovernmental approaches. This then raises the next question: what can ASEAN do moving forward to advance patent protection in the region? The majority of ASEAN MS are highly dependent on industries where innovation and creativity play only minor roles, and the immense diversity in capacities to innovate leads to different needs and demands among ASEAN MS.

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[460] Dosch, "Southeast Asia and the Asia-Pacific: ASEAN," 48.

[461] ASEAN, "Chairman's Statement of the 13th ASEAN Summit, 'One ASEAN at the Heart of Dynamic Asia' Singapore, 20 November 2007." See also Art. 5(2) of the ASEAN Charter: ASEAN MS are obliged to "take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership."

[462] See e.g. Hiroshi Matsuo, "The Rule of Law and Economic Development: A Cause or a Result?," in *The Role of Law in Development: Past, Present and Future*, ed. Yoshiharu Matsuura (Nagoya: Center for Asian Legal Exchange, Graduate School of Law, Nagoya University, 2005), 59–70, https://cale.law.nagoya-u.ac.jp/wp/wp-content/uploads/2021/09/CALE-Books2.pdf.

[463] This is drawn from the four fundamental principles under the definition provided by the World Justice Project. See: World Justice Project, "Rule of Law Index 2022" (Washington, D.C., 2022), 14, https://worldjusticeproject.org/rule-of-law-index/downloads/INDEX_2022-digital.pdf.

[464] For the ASEAN context, see e.g.: Michael Ewing-Chow, Junianto James Losari, and Melania Vilarasau Slade, "The Facilitation of Trade by the Rule of Law: The Cases of Singapore and ASEAN," in *Connecting to Global Markets*, by World Trade Organization, ed. Marion Jansen, Mustapha Sadni Jallab, and Maarten Smeets (WTO, 2014), 129–43, https://doi.org/10.30875/e2ec3dab-en.

In the context of patent rights protection, there are three main issues that ASEAN MS need to resolve. First, the impact of divergent national patent laws on trade needs to be addressed. If ASEAN MS yearn the AEC to rise above its current status of a quasi-FTA and form a more cohesive regional market, a robust regional patent system is required to minimise the effects of divergent national patent laws as an impediment to trade. Second, as ASEAN grows into its potential as a single production base, there needs to be real solutions to prevent infringers from exploiting the advantages under the AEC to carry out cross-border patent infringement activities through slicing-and-dicing production processes and spreading the infringing acts across the region. Third, more legal certainty is required to address cross-border patent disputes in order to attract technological transfer and FDI.

The key principles under the ASEAN Charter allows for two possible developments to address the above issues: either ASEAN continues its newfound momentum to opt for greater formalisation through stronger laws and institutions, or ASEAN will stick to the lowest common denominator as per the ASEAN Way and pursue cautious and diplomatic approaches through soft legalisation and non-binding cooperative measures. Similarly, in terms of patent rights protection under the AEC, ASEAN could similarly (i) spur the creation of a regional patent legislation and enforcement mechanism, or (ii) pursue non-binding commitments through inter-state cooperation.

For (i), the rationale stems from reference to other regional approaches to patent protection. The EPO, EAPO, and GCCPO have all established regional patent systems to fulfil economic goals, conferring various degrees of supranational authority to a regional system overseeing the prosecution and to some extent enforcement of the patent rights.[465] ASEAN's vision under the blueprints and the legal considerations as explored in Chapter 2 is also in line with the aforementioned regional groupings, and if ASEAN were to achieve its goals in creating a single market and production base, along with a highly competitive region, ASEAN MS should consider ceding more functions to a

[465] On this, Yukawa has argued that the ASEAN Way as a norm is not unique when compared with other regional and institutional organisations. Further, consensus-seeking has been widely adopted by most international organisation, and from a regional comparative analysis, ASEAN's norms are not unique despite being heralded as such. See: Yukawa, "The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms," 4.

supranational regional authority on patent prosecution and enforcement. In the case of patent protection, this could be the creation of a regional patent office, judicial system, and patent legislation. On the other hand, for (ii), apart from the prevalence of the ASEAN Way, the AEC itself is posited as a pillar under the ASEAN Community Vision 2025. Drawing from the title of the document, one could argue that the AEC is visionary in character, and is to be taken as a strategic and long-term endeavour.

This understanding could go both ways – either the ASEAN MS must strive attain all of the objectives noted in the AEC in order for ASEAN to establish itself as an important economic hub, or that the objectives are also visionary in nature and is not meant to be achieved in the short-term. As ASEAN embraces "open regionalism" in contrast to the European integration model, ASEAN can take a more gradual approach to enabling better protection of patent rights in the region, even without supranational ambitions, starting from harmonisation and the interoperability of standards. Notwithstanding ASEAN's framework, ASEAN MS may also consider entering into bilateral arrangements for recognition of foreign patents, or consider the adoption of a common private international law model laws to resolve cross-border patent disputes.

4.1 Current Patent Landscape in ASEAN

The current patent landscape in among ASEAN MS has developed further through efforts beyond ASEAN's ambit. As compared to the previous century, the standards of patent protection have been incorporated more significantly in trade agreements where selected trading partners exchange market access rights.[466] To further ascertain the directions that ASEAN can take, the current international patent landscape in ASEAN will be assessed.

4.1.1 Multilateral, Regional and Bilateral Instruments

Several main multilateral agreements shape the contours of the current international patent system, both on procedure and substance. this section will examine the multilateral framework of

[466] Georg Koopmann, "Regionalism Going Global," *Intereconomics* 38, no. 1 (February 2003): 2.

patent treaties as shaped by the Paris Convention, TRIPS Agreement, PCT, PLT, and the Budapest Treaty.[467]

i. Paris Convention

The Paris Convention is one the of first major multilateral instruments governing the protection of industrial property, including patents, trademarks, industrial designs, utility models, and geographical indications.[468] In 1883, the Paris Convention was signed by eleven countries, and the Convention now has 179 contracting parties.[469] Substantively, there are three main aspects most relevant to the inquiry of this dissertation: (i) national treatment which requires the Contracting State to grant the same protection it accords to its own nationals, to nationals of other Contracting States;[470] (ii) right of priority where an applicant upon filing at one of the Convention country, may within 12 months apply for protection in any other Convention country as if it has been filed on the same date as the first application,[471] and (iii) independence of patents, where patents for the same invention granted in different Contracting States are independent of another, and that the status of a patent granted in another country will not affect the status of equivalent patents in another Convention States.[472]

Prior to the Paris Convention, patentees would face obstacles obtaining parallel patents in other countries and were frequently discriminated against. The objective of the Paris Convention was to reduce such discrimination and for patentees to obtain patents in all other Contracting States with minimal difficulties.[473] To that effect, the convention laid out the foundational framework for the functioning of patents on a global scale and allowed for the emergence of a globalised technology

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[467] *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), as amended on September 26, 1980.*
[468] Art. 1(2), *Paris Convention.*
[469] For the list of Contracting Parties, see: WIPO Lex, "WIPO-Administered Treaties," WIPO IP Portal, July 6, 2022, https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=2.
[470] Arts. 2, 3, *Paris Convention.*
[471] Art. 4, *Paris Convention.*
[472] Art. 4*bis*, *Paris Convention.*
[473] Edith Tilton Penrose, *The Economics of the International Patent System* (Johns Hopkins Press, 1951), 224–26.

market, where patents became goods tradable worldwide and are no longer solely attached to monopolies in the industrial exploitation of invention.[474]

All ASEAN MS except for Myanmar have acceded to the Paris Convention. However, Art. 2.1 of the TRIPS Agreement, for which Myanmar is also a member, requires substantive obligations under the Paris Convention (1967) to be complied with. Relevantly, the RCEP which all ASEAN MS are parties to, and the CPTPP to which several ASEAN MS are parties to, requires affirmation of the ratification or accession, or to ratify or accede to the Paris Convention.[475]

ii. TRIPS Agreement

All ASEAN MS have acceded to the Agreement Establishing the World Trade Organization ("WTO Agreement"), which came into effect on 1 January 1995. The last ASEAN MS to accede to the WTO Agreement was Lao PDR which did so on 2 February 2013. As Annex 1C of the WTO Agreement, the TRIPS Agreement covers main areas of IP rights, setting out minimum standards of protection.[476] All ASEAN MS are obliged to incorporate the requirements under the TRIPS Agreement into national legislation.

The TRIPS Agreement provides for three main features: standards, enforcement, and dispute settlement. The Preamble notes the general goals of the agreement: to reduce distortions and impediments to international trade, promote IPR protection, and ensure that procedures and enforcement of IPR does not become barriers to legitimate trade. The agreement reiterates the national treatment principle,[477] and provides for the MFN clause which forbids discrimination between nationals of other Members.[478] The agreement emphasises that IPR protection should

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[474] Pierre-Yves Donzé, 'The International Patent System and the Global Flow of Technologies: The Case of Japan, 1880-1930', in *The Foundations of Worldwide Economic Integration: Power, Institutions, and Global Markets, 1850–1930*, ed. Christof Dejung and Niels P. Petersson (United States: Cambridge University Press, 2013), 181.

[475] See. Art. 18.7 of the CPTPP, and Art. 11.9 of the RCEP.

[476] Adherence to the WTO Agreement automatically subjects Member States to all the annexed agreements under Art. XII(1), apart from the plurilateral agreements. The mandatory annexes are the GATT 1994 (Annex 1A), GATS (Annex 1B), the TRIPS Agreement (Annex 1C), Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2), and Trade Policy Review Mechanism (Annex 3). See Art. XI, XII, XIII of the WTO Agreement.

[477] Art. 3, *TRIPS Agreement*.

[478] Art. 4, *TRIPS Agreement*.

contribute to technological innovation in a manner conducive to social and economic welfare, to the mutual advantage of producers and users and a balance of rights and obligations;[479] and recognises the rights of member countries to adopt measures for public health and public interest, as long as it is consistent with the agreement.[480]

With regards to patent rights protection under Part II, the TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination as long as they meet the requirements of novelty, inventive step, and are capable of industrial applications.[481] Exclusions to this basic rule of patentability include inventions contrary to *ordre public* or morality, diagnostic, therapeutic, and surgical methods for the treatment of humans or animals, and plants and animals other than micro-organisms.[482] A product patent confer the exclusive rights to prevent third parties, without having the patent owner's consent, from making, using, offering for sale, selling or importing the product, whereas for a process patent the acts of using, offering for sale, selling, or importing the products obtained directly through the process. Patent owners also have the right to assign or transfer by succession the patent rights, and conclude licensing contracts.[483] The patent owner shall also disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art known to the inventor at the filing date or on the priority date.[484] Term of the protection of a patent shall not end before twenty year counted from the filing date.[485] The agreement further stipulates the revocation or forfeiture of the patent,[486] and rules as regards to the burden of proof in legal proceedings.[487] Compulsory licensing and government use are allowed subject to the conditions under Art. 31 and Art. 31*bis*.

Further relevant to the context of ASEAN is the transition period of LDCs. Under Art. 66(1) of the TRIPS Agreement, LDCs are given a 10 years transition period under Art. 66(1). The same

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[479] Art. 7, *TRIPS Agreement*.
[480] Art. 8, *TRIPS Agreement*.
[481] Art. 27.1, *TRIPS Agreement*.
[482] Art. 27.2, 27.3, *TRIPS Agreement*.
[483] Art. 28, *TRIPS Agreement*.
[484] Art. 29, *TRIPS Agreement*.
[485] Art. 33, *TRIPS Agreement*.
[486] Art. 31, *TRIPS Agreement.*
[487] Art. 34, *TRIPS Agreement.*

provision also empowers the TRIPS Council to accord extensions to the period upon request by an LDC. During the transition period, LDCs are only required to comply with Art. 3, 4 and 5 of the TRIPS Agreement, which provide for national treatment, MFN, and the exemption from such obligations in multilateral agreements relating to IPRs under the auspices of WIPO, respectively.

Among ASEAN MS, there are three countries that are classified as a Least-Developed Country ("LDC") – Cambodia, Lao PDR, and Myanmar.[488] Under the TRIPS Agreement, an LDC joining the WTO on January 1995 would have been required to apply the provisions of the TRIPS Agreement by 1 January 2006. For the protection of IPRs in general, the transitional period has been extended twice through submission of request to the TRIPS Council – once in 2005, then in 2013. This is again extended on 29 June 2021 for an additional 13 years until 1 July 2034, and LDCs do not have to apply the provisions of TRIPS in general, apart from Arts. 3, 4 and 5.[489] Similarly for pharmaceuticals, in 2001 the Doha Declaration had instructed the TRIPS Council to extend the period of compliance until 1 January 2016, where LDCs will not be obliged to implement or enforce patent and test data obligations related to pharmaceutical products.[490] A further extension for pharmaceutical products was made in 2015, where LDCs may avoid applying and enforcing IP rights on pharmaceutical products until 2033.[491] This means that Cambodia, Lao PDR and Myanmar are exempted from applying the relevant TRIPS provisions until 1 July 2034, and are precluded from affording protection to pharmaceutical products until 2033.

With regards to the enforcement provisions in Part III (Art. 41-61), the TRIPS Agreement lays down general principles in the event of infringement of any covered IPR with the objective of allowing effective action against infringement of IPRs while maintaining basic principles of due process. These include domestic civil and administrative procedures and remedies, provisional measures, border measures, and criminal procedures. The provisions are also crafted in a manner to be compatible with both common law and civil law legal systems, especially on the provision of remedies. Members are

[488] For the list of LDCs, see: World Trade Organization, "Least-Developed Countries," Understanding the WTO: The Organization, 2023, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.
[489] World Trade Organization, "WTO Members Agree to Extend TRIPS Transition Period for LDCs until 1 July 2034," June 29, 2021, https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm.
[490] *Declaration on the TRIPS Agreement and Public Health,* para. 7.
[491] World Trade Organization, "WTO Members Agree to Extend Drug Patent Exemption for Poorest Members," November 6, 2015, https://www.wto.org/english/news_e/news15_e/trip_06nov15_e.htm.

free to decide on the implementation of the enforcement provisions, and any complaints are subject to the WTO dispute settlement under Art. 64.

iii. Patent Law Treaty [492]

The PLT was concluded in 2000 and entered into force in 2005. The treaty is open to States members of WIPO and/or States party to the Paris Convention, and is also open to accession by certain intergovernmental organizations. The PLT serves to supplement the Paris Convention through harmonizing and simplifying formal procedures with regards to national and regional patent applications, allowing national and regional patent applications to be more efficient and user-friendly. This includes standardisation of the form and content of patent applications to reduce procedural gaps between national, regional, and international patent systems. Art. 15 expressly provides for the obligation of signatories to comply with the Paris Convention, and that nothing in the PLT derogates the obligations and rights under the Paris Convention. The Treaty provides a maximum set of requirements which offices may require from applicants or owners. However, the PLT regulates only the formal aspects of protection, and does not affect the substantive laws relating to patent.

Notably, the PLT standardizes the requirements for obtaining a filing date, provides procedures for the avoidance of unintentional loss of substantive rights, establishes Model International Forms and facilitates the implementation of electronic filing. As of the writing of this dissertation, the PLT has 43 members in total, none of which are ASEAN MS.

iv. Budapest Treaty[493]

The Budapest Treaty was adopted in 1977 and entered into force on May 24, 1984. The treaty concerns the deposit of microorganisms with any international depositary authorities. The treaty aims to eliminate the need to deposit the microorganisms in which protection is sought - new strains of micro-organism can be deposited at international depository authorities for the purposes of applying

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[492] *Patent Law Treaty, adopted by the Diplomatic Conference on June 1, 2000.*
[493] *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (as amended on September 26, 1980)*

for a patent application at another Contracting State to the treaty, and only needs to do so once. As of the writing of this dissertation, there are 48 of such authorities globally. Regional patent offices may also declare that it recognises the effects of the Budapest Treaty, which includes the EPO, EAPO, and ARIPO.

In connection with the TRIPS Agreement, Art. 27(3)(b) of the TRIPS Agreement provide that member states shall exclude from patentability plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. As of the writing of this dissertation, there are 87 Contracting parties to the treaty, which include Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Viet Nam.[494] Relevantly, as regional economic agreements picked up pace within the Asia Pacific region, parties to the CPTPP and RCEP are also required to ratify or accede / endeavour to ratify or accede to the Budapest Treaty,[495] and as of the writing of this dissertation, Cambodia, Lao PDR and Thailand have yet to do so.

v. Patent Cooperation Treaty

The PCT is an international treaty concluded in 1970 and is open to states party to the Paris Convention. The treaty engages international cooperation in the filing, searching and examination of patent applications, and the dissemination of information contained in the applications. Through the PCT, patent applicants can seek patent protection for an invention simultaneously across its Contracting states through a single, uniform "international" patent application, in one language and a single set of fees.[496] The application has legal effect of an initial filing in the different countries bound by the treaty, and reduces the costs of having to file separate applications in different countries. The

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[494] For the list of Contracting Parties, see: World Intellectual Property Organization, "WIPO-Administered Treaties," WIPO IP Portal, 2022, https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=7.

[495] See: Art. 18.7 of CPTPP, stating that "each party shall ratify or accede to each of the following agreements (…), including the Budapest Treaty." Art. 11.9(2) of the RCEP further requires "each party shall endeavour to ratify or accede to the following multilateral agreements," which include the Budapest Treaty.

[496] The list for PCT fees as of 1 October 2022 is published by WIPO. See: World Intellectual Property Organization, "PCT Fee Tables," October 1, 2022, https://www.wipo.int/export/sites/www/pct/en/fees.pdf.

applicants are open to anyone who is a national or resident of a PCT member country. While the PCT facilitates the process of obtaining patents in many countries through a single application, it does not alter the substantive requirements of patentability in each member state.[497] Through streamlining the initial filing process, the PCT makes it easier and cheaper to file a patent application in a large number of countries.

There are two phases to the application of patents under the PCT procedure: the international phase where an international application is filed, and the national phase where the patent is assessed and granted by the national or regional patent offices. To protect inventions across countries, under the Paris Convention route, an applicant can file separate patent applications directly in countries where protection is sought, or file at a Paris Convention country first, followed by separate patent applications in other Paris Convention countries within 12 months from the filing date of the first application. Under the PCT route, an applicant can file a single PCT application with a Receiving Office directly or within the 12-month period under the Paris Convention, in a language which the Receiving Office accepts, and one set of fees. After the international search by an ISA is completed or 18 months from the earliest filing date, the content of the application will be disclosed to the public. The applicant may also file a demand for international preliminary examination, which will be carried out by the International Preliminary Examining Authorities (IPEA). Once the PCT procedures have ended, the application then enters into the national phase 30 months from the earliest filing date – known as the priority date, to decide which countries to pursue the grant of the patent. The international application cannot be filed in any patent offices, but must be filed in an authorized Receiving Office. Any Receiving Office where at least one of the applicants is a resident of national of the country is authorized to receive an international application filed by those applicants, and is responsible for the filing and reviewing the formalities for international applications.

There are currently 24 IP offices around the world appointed to act as ISAs and IPEAs, two of them in ASEAN: the Intellectual Property Office of the Philippines, and the Intellectual Property Office

[497] Art. 27(5) of the PCT explicitly provides that nothing in the PCT is "intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of patentability as it desires."

of Singapore (IPOS).[498] Some ASEAN countries also allow a late entry for the PCT national phase as long as the applicant pays an additional fee for the late entry and provide reasons for the delay in meeting the time limit.[499] The PCT has 156 Contracting States as of the writing of this dissertation, and all ASEAN MS are parties to the PCT with the exception of Myanmar.

Apart from the PCT, ASEAN has commenced a PCT-ASPEC with an extended pilot period from 27 August 2019 to 26 August 2023, with a capacity of up to 100 applications per year. As noted in Section 2.2.1, ASPEC enables the IP offices of ASEAN MS to utilise search and examination results from another participating IP office of ASEAN MS. The PCT-ASPEC programme further allows an additional option of relying on a PCT international preliminary examination report or a written opinion issued from an ASEAN ISA/IPEA, which at the time of writing would be IPOS and PHILIPO. Effective 15 June 2021, patent applicants can also utilise written opinion issued by another participating IP Office of ASEAN MS, except for the IP Office of Thailand.[500]

4.1.2 Role of Regional Trade Agreements

As noted in Section 3.1, the regional dimension of economic diplomacy has intensified throughout the years due to scepticisms of the multilateral order system. In 2019, ASEAN became the largest recipient of FDI in the developing world at US$182 billion, which constitute 13.7% of global FDI. In 2020, investment remained resilient at 137 billion despite the COVID-19 pandemic.[501] While ASEAN has concluded numerous FTAs with other countries, the CPTPP and RCEP are by far the most prominent regional FTAs in recent years, both of which include elements of patent rights regulation.

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[498] IPOS is the first ASEAN MS patent office to be as an ISA and IPEA on September 2014. For the list of ISA and IPEA Agreements with patent offices, see: World Intellectual Property Organization, "ISA and IPEA Agreements," accessed November 14, 2022, https://www.wipo.int/pct/en/access/isa_ipea_agreements.html.

[499] For the list of patent offices and the delays in meeting time limits, see: World Intellectual Property Organization, "Time Limits for Entering National/Regional Phase under PCT Chapters I and II," June 7, 2022, https://www.wipo.int/pct/en/texts/time_limits.html.

[500] For further details on the PCT-ASPEC, see: ASEAN Intellectual Property Portal, "ASEAN Patent Examination Co-Operation (ASPEC): Document Submission Guideline."

[501] The ASEAN Secretariat and United Nations Conference on Trade and Development, *ASEAN Investment Report 2020-2021: Investing in Industry 4.0* (Jakarta, Indonesia: ASEAN Secretariat, 2021), XVII, https://asean.org/wp-content/uploads/2021/09/AIR-2020-2021.pdf.

i. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

The CPTPP is an FTA which came into force on 30 December 2018. The agreement incorporates, by reference, provisions of the original Trans-Pacific Partnership Agreement ("TPP") which never came into force. The final text of the CPTPP is largely identical to the TPP with setting out the incorporations and suspensions.[502] The agreement aims to lower barriers to trade in goods and services and the Contracting parties pledge to eliminate nearly all tariffs and import charges, and accept common obligations ranging from digital economy to environmental protections, and is currently signed by eleven Asia-Pacific countries. The Commission constitutes government representatives of each Contracting Party,[503] who will each name a rotating chair for the Commission meetings.[504] The Commission meets once a year and adopts decisions, recommendations, and interpretations by consensus among the Contracting Parties unless otherwise stated in the agreement.[505]

As part of the accession process, interested economies are first encouraged to engage informally with all CPTPP Signatories before submitting a formal request. They are then required to notify New Zealand as the CPTPP depositary of their formal request, to start the accession negotiations.[506] The CPTPP Commission will then determine whether to commence the process in accordance with Art. 27.3 (Decision making) and 27.4 (Rules of Procedure of the Commission), in

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[502] The TPP never entered into force upon the US's withdrawal. See e.g.: Matthew P. Goodman, "From TPP to CPTPP," March 8, 2018, https://www.csis.org/analysis/tpp-cptpp; Office of the United States Trade Representative, "The United States Officially Withdraws from the Trans-Pacific Partnership," United States Trade Representative, January 2017, http://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.
[503] Art. 27.1, *CPTPP*.
[504] "Decision by the Commission of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Regarding Administration for Implementation of the CPTPP," January 19, 2019, http://www.sice.oas.org/tpd/tpp/Implementation/CPTPP_Dec_001_e.pdf.
[505] Art. 27.4.1, *CPTPP*.
[506] See: "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accession Process," accessed November 14, 2022, http://www.sice.oas.org/tpd/tpp/Implementation/CPTPP_Dec_002_Anx_e.pdf. Several countries have applied to join the CPTPP, which include the UK and China. Other APEC economies including South Korea, Thailand, and Indonesia, and Latin American and South Asian economies including Colombia, Bangladesh and Sri Lanka have similarly expressed interest. See e.g.: New Zealand Foreign Affairs & Trade, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accessions," accessed November 14, 2022, https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Consultation-Outcome-Summary-Final.pdf; Kirsty Needham, "No Consensus yet on China Joining Regional Trade Pact - Singapore PM," *Reuters*, October 18, 2022, https://www.reuters.com/world/asia-pacific/no-consensus-yet-china-joining-regional-trade-pact-singapore-pm-2022-10-18/.

parallel with ongoing consultations, and whether an Accession Working Group should be established. The Accession Working Group would then submit a written report to the Commission, where the report constitutes a consensus within the Accession Working Group.

Of the eleven Contracting Parties to the CPTPP, Brunei, Malaysia, Singapore, and Viet Nam are the only ASEAN MS. The CPTPP also suspends most of the IP-related clauses in the original TPP, and reaffirms the Doha Declaration in that Contracting Parties should not be prevented from taking measures for the purposes of protecting public health.[507] As highlighted in previous sections, the CPTPP requires its Contracting States to accede to or ratify to the PCT, Paris Convention, and Budapest Treaty. The CPTPP also requires Parties to give due consideration to ratifying or acceding to the PLT, or adopt or maintain procedural standards consistent with the objectives laid down by the PLT.

One of the contentious issues under the current CPTPP relates to the necessity of setting up patent linkages, which is carried out by connecting marketing approvals for generic pharmaceutical products to the patents covering the original drug.[508] This process allows makers of generic pharmaceutical products to plan their sales without infringing upon the patent, and allows the patentee to intervene and prevent marketing approvals from being issued. Contracting States need to ensure that a patentee holding a pharmaceutical patent must be notified of the generic version of the product that has been submitted for market approval, and ensure sufficient time and opportunity for the patentee to seek preliminary injunctions before the generic version enters the market. The biggest criticism against the patent linkage system is the resulting delayed entry of the generic drug in the market due to infringement proceedings and thus suspending the registration process, affecting access to affordable medicines. On this, the early working requirement commonly referred to as the "Bolar exception," consistent with Art. 30 of the TRIPS Agreement, has been implemented in national laws.[509] Prior to the CPTPP, only Singapore had a patent linkage system in place which was similar

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[507] Art. 18.6, *CPTPP*.
[508] Art. 18.53, *CPTPP*.
[509] See: Roche Products, Inc. v. Bolar Pharmaceutical Co., Inc. (733 F.2d 858, 1984), which was overturned by the Hatch-Waxman Act shortly. The European Commission challenged Canada based on Art. 30 of the TRIPS Agreement where the WTO Panel in 2000 concluded that the Canadian Bolar exception was consistent with Art. 30 of the TRIPS Agreement. See also: Carlos M. Correa, "The Bolar Exception: Legislative Models and Drafting Options," Research Paper (Geneva, Switzerland: South Centre, March 2016), https://www.southcentre.int/wp-content/uploads/2016/03/RP66_The-Bolar-Exception_EN1.pdf; Bryan Mercurio, ed., "Patent Linkage," in *Drugs, Patents and Policy: A Contextual Study*

procedurally and substantively to that of the US, including the 30 month automatic injunction period.[510] By ratifying the CPTPP, Brunei, Malaysia and Viet Nam are now required to implement the system, but could adopt the alternative provided under the CPTPP which is to maintain the system through means other than judicial proceedings or direct coordination between the market approval authority and the patent office.[511]

Another contentious issue relevant to patent rights protection lies in the availability of investor-state dispute settlement ("ISDS") mechanisms, which allows an investor to initiate arbitration against the Contracting Party under Chapter 9, Section B of the CPTPP.[512] The disputing parties are required to engage in consultation and negotiations for six months prior to commencing arbitration. The arbitration proceedings would be carried out under the International Centre for Settlement of Investment Disputes ("ICSID") regime, or any other institution or arbitration rules that the claimant and respondent agree on.[513] Brunei, Malaysia, and Viet Nam have each signed side letters with New Zealand to exclude the direct application of the ISDS provisions, and any dispute that would otherwise be subject to ISDS would need to comply with a similar procedure as Section 9B's first tier dispute resolution clause.[514] In order for the second tier, the commencement of arbitration to function, the respondent state must also consent to the application of Chapter 9. For Brunei, if the government does not provide the consent, then bilateral consultations with New Zealand may be held.

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of Hong Kong (Cambridge: Cambridge University Press, 2018), 183–209, https://doi.org/10.1017/9781108615235.008.

[510] Section 12A, *Medicines Act, 1975.*

[511] Art. 18.53(2), *CPTPP.*

[512] See also: *Rules of Procedure under Chapter 28 (Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.*

[513] Art. 9.19, *CPTPP.*

[514] See: New Zealand Foreign Affairs & Trade, "New Zealand – Brunei: ISDS," Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources, March 8, 2018, https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/New-Zealand-Brunei-ISDS.pdf; New Zealand Foreign Affairs & Trade, "New Zealand – Malaysia: ISDS," Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources, March 8, 2018, https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/New-Zealand-Malaysia-ISDS.pdf; New Zealand Foreign Affairs & Trade, "New Zealand – Viet Nam: ISDS," Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources, March 8, 2018, https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/New-Zealand-Viet-Nam-ISDS.pdf.

ii. Regional Comprehensive Economic Partnership (RCEP)

The RCEP is a regional FTA between all ASEAN MS and six ASEAN FTA countries, namely Australia, People's Republic of China, India, Japan, New Zealand, and the Republic of Korea. RCEP entered into force on 1 January 2022, and builds upon the existing ASEAN FTAs to deepen economic integration in the region. The core of the RCEP is also to eliminate or reduce customs duties for trade in goods, strengthen regional value chains, and enhance inter and intra-regional trade and investment. Notably, RCEP countries as a whole make up for 65% of all total worldwide patent applications in 2020.[515] According to Nguyen et al, negotiations of the RCEP has led to the stalling of the ASEAN integration process since "most of the RCEP negotiators have been the same trade officials in charge of ASEAN trade," but that when ASEAN returns to the blueprints with the conclusion of the RCEP, subsequent efforts would likely transcend what has been achieved in the AEC.[516]

Chapter 11 of the RCEP addresses the protection of IPR and recites the preamble of TRIPS: to reduce distortion and impediments to trade, but specifically through promoting deeper economic integration and cooperation through effective and adequate protection of IPR. Similar to the CPTPP, RCEP affirms the Doha Declaration in the protection of public health (Art. 11.8), requires Contracting Parties to ratify or accede to the Paris Convention and PCT, and endeavour to ratify or accede to the Budapest Treaty (Art. 11.9). Contracting Parties are also encouraged to adopt the Strasbourg patent classification system (Art. 11.47). As for settlement of IP disputes, the clauses are largely in line with TRIPS standards – fair and equitable procedures, damages, court fees, destruction of infringing goods and materials and implements, confidential information in civil judicial proceedings, and provisional measures (Art. 11.59-11.64).

In comparison with the "leaked" draft text dated 15 October 2015 released by Knowledge Ecology International, accession to the PLT, worldwide novelty, and patent term restoration are no

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[515] According to WIPO stats, 3,276,700 patents were filed worldwide in 2020, and RCEP members have filed 2,152,054 patents in total for the same year. Lao PDR and Myanmar however does not have a figure on the numbers of patent granted. See: World Intellectual Property Organization, "WIPO IP Statistics Data Center," WIPO IP Portal, November 2021, https://www3.wipo.int/ipstats/.

[516] Nguyen, Elms, and Lavanya, "The ASEAN Trade in Goods Agreement," 25–26.

longer present in the final agreement.[517] As compared to the CPTPP, requirements under the RCEP is comparatively less stringent. The reason can possibly be observed from the fact that all ASEAN MS are parties to this agreement, and how the ASEAN Way emphasised consensus, whereas only four ASEAN MS are in the CPTPP and thus are capable of agreeing to more stringent requirements.[518]

4.1.3 Bilateral Agreements

Apart from the region-wide cooperative agreements as detailed in Chapter 2.1 and 2.2 of this dissertation, ASEAN as a regional grouping has entered into several cooperative arrangements for work-sharing and accelerated processing in the national phase with other IP offices.

i. Recognition of Foreign Patents

Cambodia has been validation state to the EPO since 1 March 2018.[519] This means that a European patentee will have the option of validating their patent in Cambodia without filing for a national patent in Cambodia. The European patent will also have the same effect as a national Cambodian patent, subject to Cambodian patent law, subject to the following conditions: (i) the claims of the patent must be translated into Khmer language and submitted within three months from the publication of the grant of the European patent, and (ii) for pharmaceutical patents, Cambodia which is classified as an LDC is allowed to waive the grant and enforcement until 2033.[520]

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[517] Scholarly works prior to the signing of the RCEP has centred predominantly on the leaked text and analysis of the stringent requirements. For the draft text, see: "2015 Oct 15 Version: RCEP IP Chapter," Knowledge Ecology International, 2016, https://www.keionline.org/node/2472. For scholarly works on the draft text, see e.g. Peter K Yu, "The RCEP and Intellectual Property Normsetting in the Asia-Pacific," *Texas A&M Law Scholarship*, 2017, 91–107.

[518] On the history of negotiating the RCEP, see e.g.: Aladdin D. Rillo, Anna Maria Rosario D. Robeniol, and Salvador M. Buban, "The Story of RCEP: History, Negotiations, Structure, and Future Directions," in *Regional Comprehensive Economic Partnership (RCEP): Implications, Challenges, and Future Growth of East Asia and ASEAN*, ed. Fukunari Kimura, Shandre Thangavelu, and Dionisius Narjoko (Economic Research Institute for ASEAN and East Asia, 2022), 2–11, https://www.eria.org/uploads/media/RCEP-Monograph-Launch-14-March-2022-FINAL.pdf.

[519] *Declaration (Prakas) №282 MIH/2017.*

[520] Despite the waiver, applicants can still utilise the "mailbox system" under TRIPS to file patent applications for pharmaceutical products, which will be stored and examined after the exemption has been lifted. See also: European Patent Office, "Validation of European Patents in Cambodia (KH) with Effect from 1 March 2018," February 9, 2018, https://www.epo.org/law-practice/legal-texts/official-journal/information-epo/archive/20180209.html.

ii. Patent Prosecution Highway Programs

Patent offices have entered into bilateral agreements to promote work-sharing and accelerated processing of patent applications, where local patent examiners can utilise the work of other patent offices. The plurilateral Global Patent Prosecution Highway ("GPPH") pilot programme was also launched in January 2014 to enable accelerated processing at any participating patent office, with the Japan Patent Office serving as the Secretariat of the programme. Among 27 participating offices however, only one ASEAN MS patent office, IPOS, is part of the GPPH.[521]

Apart from the GPPH, many ASEAN MS patent offices have entered into bilateral agreements through different patent prosecution highway programs. For example, the Intellectual Property Corporation of Malaysia (MyIPO) has existing PCT-PPH agreements with the China National Intellectual Property Administration ("CNIPA"), EPO, JPO, and the Korean Intellectual Property Office ("KIPO"). The Intellectual Property Office of the Philippines ("IPOPHL") has agreements with EPO, JPO, KIPO, and the USPTO, whereas IPOS has agreements with CNIPA, EPO, and the National Institute of Industrial Property (Brazil).[522]

4.2 Increased Integration Entails Erosion of the ASEAN Way

In order to attain the objectives under the AEC, the biggest challenge for ASEAN is to transform normative aspirations into effective implementation. ASEAN recognizes the pivotal role of innovation in the growth mechanisms of developing countries and the importance of moving up the global value chain to improve its competitiveness internationally in the long-run.[523] With many ASEAN MS seen only as a destination for the manufacturing of cheap goods where workers do little other than bolting together products innovated elsewhere, or engage in low-end assembling that have little technological innovative value. To move up the global value chain, ASEAN MS needs to develop and continue to spur

[521] Japan Patent Office, "Global PPH," PPH Portal, accessed November 17, 2022, https://www.jpo.go.jp/e/toppage/pph-portal/globalpph.html.
[522] "PCT-Patent Prosecution Highway Program (PCT-PPH and Global PPH)," accessed November 17, 2022, https://www.wipo.int/pct/en/filing/pct_pph.html.
[523] Chia and Plummer, *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions*, 38.

innovative capabilities to advance high technology-based R&D innovation.[524] Accordingly, an ASEAN patent system would help foster ASEAN's innovative capabilities through incremental innovation on foreign technologies, and a common standard would also lift less developed MS in its technological transformation while reducing administrative costs.

To develop an ASEAN patent system, ASEAN needs to continue its stride towards greater legalisation, which would gradually erode the effects of the ASEAN Way. The former Secretary General of ASEAN, Severino, has also called for ASEAN MS to undertake more legally binding agreements to promote cooperation in various fields to manage the integrated economy and transboundary issues,[525] and criticised the overemphasis on the principle of non-interference as a solely ASEAN affair when "in fact this principle underpins the entire inter-state system."[526] Corthay has also noted that the principle of non-interference simply "cannot be assigned to a regional customary legal value" within the ASEAN region.[527]

Thus, the best option for ASEAN to attain its goals under the AEC would be through a centralised form of integration to effectively tackle administrative, monitoring, and other regulatory issues.[528] ASEAN needs to have a greater emphasis on the rule of law and developing formalised institutions and regulatory frameworks,[529] and continued reliance inter-state dialogue and

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[524] Jusof and Kam notes the importance of complementing the ASEAN IPR Action Plan with a comprehensive regional IP protection framework in ASEAN's negotiation policies to enable spur technology transfer, and introduce a regional IP protection system to harmonise standards in ASEAN IPR Action Plan to enable the free movement of goods and services under the AEC. See: Sufian Jusoh and Jia Yi Andrew Kam, "A Macro Analysis of Intellectual Property Rights in ASEAN Countries" (Kuala Lumpur: Southeast Asia Network for Development, April 2016), 18–20, http://ideas.org.my/wp-content/uploads/2017/03/PP_seanet_08_final.pdf.
[525] "Report of The Secretary-General of ASEAN to the 32nd ASEAN Ministerial Meeting Singapore, 22-24 July 1999," Association of Southeast Asian Nations, 2012, https://asean.org/?static_post=report-of-the-secretary-general-of-asean-to-the-32nd-asean-ministerial-meeting-singapore-22-24-july-1999-2.
[526] Rodolfo C. Severino, "No Alternative to Regionalism, by Rodolfo C. Severino, Jr.," ASEAN, August 1, 1999, https://asean.org/no-alternative-to-regionalism-by-rodolfo-c-severino-jr/.
[527] Corthay, "The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention," 39.
[528] Pelkmans, *The ASEAN Economic Community: A Conceptual Approach*, 11.
[529] Citing EU's development of the automotive market, Dieter notes that the integration processes could not have occurred "without the creation of a single regulatory sphere." See: Heribert Dieter, "Transnational Production Networks in the Automobile Industry and the Function of Trade-Facilitating Measures," *Notre Europe*, no. 58 (2007): 17, https://institutdelors.eu/wp-content/uploads/2020/08/automobileindustrydieternejune07-1.pdf. Ewing-Chow and Tan also pointed out that under the ASEAN Comprehensive Investment Agreement, ASEAN also sought to improve the ""transparency and predictability of investment rules, regulations and procedures conducive to increased investment among member states," which would help to provide clarity on the investments and dispute

coordination, which while diplomatic and beneficial, imposes a high opportunity cost for ASEAN.[530] Thus, in line with the AWGIPC's Mid Term Review of the ASEAN IPR Action Plan 2016-2025 in June 2021[531] to conduct a "feasibility study on an ASEAN Patent System," and considering the fact that the AEC aims to build a regional community through strengthening its institutions, reference can be made to other similar regional arrangements and how their patent systems build on the territorial nature of patents.

Among existing regional patent systems, prominent regional arrangements include the Organisation Africaine de la Propriété Intellectuelle ("OAPI"), the African Regional Intellectual Property Organization ("ARIPO"), the Eurasian Patent Convention, the European Patent Convention[532] ("EPC") and the unitary patent system, the GCC, and the Andean Community. These regional patent systems can be roughly divided into three groups – centralised patent systems with patent prosecution and adjudication mechanisms (Unitary Patent and Unified Patent Court), centralised patent prosecution (ARIPO, EAPO, EPO, GCCPO, and IAPO), and a common patent legislation (Andean Community) to be applied by the judicial and administrative bodies.

The rationale underlying a regional approach to patent protection has been to fulfil the regional economic integration goals to reduce barriers to trade and reduce administrative costs. In the case of EAPO, the EAPO President notes that successful operation of a regional system of registration of IP has been a key achievement in the development of Eurasian integration as it reduces the costs of innovative businesses within the region and reduces barriers to mutual trade arising from the territorial nature of IP rights.[533] Notably, a Eurasian common patent system was raised to be

resolution processes available. The codification would also provide comfort and assurance for investors that abrupt changes in policies by the government is unlikely. See: Ewing-Chow and Tan, "The Role of the Rule of Law in ASEAN Integration," 8.

[530] See e.g. Asian Development Bank, *Toward a New Pacific Regionalism: An Asian Development Bank-Commonwealth Secretariat Joint Report to the Pacific Islands Forum Secretariat*, Pacific Studies Series (Pacific Islands Forum, Mandaluyong City, Metro Manila, Philippines: Asian Development Bank, 2005), xix, https://www.adb.org/sites/default/files/publication/28797/pacific-regionalism-vol2.pdf.

[531] Association of Southeast Asian Nations, "The ASEAN Intellectual Property Rights (IPR) Action Plan 2016-2025: Updates to the ASEAN IPR Action Plan (Version 2.0)," 6.

[532] *Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000.*

[533] See e.g. Eurasian Patent Organisation, "Grigory Ivliev: The Logic of the Development of Regional Law Is Especially Relevant in Connection with the Idea of the Greater Eurasian Partnership," September 13, 2022, https://www.eapo.org/en/index.php?newspress=view&d=1406.

attached as an addendum to a proposed economic union treaty in 1990,[534] and under discussion now is the establishment of a common association for Eurasian patent attorneys, and supranational judicial systems through a court system and arbitration.[535] The importance of regional patent protection in economic development is also underlines the Lusaka Agreement establishing the African Regional Intellectual Property Organization (ARIPO), and Agreement Relating to the Creation of an African Intellectual Property Organization establishing the OAPI. The Southern African Development Community (SADC), and the African Union's aspiration of implementing "an integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance" in the Agenda 2063, the First Ten-Year Implementation Plan 2014-2023 also prioritises the creation of the African Economic Community and a Pan-African Intellectual Property Organisation ("PAIPO") for a United Africa.[536]

Among all regional approaches to patent protection, the EU model has been referred to as the most advanced form of regional integration. Scholars have underscored the advantages of the unified patent system in comparison to the current EPC system: reduction of costs required for patent enforcement when the alleged infringement occurs across several EU MS, ensure a uniform application of substantive patent law, avoid conflicting decisions by on different portions of the same European patent, and ensure EU-wide recognition and enforcement of the decision.[537]

Understanding EU's establishment of the unified patent system could serve as meaningful reference for ASEAN.[538] First, the creation of the unified patent system in the EU aims to address problems associated with cross-border patent infringement, and to remove remaining trade barriers to complete the formation of the regional single market.[539] This is in line with the aims under the AEC,

[534] Eurasian Patent Organisation, "EAPO: A History of Establishment and Development."
[535] Eurasian Patent Organization (EAPO), "Development of Eurasian Integration in IP Was Discussed at the Legal Forum," July 1, 2022, https://www.eapo.org/en/index.php?newspress=view&d=1364.
[536] See e.g. United Nations Economic Commission for Africa, African Development Bank, and African Union, *Assessing Regional Integration in Africa VIII*, 145–49; Southern African Development Community, "SADC Needs to Improve and Enforce Intellectual Property Rights Frameworks and Regulations | SADC."
[537] See e.g. Roberto Romandini and Alexander Klicznik, "The Territoriality Principle and Transnational Use of Patented Inventions – The Wider Reach of a Unitary Patent and the Role of the CJEU," *International Review of Intellectual Property and Competition Law* 44, no. 5 (2013): 526.
[538] Deinla, *From ASEAN Way to the ASEAN Charter*, 17–22.
[539] Plomer has argued that instead of facilitating the completion of a single market under Art. 3(3) of the TEU, the UPCA formally fractures the EU market between the participating states and the non-participating states; cf. Aurora Plomer, "The Unified Patent Court and the Transformation of the European

which seeks to remove trade barriers and strengthen IP protection. Second, the unified system not only involves the issuance of patents with unitary effect through a regional patent office, but also establishes a unified patent court that has exclusive jurisdiction over the patents. If the unified system comes into effect, the scale and scope of protection conferred by the unified system will be unprecedented in any regional economies, and will demonstrate the issues that ASEAN should anticipate. Third, the EU remains the forerunner in the global development of regional patent laws, and has a more developed body of statutory laws and cases with regards to patent protection, in addition to the volume of patent applications received and processed by the EPO ("European Patent Office") which outnumbers the applications received by all other regional patent offices combined.[540]

Hence, this section first provides an overview of the EU unitary patent system, advantages of the system, and whether the same is applicable to the context of ASEAN. This is further followed by a feasibility assessment of ASEAN's extraterritorial application of national patent laws, and the applicability of an ASEAN private international law system. Overall, this section seeks to underscore the challenges that ASEAN MS may encounter should ASEAN seek to heighten efforts on patent protection beyond the ASEAN Way.

4.2.1 Centralised Patent System – EU's Unitary Patent Package

The EU's unified patent system is created by the "unitary patent package" which consists of two EU Regulations and an international agreement: the Regulation 1257/2012,[541] which creates the Unitary Patent or "European patent with unitary effect"; Regulation 1260/2012,[542] which establishes a language regime applicable to the unitary patent; and the Agreement on a Unified Patent Court ("UPCA"), an intergovernmental agreement signed on 19 February 2013 which sets up the Unified

Patent System," *IIC - International Review of Intellectual Property and Competition Law* 51, no. 7 (September 1, 2020): 791–96, https://doi.org/10.1007/s40319-020-00963-6.

[540] According to WIPO IP Statistics Data Centre for the year 2020, EPO has granted 133,706 patents in total. In contrast, the GCCPO granted a total of 753 patents, the OAPI 580 patents, and 443 patents for ARIPO. For the compilation of all patent granting statistics, see: World Intellectual Property Organization, "WIPO IP Statistics Data Center," WIPO IP Portal, 2020, https://www3.wipo.int/ipstats/.

[541] *Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.*

[542] *Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.*

Patent Court ("UPC"). In addition to the unitary patent package, Rules relating to Unitary Patent Protection published by the EPO on April 2022,[543] along with the Rules of Procedure for the UPC which has entered into force on 1 September 2022,[544] are applicable under the unified patent system. The two regulations implemented enhanced cooperation, a procedure under the TEU[545] and the TFEU[546] which allows nine of more EU MS to attain greater integration without involving the non-participating MS. As of the writing of this dissertation, Spain and Croatia are the only non-participating MS, and the UK is no longer a participating MS as of 31 January 2020. Both regulations will also be applicable from the date of entry into force of the UPCA, despite being in force since 20 January 2013.

The unitary system required at least 13 EU MS to ratify the UPCA,[547] including Germany, France, and Italy which had the highest number of European patents in 2012.[548] As of the writing of this dissertation, 17 EU MS have ratified the UPCA, and introduction of the system is expected to take place on 1 June 2023. The new system will coexist with the current European patents issued by the EPO and national patents, covering 24 EU MS that have opted in under the enhanced cooperation, and not all EU MS. Secondary legislation on the unitary patent, particularly with regards to the Rules relating to Unitary Patent Protection and Rules relating to Fees for Unitary Patent Protection, will also enter into force on the same date.

The unitary patent system enables the EPO to issue patents with unitary effect on all participating EU MS, and thus provide patentees with territorially broad and uniform protection. Under the new system, a Unitary Patent will be tried once and for all before the UPC. In comparison,

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543 *Rules relating to Unitary Patent Protection as adopted by decision of the Select Committee of the Administrative Council of the European Patent Organisation of 15 December 2015 and as last amended by decision of the Select Committee of the Administrative Council of 23 March 2022.*

544 *Rules of Procedure of the Unified Patent Court as adopted by decision of the Administrative Committee on 8 July 2022.*

545 Art. 20, *TEU*.

546 Art. 326-334, *TFEU*.

547 Participating EU MS would still need to ratify the UPCA on top of participating in the Enhanced Cooperation. As of the writing of this dissertation, 16 states have already ratified the UPCA. For details on the declarations/reservations by each participating MS, see: European Council, "Agreement on a Unified Patent Court (UPC)," 2021, https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/.

548 UK was originally designated to be one of the three EU MS required to ratify the unitary patent system, but was replaced by Italy due to UK's exit from the EU. See: Udo Bux, "The Unified Patent Court after Brexit" (Policy Department for Citizen's Rights and Constitutional Affairs, March 2020), 1–2, https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649575/IPOL_ATA(2020)649575_EN.pdf.

the current classic European patent under the EPC requires patentees granted with a bundle of national patents to initiate parallel proceedings across EU MS. In order to obtain a unitary patent, the applicant would undergo the same procedures as applying a classic European patent, and then decide to opt-in for unitary effect within one month after grant through a "Request for Unitary Effect" which would be free of charge.[549] Whether double protection may be conferred through obtaining a unitary patent and a national patent is left to the respective national laws.[550] The unitary patent requires no further validation at the national level and patentees will only need to pay a single renewal fee to the EPO.

Through the unified patent system, the single market in EU is projected to be strengthened and become more attractive to innovators through the removal of bureaucratic obstacles, extra costs, and the legal uncertainty of having more than 25 legal systems across participating states.[551] The process towards creating a unitary system has been lengthy and arduous, beginning with the Community Patent Convention in 1975 ("CPC 1975"),[552] the Luxembourg Agreement in 1989,[553] the Community Patent Regulation from 2000-2004,[554] and reinvigorated negotiations on a unitary patent

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[549] Rule 5-7, *Rules relating to Unitary Patent Protection as adopted by decision of the Select Committee of the Administrative Council of the European Patent Organisation of 15 December 2015 and as last amended by decision of the Select Committee of the Administrative Council of 23 March 2022.*

[550] Recital 26, *Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.*

[551] European Commission, "The Unitary Patent System," Internal Market, Industry, Entrepreneurship and SMEs, 2022, https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/patent-protection-eu/unitary-patent-system_en.

[552] The CPC 1975 aimed to create a unitary title for the whole European Economic Community, merging the bundle of patent rights by the EPO into a single, unitary, autonomous right. The failure of this convention may be attributed to the costly translation requirements to be made in the national language of each MS, and the uncertainties associated with the dispute settlement system. While this convention never came into effect as it failed to be ratified by all nine intended Contracting States, its provisions on substantive patent law were widely adopted into national laws. See: *Convention for the European Patent for the Common Market 76/76/EEC (15 December 1975)*; Christopher Wadlow, "An Historical Perspective II: The Unified Patent Court," in *The Unitary EU Patent System*, ed. Justine Pila and Christopher Wadlow (United Kingdom: Hart Publishing, 2014), 34.

[553] *Agreement relating to Community patents 89/695/EEC (15 December 1989), OJ L4011/1 (30 December 1989)*. As per Art. 1(4) of the Luxembourg Agreement, the agreement was intended to replace the 1975 Convention. The failure of this agreement was again, attributed to legal uncertainty with litigation as national courts were able to revoke a Community patent throughout the Community. In addition, as the Community has expanded from nine members to twelve members, problems associated with the translation arrangements were further aggravated. Eventually, the agreement never came into force as it was not ratified by all of the signatories. See: Pieter Callens and Sam Granata, *Introduction to the Unitary Patent and the Unified Patent Court: The (Draft) Rules of Procedure of the Unified Patent Court* (The Netherlands: Kluwer Law International, 2013), 8–9.

[554] This proposal aims to create a system that provides for community patents through the force of a regulation, and proposed a radical reduction to the required translations as compared to the CPC 1975.

in 2009.[555] However, due to insurmountable difficulties among EU MS in reaching a consensus on the applicable language, twelve MS proceeded to advance with the unitary patent under the Enhanced Cooperation provision.[556] This initiative was then joined by 13 other MS, making the total party to 25.[557]

Prior to the creation of a unitary patent system, the Convention on the Grant of European Patents of 5 October 1973 ("EPC") established the EPO, an intergovernmental organisation entrusted to grant European patents. The EPC system provides for a cheaper option to obtain a bundle of national patents through a single application, which can be filed in any of the three official languages of the EPO. However, as the bundle of national patents must be enforced in the national courts of different MS, the need to initiate parallel proceedings becomes costly, time-consuming, opens up doors for forum-shopping, and may produce inconsistent decisions on the same European patent.[558] The bundle of national patents are also required to be validated in separate national patent offices, which may have additional validation requirements such as submitting a translation of the patent in the official language of the country which the applicant seeks protection.[559] As a result, the EPC continues to fragment EU common market, and the need to remove the erected barriers to intra-Community trade has been recognized and culminated in a series of initiatives to create a unitary patent and unitary enforcement system.

The proposal also entailed the setting up of a "Community Patent Court", a judicial panel under the CJEU. However, this proposal ultimately failed due to disagreements on the language regime. See: Art. 11, 44, *Proposal for a Council Regulation on the Community patent, COM (2000) 412 final OJ C337 E (28 November 2000)* 278-90; Wadlow, "An Historical Perspective II: The Unified Patent Court," 35–36.
[555] *Proposal for a Council Regulation on the European Union Patent, Council Doc 16113/09 ADD 1 (27 November 2009).*
[556] Under the TEU, Art. 43-45 provides for the Enhanced Cooperation provision. Enhanced Cooperation is a procedure that may be invoked when a minimum of nine EU countries establish advanced integration or cooperation in an area within EU structures, but may be evoked only as a last resort when the objectives cannot be attained within a reasonable period. The Enhanced Cooperation provision also allows other EU countries to opt-in at a later stage.
[557] The 25 MS include all 28 EU MS excluding Spain, Croatia, and Poland. Although Poland was a participant in the Enhanced Cooperation, Poland eventually announced that it will not sign or ratify the UPCA in 2013. See: Marek Lazewski, "Whatever Happened to Polish Support for Unified Patent Package," AIPPI e-News, 2013, https://www.aippi.org/enews/2013/edition30/Marek_Lazewski.html.
[558] Infra Chapter 4.2.1(v)(i) of this dissertation.
[559] Rosa Maria Ballardini, Marcus Norrgård, and Niklas Bruun, "European Patent Law: The Case for Reform," in *Transitions in European Patent Law: Influences of the Unitary Patent Package*, ed. Rosa Maria Ballardini, Marcus Norrgård, and Niklas Bruun (The Netherlands: Kluwer Law International, 2015), 6.

The introduction of the unitary patent under the existing EPC framework does not modify the framework of the EPC. Part IX of the EPC[560] was established to accommodate the CPC 1975, where the legal, technical and institutional framework to establish a unitary patent is provided under the existing EPC system. The unitary system also limits the substantive jurisdiction of the CJEU, and strives to maintain a specialist, supranational tribunal as the primary first and last instance court across the European patent field.[561] While questions on how the unitary patent system would take shape and how the unitary patent court would function remains as the regional patent system moves into uncharted territories, there are some aspects to the system that may be ascertained through the legal instruments forming the system.

i. Unified Patent Court Agreement

There are five main purposes in the creation of the UPCA, as provided in the recital:[562] (1) to further European integration, the establishment of the single market and free movement of goods and services (first recital); (2) to address the difficulties experienced by SMEs in enforcing their patents and defending themselves against unfounded claims (second recital); (3) to ensure the uniformity of the European legal order and the primacy of EU law (eight to thirteenth recitals); (4) to provide a court system in which unitary patents can be litigated (fourth recital); and (5) to create a single unified court across UPC states (second recital, fifth to seventh recitals). The substantive provisions of the UPCA are organized into five parts, which are further divided into different chapters. Part I (Chapters I-III, Arts. 1-35) contains general and institutional provisions; Part II (Arts. 36-39) deals with financial provisions and budgeting for the court, Part III (Arts. 40-82) contains organisational and procedural matters, Part IV (Arts. 83) is concerned with transitional provisions, and Part V (Arts. 84-89) contains final provisions. Part I to III are the vital provisions for the practice of the court.

[560] Art. 142(1) under Part IX of the EPC expressly empowers a group of Contracting States to provide by special agreement that European patents granted for them may have unitary character throughout their territories. Although the Regulations are secondary EU law, the Regulations on the unitary patent are qualified as "special agreements." See: Stefan Luginbuehl, "An Institutional Perspective I: The Role of the EPO in the Unitary (EU) Patent System," in *The Unitary EU Patent System*, ed. Justine Pila and Christopher Wadlow (United Kingdom: Hart Publishing, 2014), 50.
[561] Justine Pila, "An Historical Perspective I: The Unitary Patent Package," in *The Unitary EU Patent System*, ed. Justine Pila and Christopher Wadlow (United Kingdom: Hart Publishing, 2014), 17.
[562] Colin Birss et al., *Terrell on the Law of Patents*, 18th ed. (London: Sweet & Maxwell, 2017), 870–71.

Under the UPCA, Art. 1 provides that a Unified Patent Court shall be established "for the settlement of disputes relating to European patents and European patents with unitary effect." For European patents, there is a transitional period of seven years, which can be further extended for another seven years to allow actions for infringement or revocation to be brought before national courts.[563] Opting out of the UPC's competence is also possible by notifying the Registry of the UPC unless an action has already been brought before the UPC.[564] The UPCA sets up the Unified Patent Court ("UPC") as an institution with various parts[565] – the Court of First Instance, with its seat in Paris and a section in Munich, and which divided into local and regional divisions;[566] a single Court of Appeal situated in Luxembourg; and a Registry[567] which is based in Luxembourg but with sub-registries in all divisions of the Court of First Instance.[568] The central first instance division is divided between Paris, London, and Munich as according to technical subject matter.[569] The UPC also has exclusive competence over classical European patents[570] and unitary patents,[571] but the right holders of European patents may choose to opt-out from the jurisdiction of the court during the transitional period of 7 years, or at the latest 14 years if the transitional period is extended.

When hearing a case brought before the UPC, the court relies on the following sources of law:[572] (1) Union law, which includes Regulation 1257/2012 and Regulation 1260/2012, (2) the UPCA, (3) the EPC, (4) other international agreements applicable to patents and binding on all Contracting MS, and (5) national law,[573] The Rules of Procedure on the Unified Patent Court guides the conduct of

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[563] Art. 83(1), *UPCA*.
[564] Art. 83(3) and (4), *UPCA*.
[565] Art. 6, *UPCA.*
[566] Arts. 6-8, *UPCA.*
[567] Art. 10, *UPCA.*
[568] See: European Patent Office, "Unified Patent Court," October 6, 2022, https://www.epo.org/applying/european/unitary/upc.html.
[569] Art. 7(2), *UPCA.*
[570] Art. 2(e) of the UPCA defines a "European patent" as a patent granted under the EPC, which does not have unitary effect.
[571] Art. 2(f) of the UPCA defines a "European patent with unitary effect" as a patent granted under the provisions of the EPC which has from unitary effect. For the purpose of this dissertation, the term "unitary patent" is used synonymously in the context of the European system.
[572] Art. 24(1), *UPCA.*
[573] Under Art. 24(2) of the UPCA, in the event where national law is applied, the applicable law will be determined through provisions of EU law containing private international law rules (Art. 24(2)(a)), or international instruments containing private international rules if there are no directly applicable provisions of Union law (Art. 24(2)(b)), or in the absence of both EU law and international instruments, national provisions on private international law will be applied (Art. 24(2)(c)). Under Art. 24(3), the law

the UPC,[574] but the provisions of the UPCA and the Statute[575] prevails. Rules relating to Unitary Patent Protection also guides the procedures to be conducted at the EPO with regards to the relevant EU regulations. Provisions on direct infringement,[576] indirect infringement,[577] limitations to the effect of patents,[578] prior use,[579] and exhaustion[580] are also detailed under separate provisions.

International jurisdiction of the UPCA is provided under Art. 31, which is established in accordance with Regulation 1215 /2012,[581] commonly known as the Brussels I Regulation. As there are no provisions on private international law under the UPCA, the UPC is only able to deal with cases which fall under the regulation. Art. 32 of the UPCA provides for the actions that may be brought to the UPC which includes actions for infringement, revocation, and declaratory judgements. Under Art. 32(1)(d) of the UPC, revocation can only be brought in the Central Division unless agreed otherwise by the parties. Art. 33 further specifies the divisions of the UPC where actions may be brought – whether with the local/regional divisions, or in the central division. A defendant may raise a counterclaim for invalidity during a proceeding, which may be heard in a different division. For instance, if an action is brought before the local or regional division, the division may choose to proceed with the infringement action and refer the invalidity counterclaim to the central division.[582]

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of non-contracting States may also be applicable, in particular in relation to infringement (Art. 25-28), burden of proof (Art. 54-55), corrective measures (Art. 64), award of damages (Art. 68), and the period of limitation for financial compensation (Art. 72).

[574] Art. 41, *UPCA.*

[575] The Statute of the UPC refers to the Annex 1 of the UPCA.

[576] Art. 25, *UPCA.*

[577] Art. 26, *UPCA.*

[578] Art. 27, *UPCA.*

[579] Art. 28, *UPCA.*

[580] Art. 29 of the UPCA provides for the exhaustion of rights concerning a European patent in contrast to a unitary patent. The exhaustion of rights conferred by a unitary patent is provided in Art. 6 of Regulation 1257/2012. Art. 29 specifically points to the exhaustion of a European patent, and as affirmed by the CJEU under Art. 36 of the TFEU, the use of national rights to hinder the import of products voluntarily placed within the EU market impedes the free movement of goods. Thus, by providing that exhaustion occurs by virtue of one European patent, the UPCA prevents a patentee who has voluntarily put a product on the EU market from relying on the exclusive right conferred by another EU MS to prevent the importation of the good to that latter MS.

[581] *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

[582]Art. 33(3)(b), *UPCA.* Art. 33(3) provides that local and regional divisions may exercise discretion over whether to proceed with both infringement and invalidity counterclaim, or transfer only the counterclaim to the central division, or refer the entire case to the central division.

The Statute of the UPCA, which forms Annex 1 of the UPC Agreement, provides for the details of the organization and functioning of the court. The statute includes the appointment of judges and provisions about the Registry, and the institutional and financial arrangements for the UPC as a functioning institution. The statute may also be amended by a decision of the Administrative Committee as long as the amendment does not contradict the UPCA.[583]

ii. Regulation 1257/2012[584]

Regulation 1257/2012 provides for the creation of unitary patents which will be granted by the EPO. A European patent which is granted with the same set of claims in all participating MS would be able to benefit from unitary effect as long as the unitary effect is registered in the Register for unitary patent protection.[585] Under the regulation, the EPO will among all, receive and examine requests for unitary effect, register the European patent for unitary effect, publish translations during the transitional period, maintain a "Register for Unitary Patent Protection," and collect and distribute annual renewal fees to participating EU MS.[586] Unitary patents have the effect of providing uniform protection and equal effect in all participating MS through a single patent. Unitary patents can be amended, transferred, revoked, or lapse in respect of all MS at once. However, they can be licensed in the same way as national patents. The regulation is also expressed to be without prejudice to the application of competition law and the law relating to unfair competition.[587]

Under this regulation, the participating states are required to set up a Select Committee of the Administrative Council of the EPO.[588] The Select Committee will ensure the governance and supervision of several tasks, in particular the adoption of the Implementing Rules dealing with the

[583] Art. 40(2), *UPCA.*

[584] *Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.*

[585] Art. 3, *Regulation 1257/2012.*

[586] The EPO has published a breakdown of the renewal fees for the unitary patent in comparison with obtaining a patent from all 25 EU MS: total cost for a unitary patent for 20 years would be EUR 35,555, whereas renewing separate European patents in all EU MS would add up to EUR 160,633. See: European Patent Office, "Renewal Fees," Cost of a Unitary Patent, September 5, 202AD, https://www.epo.org/applying/european/unitary/unitary-patent/cost.html.

[587] Art. 15, Regulation *1257/2012.*

[588] Art. 9, Regulation *1257/2012.*

details of tasks entrusted to the EPO, and setting of the level of renewal fees for the unitary patent and their distribution among the participating states.

iii. Regulation 1260/2012

Regulation 1260/2012 deals with languages for unitary patents. While no further translation is required in order to bring the patent into effect once the European patent is published in the appropriate language at the EPO, an alleged infringer may be entitled to request the patentee to produce a full translation of the patent into a relevant local language in the event of a dispute.[589] The relevant local language may be the official language of either the state where the alleged infringement took place, or where the alleged infringer is domiciled. Machine translations developed by the EPO will help improve access to patent information and widely disseminate technological knowledge. The machine translations however, do not have any legal effect and serve information purposes only. There is a transitional period before a system of high quality machine translations into all official languages of the Union becomes available, where the development of high quality machine translations is set to not exceed 12 years from the date of application of the regulation.[590] A request for unitary effect where the language of the proceedings before the EPO is French or German needs to be accompanied by a full translation of the specification of the patent into English, or translation into any other official language of the Union if the language of the proceedings before the EPO is English.[591] The translated text however has no legal effect.[592]

The current system under the EPC enables patentees to obtain a bundle of national patents through a single application, the unified system will include the issuance of a unitary patent and the establishment of a regional patent court. The rationale behind the establishment of regional patent systems are similar:[593] to reduce the impediment to which national patents pose to trade, to lower

[589] Art. 4, *Regulation 1260/2012.*
[590] Art. 6(5), *Regulation 1260/2012.*
[591] Art. 6(1), *Regulation 1260/2012.*
[592] European Patent Office, *Unitary Patent Guide: Obtaining, Maintaining and Managing Unitary Patents*, 2nd ed., 2022, 18.
[593] EAPO was created to "reduce barriers to mutual trade arising from the territorial nature of intellectual property rights and reduce the costs of innovative business in the Eurasian space." See: Eurasian Patent Organisation, "Grigory Ivliev: The Logic of the Development of Regional Law Is Especially Relevant in Connection with the Idea of the Greater Eurasian Partnership." Notably, the Eurasian common patent

cost and inefficiency of maintaining national patent systems, and the impediment to which national patents pose to trade, rise in intellectual academic interest in supranational patent systems, and the existence of competing patent initiatives.[594]

iv. Patent Mediation and Arbitration Centre

In addition to the creation of the UPC, the Agreement stipulates the creation of a new Patent Mediation and Arbitration Centre situated in Ljubljana and Lisbon. Under the UPC Agreement, PMAC will provide facilities for the mediation and arbitration of patent disputes falling within the scope of the UPC agreement. It is yet to be settled whether PMAC will also administer patent disputes outside the exclusive competence of the UPC, or other types of disputes related to patents. PMAC will have its own mediation and arbitration rules, and is expected to draw up a list of potential mediators and arbitrators to assist parties in the resolution of their disputes.

v. Advantages of the Unified Patent System

There are several advantages associated with the creation of a unified patent system in the EU. The advantages include the strengthening of the EU's common market, enabling cross-border infringing activities within the EU to be held accountable, and increasing legal certainty in patent disputes.

(i) Strengthening of the European Union Common Market

As provided under the first recital of the UPCA, the purpose of creating a unitary patent system is to further European integration in the establishment of the single market and the free movement of goods and services. The urge to unify industrial property rights and remove barriers to trade gave rise to proposals in creating a world patent or a European patent as early as 1909.[595] Recognizing that the territorial nature of the patent system as running counter to the vision of a union and the smooth

system was proposed to be attached as an addendum to a proposed economic union treaty in 1990. See: Eurasian Patent Organisation, "EAPO: A History of Establishment and Development."

[594] Justine Pila, "The European Patent: An Old and Vexing Problem," *International and Comparative Law Quarterly* 62, no. 4 (October 2013): 919–20, https://doi.org/10.1017/S0020589313000304.

[595] Per Von Holstein, "International Co-Operation in the Field of Patent Law with Special Reference to the Activities of the Council of Europe," *The International and Comparative Law Quarterly* 16, no. 1 (1967): 196.

functioning of a common market, the recitals of the Treaty of Rome[596] have explicitly provided for the common action between EU MS to eliminate barriers which divide Europe, and the progressive abolition of restrictions on international trade. The critical point to the project is the creation of the EPO, which played a pivotal role in the administration and grant of European patents, but remains an autonomous international organization legally detached from the EU. Even with the EPO in ensuring uniformity in granting patents under the EPC, the decentralized and independent national patent systems still maintain and enforce the granted patent rights. Applicants are required to pay annual renewal fees to both the EPO and each designated MS where the patent is protected, and action needs to be initiated in each MS's court system separately. As European patents are enforceable only through national law in each separate country, this causes inconsistent legal decisions for the same patent within different national markets. Different decisions concerning the infringement of patent rendered by national courts are not binding on another EU MS as well.

While the substantive patent laws have been harmonized, the EPC still leaves room for the interpretation of each MS, which results in contradictory judgments. An illustrative example would be the *Epilady* case: A European patent was granted for the invention of a depilatory device under the name "Epilady."[597] When a rival device entered the UK and German markets, the patentee sought preliminary injunction in both jurisdictions. However, despite relying on the same Protocol on Interpretation[598] to interpret the same European patent, both courts still arrived at different conclusions and rendered divergent judgments.

When brought before the German District Court (Landgericht of Dusseldorf), the court adopted a two question analysis: whether the rubber rod of the rival device had an identical effect to the helical spring in the patent claim, and whether the rubber rod would have been obvious to a person skilled in the art.[599] The German court found that a person skilled in the art would interpret the "helical spring" broadly as not just a spring per se, but also encompasses other cylinder-shaped elastic

[596] *Treaty Establishing the European Economic Community.*
[597] David Perkins and Garry Mills, "Patent Infringement and Forum Shopping in the European Union," *Fordham International Law Journal* 20 (1997 1996): 567–71.
[598] *Protocol on the Interpretation of Article 69 EPC of 5 October 1973.*
[599] *Improver Corp. & Sicommerce AG v. Remington Products Inc., Case No. 2 U 27/89 OLG 1991.*

element with gaps, and given the equivalency, the court found that there was an arguable case for patent infringement and granted preliminary injunction. On the other hand, the English Patents Court discharged the granted preliminary injunction by the German District Court. The English court adopted a three-question analysis – whether the variant has a material effect on the invention, would the variant have been obvious to a reader skilled in the art, and whether said reader would have understood from the language that the patentee intended strict compliance with the primary meaning. The court then held that a skilled person in the art would not have understood the "helical spring" in a wide generic sense, and would understand that the patentee intended the phrase "helical spring" to be confined to its literal meaning.[600] The differences in claim interpretation by national courts as illustrated by the *Epilady* case posed as a barrier to further harmonisation of patent laws.

The inadequacies of the European patent system resulting in the fragmentation of the single market and the high costs associated with obtaining parallel patents have also formed the basis in reshaping the patent system. This realization is reflected in the promulgation of the TFEU in 2007, which is one of the two treaties forming the detailed basis of EU law. Art. 118 of the treaty provides that the European Parliament and the Council shall "establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements." The Europe 2020 Strategy, a ten-year strategy proposed by the European Commission in 2010, has identified the creation of an economy based on knowledge and innovation to attain smart, sustainable, and inclusive growth. In particular, the strategy seeks to remove barriers for entrepreneurs to bring "ideas to market" through affordable IPR protection, and notes that the knowledge markets need to become less opaque and fragmented through initiatives "on a European scale for maximum efficiency and to take advantage of economies of scale and scope."[601] Noting that economic growth is driven by investments in intangible assets, key action 7 under the Single Market

[600] *Improver Corp. & Others v. Remington Consumer Products Ltd. & Others, [1990] F.S.R. 181*. It is worth noting that the UK Supreme Court has reconsidered the approach in *Epilady* as illustrated in *Eli Lilly v. Actavis UK Ltd & Ors [2017] UKSC 482017*. See: L.T.C. Harms, *A Casebook on the Enforcement of Intellectual Property Rights*, 4th ed. (Switzerland: World Intellectual Property Organization, 2018), 102, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_791_2018.pdf.

[601] European Commission, *Europe 2020 Flagship Initiative Innovation Union*, SEC(2010) 1161 (Luxembourg: Publications Office of the European Union, 2011), 5, 21.

Act II[602] also underscored the importance of improving the business environment through the adoption of unitary patent protection. The subsequent Single Market Strategy further adopts a "follow the money" approach to respond to the cross-border nature of infringement to disrupt the revenue flow of commercial-scale infringers, and projected that the "full implementation of the Unitary Patent will lead to a gain of 0.25% in EU GDP.[603]

(ii) Enlarged Jurisdiction to Hold Cross-Border Infringing Activities Accountable

As per the second recital of the UPCA, the unified patent court aims to address difficulties faced by SMEs in enforcing their patents and defending themselves against unfounded claims. To illustrate the effectiveness of the unitary patent system in resolving infringement, this section adopts the categorization of cross-border infringement as proposed by Suzuki:[604] (1) cross-border transactions where the offer to sell occurs at a different country than the eventual manufacturing and sale, which may further involve additional parties; (2) the exportation of components to a foreign country, which is then assembled into an product deemed infringing in the exporting country; and (3) the importation of components from a foreign country to be assembled into an infringing product in the importing country. In all of the cases illustrated below, country A is a Contracting State to the UPCA, and country B is not a Contracting State to the UPCA nor the EPC. Product S is a product infringing upon a unitary patent, and the action is raised in the UPC, where the applicable law to the dispute are the UPCA and other relevant laws of the EU.

In the first case, the place where the offer to sell takes place and whether the act of manufacturing and sale is carried out by a third party constitute the points of contention. Accordingly, four scenarios may result, and this paragraph first adopts the offer to sell in country A as the constant variable. First, party X offers to sell product S to party Y in country A, but manufactures and sells the

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[602] "Single Market Act II: Twelve Priority Actions for New Growth," European Commission: Press Release, 2012, http://europa.eu/rapid/press-release_IP-12-1054_en.htm.

[603] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions: Upgrading the Single Market: More Opportunities for People and Business," COM(2015) 550 final § (2015), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0550.

[604] Masabumi Suzuki, "国境をまたがる行為と特許権の間接侵害の成否," *パテント 2014* 67, no. 12 (2014): 116.

product to party Y in country B, which is not covered by the unitary patent. Second, party X offers to sell product S in country A, but the manufacturing is carried out by party Z in country B, where the manufactured product S is then sold to party Y in country B.

In the first scenario, party X would be held liable under Art. 25(a) of the UPCA, as the offer to sell without the patentee's consent within the territory of the Contracting States constitutes an infringement against the direct use of the invention. In the second scenario, Art. 25(a) would also hold party X liable through the offer to sell. As for party Z, there are no provisions under the UPCA to hold foreign manufacturing activities accountable. However, the UPC may be able to establish secondary jurisdiction over party Z under Art. 31 of the UPCA, which determines the international jurisdiction of the Court based on the Brussels I Regulation. The regulation has been further amended by Regulation 542/2014 ("Brussels I Regulation recast") in May 2014, which states that the UPC may be competent to rule on damages suffered outside the territory of the Contracting States resulting from the infringement of a European patent, subject to several conditions. For instance, suppose that party Z is domiciled in Turkey.[605] Party Z needs to first be sued before the UPC for an infringement on a European patent occurring within the territory of the UPC. Once the jurisdiction of the court is established, then and only then will the UPC consider the infringing actions occurring in Turkey in awarding damages to Party X. This is known as the "long-arm jurisdiction" under the UPC, which is further contingent upon whether property belonging to the defendant is located in one of the UPC participating MS, and if the dispute has sufficient connection with any such MS.[606] As noted by Pila and Torremans, the regulation requires sufficient connection to provide safeguards against the extension of jurisdiction to a foreign defendant that does not act or commit direct action in or towards the jurisdiction, such as manufacturing a patented product in a country where there is no patent

[605] Turkey is used as an example in this case as it is a member state to the EPO where the classical European patent applies, but not a participating state to the unified patent system. Other states like Turkey include Albania, Norway, Serbia, and Switzerland.

[606] Art. 71(b)(3) of the Brussels I Regulation recast provides that the UPC may find jurisdiction over infringement upon a European patent which occurs outside the jurisdiction of the UPC. This means that the statutory extension of jurisdiction is not compulsory, and the UPC may decline jurisdiction for other reasons such as *forum non conveniens* when there is a more appropriate forum available to the parties.

protecting the product, and the product imported into a contracting state where the patent is in force by an independent distributor.[607]

In the third scenario, party X offers to sell product S to party Y in country B, but manufactures and sells the product to party Y in country A. In the fourth scenario, party X offers to sell product S in country B, but the manufacturing is carried out by party Z in country A, where the manufactured product S is then sold to party Y in country A. Party X in the third scenario and party Z in the fourth scenario thus directly infringes upon the patent in country A for the manufacturing of the infringing good. In the fourth scenario however, the question of whether party X may be found liable for offering to sell in country B arises. Art. 25 (a) of the UPCA which provides for the right to prevent the direct use of the invention does not explicitly state that the offer needs to occur within the territory of the Contracting MS. This is in contrast to Art. 25(b), which explicitly states that the offering a process which is the subject matter of a patent for use needs to occur "within the territory of the Contracting Member States in which that patent has effect". However, it remains unclear if the statutory language may be broad enough to include offers occurring outside the territory, and whether party X may be found liable in the case above.

As for the second case, party X in country A supplies component(s) to party Y in country B to be assembled into product S. In this case, party X may be found liable under Art. 26(1) and 26(2) of the UPCA for supplying or offering to supply within the territory of the Contracting MS if the component(s) do not constitute a staple commercial product. Whether or not the act of putting the invention into effect occurs within country is irrelevant in this case.

For the third case, party X in country B supplies a component to party Y in country A, to be assembled into product S. There are no provisions in the UPCA directly prescribing the act of supplying components from overseas as an act of infringement. Similar to the second scenario in the first case, the "long-arm jurisdiction" under the Brussels I Regulation recast may find secondary jurisdiction if the supplier is domiciled in a country under the EPC, is brought to an action before a UPC court, has property in any of the UPC Contracting States, and that the act of supplying has sufficient connection

[607] Justine Pila and Paul Torremans, *European Intellectual Property Law* (United Kingdom: Oxford University Press, 2016), 639–40.

with the case before the UPC. In any case, the mere act of supplying of components from abroad does not affect the functioning of the single market as the components circulating in the single market are not infringing unless a party assembles the components into an infringing product.

As illustrated by the above three scenarios, the unified patent system provides some form of legal certainty and relief through an enlarged jurisdiction in holding cross-border patent infringing acts accountable within the region. More can be observed once the unified patent system is put into action.

(iii) Reducing Legal Uncertainty

Under the UPCA, the eighth to thirteenth recitals provide for ensuring the uniformity of the European legal order and the primacy of EU law. With a distinct judicial body to rule upon issues on patents, the system will ensure the consistency of case laws and provide legal certainty to the user of the system. The UPC as a common court with an international jurisdiction would resolve many of the disputes arising from actions occurring within the territories of the contracting states. In determining disputes concerning contractual obligation that falls within the subject matter jurisdiction of the UPC, the UPC may also have jurisdiction over the person sued if the obligation is to be performed in any of the contracting states.

In resolving cross-border litigation, in addition to the substantive laws, the procedural uncertainties in both litigation and arbitration generally centres on issues concerning jurisdiction, preliminary injunction, choice of law, and enforcement of the judgement. Jurisdiction concerns the appropriate forum to where the proceedings should take place, and whether the selected dispute resolution mechanism is competent to rule on the legal issues of the case. Only once jurisdiction is established can one turn to the competence of the court, which will determine the subject matter jurisdiction, concerning the infringement and validity issues surrounding both European patents and unitary patents.[608] Preliminary injunction concerns whether the affected parties will be able to rely on the concession of injunctions when a patent infringement takes place. The choice of law refers to

[608] Pila and Torremans, 634.

the applicable law(s) to a proceeding, and the enforcement of the decision determines whether the judgement will ultimately be recognized.

Under the current system, several national courts and authorities of the EU MS may assume jurisdiction over infringement and validity proceedings concerning European patents, which leads to higher costs and diverging decisions. The Brussels Convention[609] provides that action be brought before the courts of the defendant's domicile, or the state in which an infringing product was manufactured or sold in breach of a national patent. This results in forum shopping as the patentee may sue the infringer in the court of the infringer's domicile or in the place of infringement, choosing the most opportune court.[610]

When actions are initiated in parallel across different jurisdictions, the aforementioned uncertainties and complexities associated amplifies substantially. Through the UPC, the uncertainties are minimized as the UPC may establish jurisdiction on infringing activities occurring within the contracting states, order preliminary injunctions when necessary, has a clear hierarchy on the sources of law, allows for the consolidation of several conflicts and infringing actions into a single procedure, and will be enforceable in all contracting states. In addition, the judges in a proceeding at the UPC will be multinational, and include at least one technically qualified judge.[611] While there are still legal uncertainties associated with the UPC, the consolidation of infringing actions spread across the territories of UPC Contracting States into one proceeding avails at least some of the uncertainties associated in initiating parallel proceedings across different jurisdictions. However, if an opposition proceeding were to be raised in the EPO in parallel with revocation proceedings in the UPC, the decision of the UPC will not be binding.

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[609] *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 285/1 (1989).*
[610] John Gladstone III Mills, "A Transnational Patent Convention for the Acquisition and Enforcement of International Patent Rights," *Journal of the Patent and Trademark Office Society* 88 (2006): 549–602; Kevin P. Mahne, "A Unitary Patent and Unified Patent Court for the European Union: An Analysis of Europe's Long Standing Attempt to Create a Supranational Patent System," *Journal of the Patent and Trademark Society* 94, no. 2 (2012): 168; James Tumbridge, "Unified Patent Court: Harmonising Patent Law Throughout Europe," *Business Law International* 15, no. 1 (2014): 66.
[611] Art. 8, *UPCA.*

4.2.2 Viability of a Unified Patent System in Southeast Asia

There are marked differences between the EU and ASEAN's path towards integration. The process of European integration was carried out through a progressive construction of institutional architecture, legal framework, and supplemented by a wide range of policies, hard and soft law instruments. Post-war European patent initiatives was also a "combination of economic, political, intellectual, and psychological motivations," which included a conscious decision to promote a political federation.[612] ASEAN on the other hand, as a regional organisation with a high degree of "discreetness, informality, pragmatism, expediency, consensus-building, and non-confrontational bargaining styles"[613] served solely as a forum for discussion on security matters.

Arguably the most substantive difference between the EU and ASEAN integration lies in the administration of the rule of law – EU's integration is driven by the supremacy of the Community law, grant of rule-making powers to the competent organs, and judicial interpretation of treaty provisions.[614] This process entails the surrendering of some aspects of sovereignty, but the combination of laws and institutions enabled the functioning of the rule of law towards economic integration and accountability of EU's institutions. ASEAN however is limited in that respect. EU's legal methodology for IP is also one which study "techniques by which European institutions pursue their legitimate legal and constitutional objectives, or at least, those techniques by which such institutions purportedly exercise their legal and constitutional authority."[615] Constricted by the ASEAN Way, ASEAN as a regional organisation is unable to empower regional institutions to interpret treaties, and an ASEAN legal methodology never had a chance to develop.

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[612] Pila, "The European Patent: An Old and Vexing Problem," 920.
[613] Amitav Acharya, "Ideas, Identity, and Institution-Building: From the 'ASEAN Way' to the 'Asia-Pacific Way'?," *Pacific Review* 10, no. 3 (1997): 329.
[614] Higgott described ASEAN's initiative as "de facto market driven regional economic integration," whereas EU has been "de jure institutional cooperation and policy coordination." See: Richard Higgott, "The Politics of Economic Crisis in East Asia: Some Longer Term Implications," *CSGR Working Paper No. 02/98*, March 1998, https://doi.org/10.2139/ssrn.146971.
[615] Justine Pila, "Constitutionalized Doctrine of Precedent and the Marleasing Principle," in *The Europeanization of Intellectual Property Law*, ed. Ansgar Ohly and Justine Pila (United States of America: Oxford University Press, 2013), 231.

However, establishment of the unified patent system constitute an initiative to complete the EU single market, which ASEAN could draw lessons from in creating ASEAN's own single market and production base. Prior to the unified patent system, the EPC was established to strengthen cooperation between European states to protect inventions through a single procedure for patent granting.[616] Under the EPC, patentees are granted a bundle of national patents which requires further validation at the local level, along with the need to initiate parallel proceedings before national courts to enforce their rights. Thus, national courts of the EPC MS could apply different rules and approaches to patent infringement, and this fragmented process drew criticisms that the process is inimical to Europe's welfare as it results in fewer innovative activities and lower economic growth.[617] The unified patent system, while marked by several failed initiatives,[618] was still preferable to the EPC. AS pointed out by Pila, there are four motivations on the shift: cost and inefficiency of maintaining national patent systems, impediments to which national patents pose to trade, rise in intellectual academic interest in supranational patent systems, and the existence of competing patent initiatives.[619]

Further, the unified patent system would also address the ongoing issue with backlog of patent examination in some ASEAN MS, due to difficulties in recruiting technical experts and mandatory language translations, among all. For example, the granting of a utility solution patent by Viet Nam's NOIP is not much different from an invention patent due to the ongoing backlog.[620] However, the real problem of the backlog lies with the resulting downstream issues. Using Thailand as an example, the EU Commission report in 2021 notes a severe patent backlog where the duration of patent examination lasts on average 10-12 years, covering up a large part of the 20 year patent term.[621] Due to limited resources and facilities to test the patentability aspects, a claimed invention

[616] Preamble, *EPC*.
[617] Pottelsberghe, *Lost Property: The European Patent System and Why It Doesn't Work*, IX:5–6.
[618] For an overview on the history of the European patent system, see e.g,: Steve Peers, "The Constitutional Implications of the EU Patent," *European Constitutional Law Review* 7, no. 2 (June 2011): 229–66, https://doi.org/10.1017/S1574019611200051; Aurora Plomer, "A Unitary Patent for a (Dis)United Europe: The Long Shadow of History," *International Review of Intellectual Property and Competition Law* 46, no. 5 (2015): 508–33.
[619] Pila, "The European Patent: An Old and Vexing Problem," 919–20.
[620] Hien Thi Thu Vu and Mai Thi Le, "Pharmaceutical IP and Competition Law in Vietnam: Overview," Thomson Reuters Practical Law, December 1, 2020, http://uk.practicallaw.thomsonreuters.com/0-560-3825?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[621] European Commission, "Commission Staff Working Document: Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries," 49.

granted by a foreign patent office is also almost guaranteed a patent right in Thailand.[622] The resulting outcome is significant: in 2006 and 2007, the Thai government issued government use licenses for three patents, efavirenz, Merck's anti-HIV drug, ('Stocrin'); lopinavir/ritonavir ('Kaletra') also ARV distributed by Abbott Lab; and clopidogrel (Plavis), anti-clotting drug sold by Sanofi-Aventis and BMS, all three patents which according to Kuanpoth should not have been issued in the first place.[623] Lopinavir was a combination of two existing products, and clopidogrel as a composition of matter patent which include claims over a polymorph should not have been deemed a patentable invention.[624] To remediate the backlog situation, the Department of Intellectual Property ("DIP") also outsources patent search processes to foreign patent offices including the Australian Patent Office, fees to be borne by the applicant. This however, creates a language issue as patent applications are required to be drafted in Thai.

Drawing from the EU experience, rather than viewing the lack of binding legal instruments as an impediment, ASEAN's underpowered institutions allow ASEAN more room to decide their mode of integration. The creation of the UPC under the Enhanced Cooperation had its fair share of challenges - Italy and Spain lodged a complaint with the European Court of Justice ("ECJ"), claiming that the creation of the UPC as contrary to the spirit of the single market. The complaint was dismissed by the ECJ,[625] and Italy ultimately proceeded to ratify the unitary patent package later. However, Spain persisted in challenging Regulation 1257/2012 as delimiting the scope of EU law in the administrative procedure of granting a European patent, and Regulation 1260/2012 on the basis of the language arrangement which Spain perceived as prejudicial to individuals whose language is not one of the official languages of the EPO.[626] These are lessons that illustrate the complexities involved in creating

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[622] Kuanpoth lists several factors that lead to the lack of experienced patent examiners, including uncompetitive salary paygrade and limits to budget flexibilities since the Department of Intellectual Property is not an autonomous organisation. See: Jakkrit Kuanpoth, "Patents and the Emerging Markets of Asia: ASEAN and Thailand," in *Emerging Markets and the World Patent Order*, ed. Frederick M. Abbott, Carlos M. Correa, and Peter Drahos (United Kingdom: Edward Elgar Publishing, 2013), 318.
[623] Kuanpoth, 319–20.
[624] Kuanpoth, 319–20.
[625] Judgement of the Court (Grand Chamber), 16 April 2013, *Kingdom of Spain v European Parliament and Council of the European Union*, *C-274/11* and *C-295/11, ECLI:EU:C:2013:240.*
[626] This was also dismissed by the ECJ. See" Judgement of the Court (Grand Chamber), 5 May 2015, *Kingdom of Spain v European Parliament and Council of the European Union*, *Case C-146/13, ECLI:EU:C:2015:298*; Judgement of the Court (Grand Chamber), 5 May 2015, *Kingdom of Spain v European Parliament and Council of the European Union*, *Case C-147/13, ECLI:EU:C:2015:299.*

a system under the EU due to the constraints of the available legal instruments, and drawing from EU's experience, ASEAN can tease out the shortcomings.

Apart from the rule of law or lack thereof, another differentiating factor that ASEAN needs to take into consideration is the economic inequality between its MS, arguably a North-South divide in play within the very region itself. Severino has rightly noted the following: "the only thing worse than a two-tier ASEAN is a two-tier Southeast Asia – a progressive ASEAN and a lagging portion of Southeast Asia."[627] Patents are potentially anti-innovative in that developing countries simply do not have the capabilities, institutions, and endowments as in developed countries.[628] The adoption of stronger IPRs increases the profitability of more developed foreign firms at the expense of domestic producers, widening the technical barrier and economic gap among countries.[629] The technology-divide between developed and developing countries is believed to be further exacerbated by the high rents exacted by technology exporters, leaving developing countries in a worse condition than before.[630] If however, ASEAN decides to establish a unified patent system in Southeast Asia, the first step would be the establishment of a regional patent office. This would include detailing the substantive, procedural, and administrative aspects to ensure the proper functioning of the office.

First, in order for the ASEAN patent office to begin issuing unitary patents applicable throughout the region, an applicable patent legislation needs to be established. As noted by Gallini and Scotchmer, there are three most important features in the protection of intellectual property: length, breadth, and standard for protection.[631] The length determines the duration where the protection is afforded; the breadth refers to the scope of the protection; and the standard of protection points to the minimum standard to be met in order to receive protection. Hence, the patent legislation will

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[627] Statement made by Severino, cited in Alice D Ba, *(Re)Negotiating East and Southeast Asia: Region, Regionalism, and the Association of Southeast Asian Nations* (Stanford, Calif.: Stanford University Press, 2009), 130.
[628] Reichman and Dreyfuss, "Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty," 94.
[629] Dongwook Chun, "Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome," *Journal of Patent and Trademark Office Society* 93, no. 2 (2011): 161.
[630] Carlos M. Correa, "Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?," in *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, trans. Keith E. Maskus and Jerome H.H. Reichman (Cambridge University Press, 2005), 229–32.
[631] Nancy Gallini and Suzanne Scotchmer, "Intellectual Property: When Is It the Best Incentive System?," in *Innovation Policy and the Economy, Volume 2*, ed. Adam B. Jaffe, Josh Lerner, and Scott Stern (United States: MIT Press, 2002), 70–73.

include provisions on the standards for patentability, patentable subject matter, publication of inventions, grace period, and compulsory licensing. While the TRIPS Agreement established certain minimum standards, states still retain wide discretion in the interpretation and implementation for the standards, and as negotiation of the RCEP has demonstrated, key global standards such as the standard of worldwide novelty are no longer in place.

As explored in Chapter 2.2 of this dissertation, the efforts carried out within ASEAN MS have been geared towards streamlining administrative procedures, interoperability between patent offices, and work-sharing programmes, rather than focusing directly on the harmonization of substantive laws.[632] In order for an ASEAN patent office to issue unitary patents that are enforceable throughout the region, ASEAN MS would need to first agree on a patent legislation that will define the standards of protection of the unitary patent.

In contrast to other IP rights cases (i.e. copyright, trademarks, and trade secrets), patent rights are strictly registered rights and the validity of such right is often contested. A patent may be declared invalid for any defect in any of the following separate requirements: disclosure, utility, novelty, non-obviousness, and patentable subject matter. In view of the varying national standards for these requirements, ASEAN MS may reach inconsistent results on the same cause of action, and patent cases involving infringement, national differences in claim interpretation determine whether claims are to be read literally or with a view to include "equivalent" features.

While the establishment of a common standard may appear to be difficult in Southeast Asia, there is still a possibility for the substantive patent laws between ASEAN MS to converge and align with globally recognised standards. Maintenance of certain standards under a multilateral trade framework would not be sustainable in the long run – an ASEAN MS granting patents based on novelty standards limited to within their country for instance, allowing for bad faith or predatorial filing

[632] In a speech delivered by Mr. Tan Yih San, the chief executive of the Intellectual Property Office of Singapore, he stressed the need for interoperability of patent offices and not harmonization of patent laws. While the harmonization of substantive laws may occur indirectly through work-sharing programmes, unless the statutory laws of ASEAN MS are harmonized, internal differences will still remain. See: Ng, "ASEAN IP Harmonization: Striking the Delicate Balance," 158–60; "Speech by Mr Tan Yih San, Chief Executive of IPOS at the NUS Centre for Business and Law," Intellectual Property Office of Singapore, 2014, https://www.ipos.gov.sg/MediaEvents/Readnews/tabid/873/articleid/290/category/Speeches/parentId/80/year/2014/Default.aspx.

attempts based on the publication of an invention outside of the country, would lose out on investments, technology transfer, and R&D prospects. Another hope for the different substantive patent laws in ASEAN MS is that while different ASEAN MS provide for different criteria in the patentability of subject matters, that does not signify that any invention that embodies the excluded subject matter may not be patentable. The invention may include parts which constitute subject matter(s) that are deemed excluded from patentability, but the invention as a whole could still be patentable if it fulfils the standards of patentability. Drahos has pointed out that patent offices do not necessarily stop granting patents to inventions that are excluded from patentable subject matter, as evidenced by the EPO offices in granting patents on software.[633] In the case of Malaysia for instance, Sec. 13(1)(a) of the Malaysian Patents Act 1983 excludes from patentable subject matter "discoveries, scientific theories and mathematical methods." While a computer program closely resembles a mathematical method as it contains a set of instructions to control a sequence of operations of a data-processing system, which may render it not patentable, it may still be considered patentable if it makes a technical contribution to the prior art.[634]

Second, the procedural aspects of an ASEAN patent system would include the documentary requirements for patent filing, application for patent examination, and prior art search and examination processes. While both the PCT and ASEAN's regional initiatives have streamlined the patent application process, the language utilised in patent-filing however, still varies in each ASEAN MS. Prior initiatives by the EU in establishing a unitary patent system would illustrate this problem: the CPC 1975 and the Luxembourg Agreement 1989 were both unsuccessful due to the burdensome language regime. The CPC 1975 required patent claims to be translated into the languages of all MS, and that individual states reserved the right to demand specifications to be translated into their own language for the patent to take effect in their territory, which greatly increases the costs of patent

[633] Peter Drahos, *The Global Governance of Knowledge* (United Kingdom: Cambridge University Press, 2010), 64–65.

[634] MyIPO's guidelines for patent examination notes that "any exclusion from patentability (…) should be regarded as applying only to the extent to which the application relates to the excluded subject-matter as such", and that "it is necessary to identify and assess the real contribution which the subject-matter claimed, considered as a whole, adds to the prior art." See: Intellectual Property Corporation of Malaysia, "Guidelines for Patent Examination in the Intellectual Property Corporation of Malaysia" (Malaysia, October 2011), 20, https://drive.google.com/file/d/0B526dR6VYUv-ajNES1ZseGl3Uzg/view?resourcekey=0-rHzMz62jaG8azt1Ciu9xhA.

filing.[635] The Luxembourg Agreement on the other hand, requires patentees to translate specifications of the patent as a whole rather than mere patent claims into an official language of each MS,[636] which however, still proved to be costly with the expanding Community membership.[637]

Among ASEAN MS, Cambodia, Indonesia, Lao PDR, Thailand and Viet Nam require patent filing to be made or translated into the local language, and most MS requires the representation of a local agent in the filing process, which further racks up the costs for obtaining parallel patents. One of the ways ASEAN MS may overcome this problem is to designate a single working language for the application of unitary patents. Since English has been the working language for ASEAN cooperation, this could minimize the need for translations. Similar to the unified patent system, full translation can be requested for a relevant local language in the case of an infringement.

The costs of obtaining a unitary patent in Southeast Asia also need to be ascertained. Burk has pointed out that under the EPC, EPO applicants with a bundle of national patents typically choose to forgo all but three or four jurisdictions, which are Germany, France, the Netherlands, and the United Kingdom.[638] Recognizing that the costs of a unitary patent may deter applicants from applying for unitary patents, the Select Committee of the Administrative Council of the EPO made a conscious decision to keep the costs of renewing a unitary patent as competitive as possible, and similar to the costs of obtaining European patents and validating them in the aforementioned four countries.[639] Similarly, the costs of obtaining a patent in Southeast Asia needs to be competitive, and must at the very least be lower than the costs of obtaining and maintaining patents from all ten MS.

Third, the administrative aspects of the ASEAN patent office will involve discerning the legal status, duties and scope of duties of the body running the patent office, the management of the different divisions, the overseeing administrative body, and financial provisions. Given ASEAN's

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[635] Art. 14, 33, and 88, *CPC 1975*.
[636] Art. 30, *Luxembourg Agreement*.
[637] Pila, "An Historical Perspective I: The Unitary Patent Package," 12.
[638] Dan L. Burk, "Patents and Related Rights: A Global Kaleidoscope," in *The Oxford Handbook of Intellectual Property Law*, ed. Rochelle C. Dreyfuss and Justine Pila (New York, United States of America: Oxford University Press, 2018), 462, https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198758457.001.0001/oxfordhb-9780198758457-e-32.
[639] "Business-Friendly Fee Pattern Adopted for the Unitary Patent," European Patent Office, 2015, https://www.epo.org/news-issues/news/2015/20150624.html. See

record on "pooling sovereignty" to establish supranational institutions, [640] and the wide developmental and economic gap between ASEAN MS, it is foreseeable that ASEAN MS would need to overcome significant hurdles to emulate the unitary patent package approach.

i. Establishing an ASEAN Patent Office

The challenges for ASEAN in instituting a unified patent system does does not exclude the possibility of instituting an ASEAN patent office per se. A patent with unitary effect may be issued by an ASEAN patent office as long as the patent examination process involves a unified or harmonized standard for patentability, namely novelty, inventive step / obviousness, industrial applicability, the issuance of unitary patents is possible. The ASEAN unitary patent will be able to cover all infringing activities occurring within the region, enabling courts to hold intra-ASEAN manufacturing activities accountable, and provide greater legal certainty. Procedurally, WIPO has also published a policy guide which provides alternatives for patent search and examination, distinguishing it to three main categories: (i) formality examination only, (ii) formality examination and prior art search, and (iii) formality examination, prior art search, and substantive examination.[641] ASEAN can consider the former two options, but if substantive examination is to be conducted as provided under the third option, then an assessment on the standards of patentability among ASEAN MS should be made.

In determining the standards of patentability among ASEAN MS, apart from minimum standards under the TRIPS agreement, other international efforts that provide for the harmonization of substantive law include the SPLT. While SPLT negotiations have been put on hold in 2006, the research works and discussions carried out under the SPLT on the understanding and application of substantive patent law across different jurisdictions still hold persuasive value. In order to highlight any disparities in the understanding of such standards among ASEAN MS, this section will utilize the definitions and understanding of the standards of patentability among ASEAN MS through works

[640] Woon, *The ASEAN Charter: A Commentary*, 77.
[641] World Intellectual Property Organization, "Alternatives in Patent Search and Examination," 2014, https://www.wipo.int/publications/en/details.jsp?id=3921&plang=EN.

undertaken by the International Bureau of the SPLT, along with the WIPO Handbook as a point of reference.

(i) Novelty

Novelty is not a standard that can be proved or established, and only its absence can be proved.[642] If an invention has been anticipated in prior art, then the invention cannot be considered novel.[643] Prior art refers to the knowledge that existed prior to the filing or priority date of a patent application, which could be limited to the prior art of the protecting country ("national novelty"), or a worldwide determination ("absolute novelty"). In considering the novelty of an invention, it is not permissible to combine separate items of prior art together.[644] According to the WIPO handbook, the disclosure of an invention so that it becomes part of the prior art may occur in three ways:[645]

(1) Description of the invention in a published writing or publication in other form;

(2) Description of the invention spoken words uttered in public which are not necessarily recorded. Such a disclosure known as "oral disclosure";

(3) Use of the invention in public, or by putting the public in a position enabling any member of the public to use it, such as a display, sale, demonstration, unrecorded television broadcasts, and actual public use. Such a disclosure known as "disclosure by use."

Among ASEAN MS, Brunei,[646] Cambodia,[647] Indonesia,[648] Lao PDR,[649] Malaysia,[650] the Philippines[651] Singapore,[652] Thailand,[653] and Viet Nam[654] have stipulated the requirement of absolute

[642] Art. 12(2), *SPLT*; World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (Geneva, Switzerland, 2004), 19.
[643] Art. 33(2), *PCT*.
[644] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 20.
[645] World Intellectual Property Organization, 19.
[646] Sec. 14, *Patents Order, 2011.*
[647] Art. 6, *Law on the Patents, Utility Model Certificates and Industrial Designs NS/RKM/0103/005.*
[648] Art. 5, *Law of the Republic of Indonesia No. 13 of July 28, 2016, on Patents.*
[649] Art. 13(1), *Law No. 01/NA of December 20, 2011, on Intellectual Property.*
[650] Sec. 14, *Patents Act 1983 (Act 291, as amended up to Act A1649).*
[651] Sec. 23, Sec. 24, *Intellectual Property Code of Philippines (Republic Act No. 8293), Part II*.
[652] Arts. 14(1), 14(2), 14(3), *Patents Act (Revised Edition 2005, as amended up to the Statutes (Miscellaneous Amendments) Act 2014).*
[653] Sec. 5, Sec. 6, *Patent Act B.E. 2522 (1979).*
[654] Art. 60, *Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property (promulgated by the Order No. 28/2005/L-CTN of December 12, 2005, of the President of the Socialist Republic of Vietnam).*

novelty in their respective patent laws, where the invention has not been made public whether within the country or elsewhere before the priority date. In general, the test for novelty is carried out by accessing databases of prior art to be checked for novelty and inventiveness over published patent records. According to the patent examination guidelines published by MyIPO, The IPOPHL and IPOS, reading of the prior art through the eyes of the person "skilled in the art", and in the light of "common general knowledge" may be taken into consideration for novelty purposes.[655] This implicit disclosure may be considered as an objection based on the grounds of novelty and obviousness. Furthermore, a claimed invention will lack novelty if anticipated by a prior publication, which when put into practice, will necessarily fall within the scope of the claim, even if the original publication does not disclose such parameters.[656] Therefore, it may be said at the very least, IPOPHL, IPOS and MyIPO all abide by the criteria of strict novelty.

Each ASEAN MS also provides for a grace period after the disclosure of an invention. The criteria, however, differ from one MS to the other. A 12 month grace period is provided by Brunei,[657]Cambodia,[658] Malaysia,[659] Singapore,[660] Thailand,[661] and the Philippines.[662] Viet Nam has also in recent years made several amendments to their patent law, among all increasing the grace period from 6 month to 12 months, for all acts of disclosure including from the inventor, abuse of rights, or from a third party.[663] Indonesia provides for a 6 month grace period if the invention is

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[655] Intellectual Property Corporation of Malaysia, "Guidelines for Patent Examination in the Intellectual Property Corporation of Malaysia," para. 8.7; Intellectual Property Office of the Philippines, "Manual for Substantive Examination Procedure," 2017, para. 7.6, https://drive.google.com/file/d/1vlZS7X81CdtRURtH9XSL8m44UiQtm0cJ/view?pli=1; Intellectual Property Office of Singapore, "Examination Guidelines for Patent Applications at IPOS" (Singapore, 2022), para. 3.30, https://www.ipos.gov.sg/docs/default-source/resources-library/patents/guidelines-and-useful-information/examination-guidelines-for-patent-applications.pdf.
[656] Intellectual Property Corporation of Malaysia, "Guidelines for Patent Examination in the Intellectual Property Corporation of Malaysia," para. 8.9; Intellectual Property Office of Singapore, "Examination Guidelines for Patent Applications at IPOS," para. 3.22-3.23.
[657] Sec. 14(4), *Patents Order, 2011.*
[658] Art. 6(i) and (ii), *Law on the Patents, Utility Model Certificates and Industrial Designs NS/RKM/0103/005.*
[659] Sec. 14(3), *Patents Act 1983 (Act 291, as amended up to Act A1649).*
[660] Sec. 14(4), *Patents Act (Revised Edition 2005, as amended up to the Statutes (Miscellaneous Amendments) Act 2014).*
[661] Sec. 6, *Patent Act B.E. 2522 (1979).*
[662] Sec. 25(1), *Intellectual Property Code of Philippines (Republic Act No. 8293), Part II.*
[663] Art. 60.3, *Law No. 42/2019/Qh14 Of June 14, 2019, Amending The Law On Insurance Business And The Law On Intellectual Property*. See also the latest amendment to Art. 60.1, which explicitly notes that a "secret prior art" – a patent application filed but yet to be published – would mean that the latter

displayed at an exhibit or for R&D purposes, and a 12 month grace period for the breach of confidentiality.[664] However, Indonesia seem to be in the midst of amending the patent law and increase the grace period to 12 months.[665]

From the above analysis, while it is difficult to determine if all patent offices of ASEAN MS abide by the same criteria in determining novelty, the statutory laws of ASEAN MS have demonstrated the convergence of the novelty standard among ASEAN MS. The only major difference in the determination of novelty is the divergent duration of grace periods, which needs to be addressed if a common standard is to be achieved.

(ii) Inventive Step / Obviousness

A claimed invention is considered to involve an inventive step if it is not obvious to a person having ordinary skill in the art.[666] The purpose of including this requirement as a standard of patentability is not to reward inventions that are known as part of the prior art, or anything a person with ordinary skill could deduce as obvious consequence thereof, but to reward significant advancement and progress the invention provides. This requirement however, has been cited as the most difficult standard to discern as it involves a factual-based analysis, and needs to be measured as according to the field where the invention is supposed to advance.[667]

According to the WIPO Handbook, inventive step can be determined through three tests: (i) the problem to be solved; (ii) solution to that problem; and (iii) advantageous effects, if any, of the invention with reference to the background art.[668] In the event where the problem is known or obvious, the examination will then focus on the originality on the claimed solution. If no inventive step is found in the claimed solution, the question becomes whether or not the result is obvious, or whether

application on the same invention has lost its novelty. *Law No.07/2022/QH15, Amendment to Vietnam's Law on Intellectual Property.*

[664] Arts. 6(1), 6(2), *Law of the Republic of Indonesia No. 13 of July 28, 2016, on Patents.*

[665] Melinda Ambrizal, "Proposed Amendments to Indonesia's Patent Law," Tilleke & Gibbins, October 18, 2021, https://www.tilleke.com/insights/proposed-amendments-to-indonesias-patent-law/.

[666] Arts. 12(3), 33(3), *SPLT.*

[667] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 20.

[668] World Intellectual Property Organization, 20–21.

it is surprising "either by its nature or by its extent."[669] This means that if a person with ordinary skill in the art would have been able to pose the problem, solve the problem in the matter claimed, and foresee the result, then the inventive step is lacking.

Under the patent laws of most ASEAN MS, not much has been elaborated concerning the determination of an inventive step, apart from stipulating it as a requirement. Art. 61(1) of the Viet Nam IP law for instance only notes that inventive step can be established "cannot be easily created by a person with average knowledge in the art." Art. 7(2) of the Law of the Republic of Indonesia provides that the determination of inventive step needs to be made by observing the expertise available during the submission of the application or the expertise submitted by a prior application which has priority. The patent examination guidelines by IPOPHL, IPOS and MyIPO have also provided little guidance in determining inventive step in general as determination of inventive step is specific to its technological field.

As the substantive laws do not provide much understanding in the determination of an inventive step, observation may be made concerning the conduct of patent offices and the courts. The only jurisdiction among ASEAN MS that has extensive case laws on the determination of inventive step is Singapore, which refers to the precedents set by the English courts, and subsequently produced its own interpretation of what constitutes an inventive step. In the case of *Merck & Co Inc v Pharmaforte Singapore Pte Ltd*,[670] the court utilized the English case of *Windsurfing International v Tabur Marine*,[671] where Oliver LJ instituted a series of tests to determine an inventive step.[672] In defining a person skilled in the art, the court in *Insitut Pasteur & Anor v Genelabs Diagnostics & Anor*[673] raised three definitions acquired from English precedents: 1) the person is not the "mechanician of genius nor…

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[669] World Intellectual Property Organization, 21.
[670] *Merck & Co, Inc v Pharmaforte Singapore Pte Ltd* [2000] 3. SLR 717; [2002] 2 SLR 515.
[671] *Windsurfing International v Tabur Marine* [1985] RPC 59.
[672] This 4-step test is known as "The Windsurfing Test" has been utilized to assess obviousness. The first step is to identify the inventive concept embodied in the disputed patent. The second test is to assume the mantle of the ordinarily skilled but unimaginative addressee in the art at the priority date, and to impute him what was the general knowledge of the art in question. The third step is to identify the existing differences between "known" or "used" at the priority date by the alleged invention. The final test is to decide whether, viewed without any knowledge of the alleged invention, that those differences constitute steps which would have been obvious to the ordinarily skilled person, or whether any degree of invention is necessary.
[673] *Insitut Pasteur & Anor v Genelabs Diagnostics & Anor* [2000] SGHC 53.

the mechanical idiot",[674] 2) the person is "assumed to be of standard competence at his work without being of an imaginative or inventive turn of mind",[675] and 3) the person is "the normally skilled but unimaginative addressee in the art at the priority date".[676] The position of Singaporean courts is further summed up in *Ng Kok Cheng v Chua Say Tiong*[677], where a person skilled in the art is a person who 1) possesses a common general knowledge[678] of the subject matter in question, 2) has a practical interest in the subject matter of the patent or is likely to act on the directions given in it, and 3) whilst unimaginative is reasonably intelligent and wishes to make the directions in the patent work.

(iii) Industrial Applicability

According to the SPLT, industrial applicability refers to the possibility of making and manufacturing an invention in practice.[679] Under the Paris Convention and the PCT, the term "industrial" is to be considered in its broadest sense, which includes any kind of industry, and the application of the invention involves technical means on a certain scale.[680]

National and regional laws vary in the determination of industrial applicability. There are two ends in the spectrum of considering whether the patent can be made in industry, and what the utility invention might be. The first determination is that the requirement of industrial applicability is met as long as the claimed invention can be made in industry. Second, the "usefulness" of the claimed invention is considered. Third, some countries do not require industrial applicability, but rather utility. In order for an invention to be patentable, the invention must be one that can be used for practical purposes, not purely theoretical.[681] If the invention is intended to be a product or constitute part of a product, it needs to be possible to make that product through the invention. If the invention is

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[674] *Van der Lely NV v Bamfords Ltd* [1961] RPC 296.
[675] *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd & Ors* [1972] RPC 457.
[676] *Windsurfing International v Tabur Marine* [1985] RPC 59.
[677] *Ng Kok Cheng v Chua Say Tiong* [2011] SGHC 143.
[678] The determination of "common general knowledge" is clarified in *Bourns Inc v Raychem Corp [1998] RPC 31*, where it refers to the technical background of the skilled person, which include all the material the skilled person knows exists and would regard as sufficiently reliable to use as a foundation for further work or to understand the pleaded prior art. In that sense, standard textbooks or readily available trade literature may be considered as common general knowledge in the art.
[679] Art. 12(4), *SPLT*.
[680] Art. 1(3), *Paris Convention*; Art. 1(4), *PCT*.
[681] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 18.

intended to be a process or part of a process, it is also necessary to be able to carry that process out through that invention.[682]

Among ASEAN MS, industrial application is mainly focused on whether the claimed invention can be made in industry. Cambodia,[683] Indonesia,[684] Malaysia,[685] the Philippines,[686] and Thailand[687] explicitly provide that an invention should be considered as having industrial applicability if it can be made or used in any kind of industry. Singapore[688] and Brunei[689] provide for the same standard, and share additional provisions concerning the exceptions to method of treatment of the human or animal body by surgery or therapy to be considered as having industrial application. Viet Nam provides that an invention is considered susceptible to industrial application if the subject matter of the invention allows for the possibility for "massive production," "manufacture of the product," or "repeated application of the process" and achieve stable results.[690]

While the statutory laws concerning industrial application differs the greatest among the standards of patentability between ASEAN MS, the provisions all share the underlying principle of enabling the production and use in industry. However, despite the ongoing cooperative efforts, some differences still exist between the statutory laws, guidelines, and court cases between different ASEAN MS. Ongoing harmonisation of standards is still required, and discussions on an ASEAN patent system could potentially allow the patentability standards to converge further.

ii. Instituting an ASEAN Unified Patent Court

Contrary to the establishment of an ASEAN patent office, which was brought up for consideration under the ASEAN Framework Agreement on Intellectual Property in 1995, the potential

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[682] World Intellectual Property Organization, 18..
[683] Art. 8, *Law on the Patents, Utility Model Certificates and Industrial Designs NS/RKM/0103/005.*
[684] Art. 8, *Law of the Republic of Indonesia No. 13 of July 28, 2016, on Patents.*
[685] Sec. 16, *Patents Act 1983 (Act 291, as amended up to Act A1649).*
[686] Sec. 27, *Intellectual Property Code of Philippines (Republic Act No. 8293), Part II.*
[687] Sec. 8, *Patent Act B.E. 2522 (1979).*
[688] Sec. 16, *Patents Act (Revised Edition 2005, as amended up to the Statutes (Miscellaneous Amendments) Act 2014).*
[689] Sec. 16, *Patents Order, 2011.*
[690] Art. 62, *Law No. 50/2005/QH11 of November 29, 2005, on Intellectual Property (promulgated by the Order No. 28/2005/L-CTN of December 12, 2005, of the President of the Socialist Republic of Vietnam).*

creation of an ASEAN patent court was never explored on a formal basis. Even for the Mid Term Review of the IPR Action Plan 2016-2025, in terms of enforcement the AWGIPC provided only guidelines based on best practices in terms of IPR enforcement, coordination, and stronger linkages between national IP offices and judiciary in each ASEAN MS to expedite disposition of IP cases.[691]

To implement the creation of a unified patent court that was not part of ASEAN's agenda may prove to be a tricky process. As exemplified by the EU, even with the necessary legal instruments and means to establish a unified patent court, the envisioning and drafting of agreements that give rise to the UPC was a time-consuming process. The creation of the UPC in the EU was first put into action in 2007, which began with the draft agreement for setting up a patent court with exclusive jurisdiction for both European patents and unitary patents.[692] ASEAN on the other hand does not have the necessary legal instruments nor the means in creating a regional judicial body in resolving patent disputes. Without an ASEAN patent legislation and an established ASEAN patent office, the introduction of a single judicial structure to litigate an ASEAN patent is likely to be more difficult than just the establishment of an ASEAN patent office.

Instituting a supranational patent court system whose judgement is binding among the MS however, could still be tricky for ASEAN MS at the current stage. While the gradual unification of patent law is an ideal scenario in enabling the free movement of goods in a single market, the creation of a unified patent court in Southeast Asia not only requires the extensive harmonisation of substantive patent laws to begin with, but also the harmonisation of civil procedure laws in the patent litigation process in addition to the remedies available. The lack of political will and immense resources needed to create and maintain a supranational judicial institution is likely to make the idea of its establishment undesirable by ASEAN MS.[693] Furthermore, the downside to a unified patent court which presumes a single ASEAN patent legislation is that the ownership of an invention would reside in the same person. Arguably, this could potentially be devastating to ASEAN MS given the current

[691] See: Initiative 12, Association of Southeast Asian Nations, "The ASEAN Intellectual Property Rights (IPR) Action Plan 2016-2025: Updates to the ASEAN IPR Action Plan (Version 2.0)."
[692] European Commission, "The Long Road to Unitary Patent Protection in Europe" (Brussels, 2012), 3, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/134393.pdf.
[693] Woon, *The ASEAN Charter: A Commentary*, 77.

technological and economic gap when the patent system caters to the needs of the more developed ASEAN MS at the expense of other less developed ASEAN MS, but instituting national limitations on the effect of the patent in line with the global framework remains a possibility.[694]

Nevertheless, instituting an ASEAN regional court would strengthen the rule of law within the region, as it could provide authoritative interpretation of ASEAN's legal instruments, in addition to acting on complaints by ASEAN MS.[695] According to Trimble, Wiegand and Reimer have asserted in the 1940-50s that even absent a single European patent, the creation of a single European patent court may contribute to the gradual unification of patent law.[696] For ASEAN, this could be an impetus if ASEAN leaders can actually agree to establish among all, common procedural rules, maintenance of the court system, and the fee structure to the enforcement of the decisions. The jurisdiction and competence of the court would also need to be ascertained, along with the recognition and enforcement of the patent court's judgement by all ASEAN MS.

4.2.3 Extraterritorial Application of Patent Laws

Another option that ASEAN MS may consider would be to extend the application of their national patent laws to instances of cross-border infringement occurring across ASEAN MS and beyond. This option at the outset would seem impossible, given the prevalent understanding that (i) the ASEAN Way reflects the Westphalian conception of state sovereignty which seemingly forbids the extraterritorial application of laws, and that (ii) patent rights are territorial rights and which is tied to the concept of state sovereignty and exclusive jurisdiction. In addition, many ASEAN MS have prescribed this territorial limitation through infringement-related provisions in their local laws,

[694] Abbott supports this position by raising the example of second medical use patents (second medical indication patents in the document)– stating that individual CARICOM countries may grant compulsory licenses for their specific territory without extending the effects throughout the region (analogising private sector licenses granted for specific geographic territories). Frederick M. Abbott et al., "Regional Assessment of Patent and Related Issues and Access to Medicines: Caricom Member States and the Dominican Republic (HERA)," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, December 31, 2009), 65, https://papers.ssrn.com/abstract=1909978.
[695] Klučka and Elbert, *Regionalism and Its Contribution to General International Law*, 145–47.
[696] Marketa Trimble, *Global Patents: Limits of Transnational Enforcement* (New York: Oxford University Press, 2012), 18.

which requires the infringing act to occur within the borders of the state.[697] Nevertheless, statutory laws and court decisions across jurisdictions have reflected a more expanded interpretation of the application of patent laws beyond its territory, which will be explained in this section.

To start, the primacy of state sovereignty under international law harkens back to the consecration in the Treaty of Westphalia in 1648, which gave rise to the principle of territorial delimitation of state authority and non-intervention.[698] A sovereign state is defined as having a territory, a population, a government, and the capacity to enter into relations with other states,[699] and the exercise of sovereign power is most obvious in the assertion of jurisdiction,[700] the means to which state "displays and exerts its sovereign will within its own particular sphere of influence or jurisdictional domain."[701] There are three corollaries of state sovereignty: prima facie exclusive jurisdiction over a territory and the permanent population; duty of non-intervention in the area of exclusive jurisdiction of other states; and dependence upon consent of obligations arising from customary law or treaties.[702]

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[697] This strict interpretation is not limited to just ASEAN MS - In Japan, territoriality has also been raised as a ground to reject jurisdiction over a case. In the Card Reader case, the Tokyo High Court invoked the principle of territoriality to reject the enforcement of a foreign patent in the request for injunction. For damages, the principle of territoriality is implicit by noting that since the infringing acts occurred abroad, it did not constitute infringement in Japan. Upon appeal, the Supreme Court then invoked the principle of territoriality, stating that since ruling upon a foreign patent would grant the same validity as a Japanese patent would run against the Japanese understanding of territoriality, and thus run contrary to the "public order" requirement under the *Horei.* For damages, the notion of territoriality is again implicit, where the court stated that events occurring abroad does not constitute tort in Japan. In the assessment of damages under the Card Reader Case, rather than addressing whether such rights have extraterritorial effect, the Supreme Court invoked the principle based on the absence of a provision that makes a foreign right effective in Japan. For an overview of the case, see: Yasuto Komada, "Applicable Law When an Act Implemented in Japan Allegedly Infringed a U.S. Patent Right," in *Annotated Leading Patent Cases in Major Asian Jurisdictions*, ed. Kung-Chung Liu, ARCIALA Asian IP Law Series (Hong Kong: City University of Hong Kong Press, 2017), 406.

[698] For a succinct overview of the development of the principle of state sovereignty, see: Samantha Besson, "Sovereignty," Oxford Public International Law, 2011, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472.

[699] Article 1, *Montevideo Convention on Rights and Duties of States*.

[700] As noted by the Permanent Court of International Justice in *Legal Status of Eastern Greenland, Denmark v. Norway, Judgment, 5 September 1933 (PCIJ Series A/B. No 53),* jurisdiction constitute one of the most obvious form of the exercise of sovereign power.

[701] John H. Currie, *Public International Law*, 2nd ed. (Ontario: Irwin Law Inc., 2008), 332.

[702] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford University Press, 2012), 447.

Huber's three maxims also addressed the principle of territorial jurisdiction of the state and foreign rights:

> "1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
>
> 2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
>
> 3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects."[703]

The first two maxims announce that all laws are territorial, and has no force beyond the limits of the enacting state, but binding within the territory.[704] Thus, a sovereign cannot regulate extraterritorially to protect its own interests. The third maxim relates to the notion of *comitas*, which calls for the recognition in each state for foreign created rights on grounds of convenience and utility in contrast to a binding obligation of duty. This is to be carried out only "so far as they do not cause prejudice to the power or rights of such government or of their subjects."[705] As noted by Dodge, this maxim does not attempt to revise the strict territorial view of sovereignty, but constitute an attempt to solve a problem that territoriality created, one of it being the inconvenience to commerce where transactions valid in one nation is invalid in another.[706] The third maxim also provides that any "force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter…".[707] This relates to the recognition of a foreign right in the exercise of another state's jurisdiction, notably known as the doctrine of comity. The enforcing state has the sole discretion in deciding the operation of foreign laws and the rights growing out of them within its territories, and each nation is its own judge in determining the administration of justice.

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[703] Ernest Lorenzen, "Huber's de Conflictu Legum," *Ill. L. Rev.* 13 (1918): 200.
[704] Lorenzen, 200.
[705] Lorenzen, 227.
[706] William S. Dodge, "International Comity in American Law," *Columbia Law Review* 115, no. 8 (December 2015): 2086.
[707] Joseph Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Little, Brown, 1846), 33–34.

Since patent right is essentially a privilege created by the state through an administrative act to incentivise innovative activities, the right should be valid only within the boundaries of the jurisdiction, and a state can only grant or enforce national patents within its own territory.[708] This understanding where land and law are linked was most prevalent during the 19th century where no states may "directly affect, bind, or regulate property beyond its own territory."[709] In terms of patent law's international framework, while the Paris Convention does not use the term "territoriality" and expressly prescribe a jurisdictional limitation,[710] Art. 4*bis* of the Paris Convention has been said to emphasise the territorial nature of patents, which was further confirmed during the Washington Conference in 1911 with the introduction of paragraph 2 to Art. 4*bis* and an exception to patents of importation.[711] Paragraph 1 states that patents obtained for the same invention in other countries are independent of each other, while paragraph 2 further provides that the independence should be understood to encompass nullity, forfeiture, and duration. Interpreted in light of the rest of the convention, this provision is inferred to encompass elements of territoriality. The convention also emphasizes the importance of territorial protection in relation to the national treatment principle (Art. 3) and grace period for international exhibitions (Art. 11). The draft of the subsequent treaty to supplement the Paris Convention[712] further affirms the territorial aspect, emphasising the location where the offer for sale is made, (Alternative B and C, Art. 19), and for prior user rights specifically pointing to within the territory where the patent has effect (Art. 20). Notes on Article 20 further states

[708] In the context of copyright law, Matulionyte has further broken down the justifications of strict territoriality into three categories: state sovereignty, historical-factual situation, and national state policies. On state sovereignty, Matulionyte argued that it is merely a requirement for states to confine the application of national laws to their own territory, and states are not prevented from issuing laws with extraterritorial application. See: Rita Matulionyte, *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals* (Edward Elgar Publishing, 2011), 19.
[709] Henry Wheaton, *Elements of International Law*, ed. James Brown Scott, The Classics of International Law (Washington: Carnegie Endowment for International Peace, Division of International Law, 1866), 111–12.
[710] Frederick M. Abbott, Thomas Cottier, and Francis Gurry, *International Intellectual Property in an Integrated World Economy*, Fourth edition, Aspen Casebook Series (New York: Wolters Kluwer, 2019), 121–22.
[711]According to Ladas, this was to accommodate the Italian delegation's request concerning patents of importation in Italy given that inventions published or worked abroad which no longer have the element of novelty. Further, Ladas also noted that the "whole spirit of the Convention" is to "contemplate the elimination of any kind of interdependence among patents granted in various countries of the Union to the same invention."See: Stephen Pericles Ladas, *Patents, Trademarks, and Related Rights: National and International Protection* (Harvard University Press, 1975), 505, 508–10.
[712] *Treaty Supplementing the Paris Convention as far as Patents are Concerned.*

that "territory" should be interpreted "in its broadest sense to cover any and all places and areas where the patent has effect."[713]

The TRIPS Agreement has also been cited as an example of how international law is utilised by developed countries to export and expand the protection of IP rights, facilitating the registration of rights while respecting the territoriality principle.[714] While not explicitly referring to the territorial nature of patents, the TRIPS Agreement contains several provisions that emphasises territorial boundaries, but on the excludable grounds for patentable subject matter rather than on the effects of patents.[715] The TRIPS Agreement's acknowledgement of national treatment and MFN treatment, has also been said to reinforce the territoriality principle.[716] Further, Art. 31*bis* 3 which concerns the importation or production of a pharmaceutical product under a compulsory license to be exported to other developing or LDCs which are parties to the regional trade agreement, notes that "this will not prejudice the territorial nature of the patent rights in question."

Thus, a strict interpretation of patent law's international instruments would mean that patent rights exists only within a specific territory, has no effect beyond the territory, and is enforceable only within said territory. When put into practice, the prevalent interpretation is that a patent can only be granted by a state-approved authority, adjudicate only before the state's court based on a conduct that occurred within the state, and if successful, obtain remedies from asset(s) under the state's jurisdiction. Courts would also refrain from enforcing foreign patents under the doctrine of comity as it could "cause prejudice to the power or rights of such government or of their subjects."[717]

However, the increasing interdependence between states and international contact such as through cross-border trade gave rise to the overlap in the exercise of state jurisdiction when there are

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[713] World Intellectual Property Organization, "Conference Documents of the 'PLT/DC' and 'PLT/DC/INF' Series," in *Records of the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned: Volume I: First Part of the Diplomatic Conference, The Hague, 1991*, vol. 1, First Part of the Diplomatic Conference (Geneva, Switzerland: World Intellectual Property Organization, 1991), 88.
[714] Thomas Cottier, "Industrial Property, International Protection," in *The Max Planck Encyclopedia of Public International Law: Print Edition*, ed. Rüdiger Wolfrum (Oxford, New York: Oxford University Press, May 30, 2013), 160–63.
[715] See e.g. Art. 65 which provides for transitional arrangements for developing country member, and Art. 66 for least-developed country Members.
[716] Annette Kur and Ulf Maunsbach, "Choice of Law and Intellectual Property Rights," *Oslo Law Review* 6, no. 1 (May 14, 2019): 45, https://doi.org/10.18261/issn.2387-3299-2019-01-07.
[717] Lorenzen, "Huber's de Conflictu Legum," 227.

shared interests by different states.[718] To govern the jurisdictional reach of each state, international law has developed two perspectives in determining the conditions to which a state may assert jurisdiction: in the absence of rules prohibiting so, or only in accordance with permissive rules.[719] The former approach provides that jurisdiction is limited only by rules that states voluntarily adopt, "plenary and discretionary,"[720] and states may "naturally extend or restrict their jurisdiction as far as they like."[721] The second approach is the prevalent approach to jurisdiction in international law, which requires state power to be premised on the existence of a territorial or personal connection. This requires a genuine connection between the subject-matter of jurisdiction and the territorial base, or reasonable interests of the state,[722] to justify the state's regulatory authority as a matter of state discretion. To reduce conflicts in the international setting, countries have opted to exercise forbearance over such assertions due to overlapping state interests which results in competing exercises of state jurisdiction, and only do so under permissive rules, namely territoriality, nationality, protection, universal jurisdiction, and passive personality.

Just as how international law developed the requirement of a genuine connection along with permissive rules, scholars, policymakers, and courts have adopted increasingly broad interpretation of the conceptions of IPR protection in light of a globalised market economy, precisely through establishing a connection. Dinwoodie has pinpointed four approaches adopted by courts and policymakers in their interpretation of territoriality in the context of international copyright law: (i) nationalistic territoriality, essentially strict territoriality, (ii) reformed territorialism, where domestic and foreign claims are consolidated before a single court, (iii) pragmatic territorialism, where foreign

[718] Currie, *Public International Law*, 332–33.
[719] This position is largely attributed to the *Lotus* case before the Permanent Court of International Justice in 1927. Ryngaert noted that through providing states with unfettered jurisdiction may not decrease the conflicts between states, and that the current consensus is that states are required to justify their assertion over jurisdiction under the latter approach. See: Cedric Ryngaert, *Jurisdiction in International Law*, Second edition, Oxford Monographs in International Law (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015), 29. Mills also noted that the *Lotus* case constitute an anomaly to public international law, a "regrettable digression into a 'positivist' model of plenary jurisdiction." See: Alex Mills, "Rethinking Jurisdiction in International Law," *The British Yearbook of International Law* 84, no. 1 (2014): 188.
[720] Mills, "Rethinking Jurisdiction in International Law," 192.
[721] Lassa Oppenheim, *International Law (Review Citation)*, 1st ed. (Longmans Greed & Co 1905, n.d.), chap. 1, section 1.
[722] Crawford, *Brownlie's Principles of Public International Law*, 456–57.

conducts are localised, and (iv) internationalism, where courts would apply the best law for an international dispute.[723] Accordingly, there is no one approach to territoriality and at least four interpretations are available.

Despite the prevalent strict territorial approach to IPR protection, Peukert noted that the "underlying assumption of a territorially limited reach of substantive protection is not necessarily warranted" as jurisdictions have "wipe[d] off the traditional limits imposed by the territoriality principle" and extend the application of their national laws based on a national patent, to a conduct occurring overseas, or to protect the rights of its citizens in a foreign country, especially when there is insufficient or non-existent IP regime in the foreign country.[724] Furthermore, territoriality can at least differentiated between "objective territoriality" where IP rights are limited to the territory of the state granting it, and also "subjective territoriality," which is evidenced through the requirements of local publication where states extend the availability of protection to foreigners under certain conditions but restrict it to its nationals.[725]

To illustrate, states have unilaterally expanded the application of their IP laws through establishing a connection to the extraterritorial activity or effect, and can be broken down into (i) local acts with foreign effects, (ii) foreign acts with local effects, or (iii) conduct occurring partly locally, partly abroad. An example of (i) would be Art. 271(f) of the US Patent Act,[726] which provides that components are exported to be assembled for combination and use in foreign markets constitute infringement. This act of exportation of components was pointed out as a "loophole" by the dissenting Justices in *Deepsouth Packing Company v. Laitram Corporation*,[727] to which Congress has responded in

[723] Graeme B. Dinwoodie, "Commitments to Territoriality in International Copyright Scholarship" (Report of the Neuchâtel Study Session of ALAI 74, 2002), 1–4.
[724] Alexander Peukert, "Territoriality and Extraterritoriality in Intellectual Property Law," in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, ed. Günther Handl, Joachim Zekoll, and Peer Zumbansen, Queen Mary Studies in International Law (Leiden/Boston: Brill Academic Publishing, 2012), 12–23, https://ssrn.com/abstract=1592263.
[725] Peukert, 2–3.
[726] US Code: Title 35 - Patents.
[727] In that case, defendant manufactured and shipped all unassembled components of a patented shrimp de-veining mechanism overseas. Since the device was not made in the US and thus does not constitute and infringement, plaintiff argued that limits to the scope of the patent laws of the US would be unfair in the global economy. This led to Congress enacting 271(f) and (g) in 1984, both of which does not involve the making or use of the patented invention in the U.S, but the infringement is understood to happen in the US. 271(f) relates to creating components inside the US and exporting them for use overseas.

passing 271(f), and later interpreted by the Federal Circuit in *Waymar Corp. v Porta Sys. Corp*[728] as requiring the intent to be combined outside the US.

For (ii), an infringing activity could occur overseas and the effects are felt in another country. This could be through importation if it is a product, or transmission if it is a system/process. While relevant to a copyright case, a US court has expressed that an alleged infringer cannot claim the use of "the principle of non-extraterritoriality" to be exempted from liability under Copyright Law if they have "purposefully injected" themselves into the American market by shipping infringing goods, whether it was directly or through an importer.[729]

As for (iii), infringing activities occurring partly local, and partly abroad could be the use of process patents involving several steps that are dispersed across several countries. Depending on the national legislation, whether all or just part of the infringing act is committed can be construed as infringement. In the event of an ubiquitous infringement where infringement occurs simultaneously in different locations, regardless of the location of the hosting of the site or where the manufacturing occurs, an offer to sell on a website could constitute an infringement in every country where the website is accessible.[730] How localisation is construed in these cases would differ across jurisdictions. As pointed out by Trimble, infringement over the internet is most evident of this dilemma, particularly on how localisation is carried out – not only the place where the conduct is undertaken would be considered, but also the places where the effects of the infringing act is felt would be considered.[731] For instance, in the event of the uploading of contents of a DVD, the place where the infringer keyed in the command, the location of the users when the program is downloaded, the location of the servers that hosted the program file: these would lead to three or more different jurisdictions, and would

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[728] *Waymar Corp. v Porta Sys. Corp., 245 F.3d 1364 (Fed cir. 2001).* This interpretation arguably makes 271(f) not entirely extraterritorial since the intent for the components to be assembled abroad needs to be established and not just the foreign sale itself, in order to establish a connection to the US as it is premised on conduct in or from the US. Makman further noted that interpreting the statute this way ensured that there is no genuine application of extraterritoriality since "patentee does not have to submit any proof regarding what actually happens with the products overseas." See: David A Makman, "Cross Border Patent Disputes," *Hastings Bus. L. J.* 15, no. 2 (2019): 387.

[729] *GB Marketing USA v. Gerolsteiner Brunnen GmbH & Co., 782 F. Supp. 763 (W.D.N.Y. 1991)*

[730] Courts have found that access alone is insufficient to establish jurisdiction in trademark infringement cases. For US, see e.g.: *McBee v. Delica Co. United States Court of Appeals for the First Circuit, 2005, 417 F.3d 107*. See also: Peukert, "Territoriality and Extraterritoriality in Intellectual Property Law," 2.

[731] Marketa Trimble, "The Territorial Discrepancy Between Intellectual Property Rights Infringement Claims and Remedies," *Lewis & Clark Law Review* 23, no. 2 (2019): 507–8.

increase if the servers are mirrored, and if the IP address is tampered with, thus creating a virtual presence in another country.

Despite the different types of territoriality, Peukert has pointed out that a balance needs to be struck: while territorialism underregulates to the detriment of IPR holder, extraterritorialism would overregulate and subject an activity to divergent IP regimes.[732] Abbott also notes that such extraterritorial approaches which extend to another state could "intrude upon foreign jurisdictional prerogatives,"[733] and Holbrook has called for a revaluation of the historical strict territorial approach in patent law but cautioned against overly broad approaches to the notion of territoriality.[734]

In the context of ASEAN, ASEAN MS' approach to patent protection has almost never deviated from a strict interpretation of territoriality, be it through local laws or court decisions. This is either attributed to the ASEAN Way, or that ASEAN MS have simply adopted the prevalent strict territorial approach. All three aforementioned scenarios are thus not regulated among ASEAN MS, since ASEAN MS have not reconsidered their positions on territorial sovereignty, and by extension the territorial principle underlying patent protection. Beyond patent rights protection however, ASEAN MS have passed legislation on the basis of objective territoriality on issues concerning environment, corruption, and electronic transactions. Singapore for one, enacted the Transboundary Haze Pollution Act in 2014 which makes engaging or condoning a conduct causing or contributing to haze pollution in Singapore an offence.

However, ASEAN's current insistence on a strict interpretation of territoriality could easily change if even just one ASEAN MS were to reconsider the conception of territoriality as above. Given the lack of a unified system in ASEAN, extending patent laws to other ASEAN MS which has yet to develop a patent system yet could allow a patentee to recoup their losses. In a recent US Supreme Court case, *WesternGeco v. ION Geophysical Corp*,[735] whether one could claim damages based on lost profits that would have been earned beyond the US was of contention. ION Geophysical manufactured

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[732] Peukert, "Territoriality and Extraterritoriality in Intellectual Property Law," 40–41.
[733] Frederick M. Abbott, "Intellectual Property, International Protection," ed. Rüdiger Wolfrum (Oxford, New York: Oxford University Press, May 30, 2013), 232.
[734] Timothy R. Holbrook, "Extraterritoriality in U.S. Patent Law," *William & Mary Law Review* 49, no. 6 (2008): 2119–92.
[735] *WesternGeco LLC v. ION Geophysical Corp. - 138 S. Ct. 2129 (2018)*.

components which assembled, would form a system indistinguishable from WesternGeco's. WesternGeco holds four patents relating to the system. However, ION Geophysical manufactured the components in the US, but shipped it overseas for assembly. As explored in Chapter 2.3.3 of this dissertation, if the same situation were to occur in ASEAN, it is likely that infringement cannot be established since the making of the product occurred overseas, and there are no statutory laws providing for exportation of components. However, the US Patent Act took into consideration of this attempt to circumvent national patent law, and in applying Sec. 271(f), the Supreme Court ruled that just because lost profits occurred extraterritorially and foreign conduct gave rise to the injury, awarding damages for lost foreign profit still constitute a permissible domestic application of the clause and would not run contrary to the presumption against extraterritoriality.

As demonstrated, the extraterritorial application of patent law could deprive commercial-scale infringers of their revenue flows and allow recovery of damages for local patentees, particularly under the single production base where production and process are divided across different ASEAN MS. However, given the preoccupation with sovereignty and non-interference under the ASEAN Way, granting damages to infringing conduct which occur in another member state could violate the principle of non-intervention since states have a legitimate regulatory interest in their granted patents Thus, some form of cooperation or coordination would be required among ASEAN MS to enable such extraterritorial extensions, which could be carried out through judicial dialogue as part of ASEAN's ongoing initiative in establishing an ASEAN IP network under the ASEAN IPR Action Plan 2016-2025.

4.2.4 Applicability of Private International Law Concepts

Parallel to the reconsideration of the principle of territoriality in the previous section, ASEAN could also consider adopting a common private international law to provide a uniform approach in resolving cross-border patent disputes. Private international law or the conflict of law consists of principles and rules in dealing with legal disputes with a foreign element, and involves the determination of jurisdiction, applicable law, and recognition and enforcement.

As with the extraterritorial application of patent law, applying private international law concepts to patent disputes in ASEAN could easily be construed as in direct conflict with the ASEAN Way due to the application of foreign laws and foreign patents as the subject matter. As noted by Dinwoodie, the "*perceived* or *claimed* clarity of the territoriality principle" precluded further inquiries into the rules of private international law.[736] It was assumed that the strictest interpretation of the territoriality principle would apply in terms of patent rights protection. The conception underlying the application of private international law to IPR lies in that patents, albeit territorial in nature, are still private rights enforced and challenged before civil or commercial courts, or arbitral tribunals, to the extent which public law does not apply.[737] What may be observed from some ASEAN MS' patent law is also an express restriction in terms of requiring patent infringement to occur within its territory, to which the applicability of private international law would be excluded. Still, some concepts under private international law could still guide the resolution of cases involving foreign elements.

One promising development in the resolution of IP disputes among ASEAN MS is the establishment of the Singapore International Commercial Court ("SICC"). As per Order 110 of the Rules of Court which governs the proceedings in the SICC, claims relevant to an *in personam* IP dispute is potentially within the jurisdiction of the SICC since such disputes are commercial in nature. Similarly, according to a final report published by a Committee, as appointed by the Ministry of Law in 2018, the report expressed reservation on the justifiability of foreign IP rights, but noted an *in personam* exception could find application in a claim over a license agreement which requires determination of the validity of a patent.[738] Instead of adopting a strict interpretation of the territoriality principle, this consideration signifies a positive development in the resolution of cross-border patent disputes in ASEAN.

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[736] Graeme B. Dinwoodie, "Developing a Private International Intellectual Property Law: The Demise of Territoriality?," *William & Mary Law Review* 51, no. 2 (2009): 725.

[737] Alexander Peukert and Benedetta Ubertazzi, "International Law Association's Guidelines on Intellectual Property and Private International Law ('Kyoto Guidelines'): General Provisions," ed. Toshiyuki Kono, Axel Metzger, and Pedro de Miguel Asensio, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 12, no. 1 (2021): 2.

[738] Ministry of Law Singapore, "Public Consultation on Intellectual Property ('IP') Dispute Resolution Reforms," October 2018, https://www.mlaw.gov.sg/news/public-consultations/public-consultation-IP-dispute-resolution-reforms/.

If ASEAN's stronghold on the ASEAN Way continues to erode and ASEAN is willing to adopt a broader understanding of territoriality, ASEAN may consider addressing the challenges posed by the fragmentation of patent litigation by eliminating procedural uncertainties in adjudicating cross-border patent disputes. This can be carried out through adopting a region-wide uniform or harmonised private international law. Currently, a few guidelines have been prepared to address the procedural concerns in resolving IP disputes, which include the ALI Principles, CLIP Principles, Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property (Transparency Proposal), Joint Proposal by Members of the Private International Law Association of Korea and Japan(Joint Korean-Japanese Principles), Guidelines on Intellectual Property and Private International Law (Kyoto Guidelines), and the Asian Principles of Private International Law (APPIL). The APPIL in particular, is an initiative by the Commission on Asian Principles of Private International Law with the contribution of scholars across 10 East and Southeast Asian jurisdictions to harmonise the private international laws across Asia, and has been recognized as the "voice of Asia" in private international law.[739] Scholars have similarly supported the notion of utilising private international law to further boost the AEC.[740] Given that the ALI Principles and CLIP Principles represent divergent approaches, and that subsequent projects were mostly built upon concepts under both principles, this section will demonstrate how cross-border patent disputes may be resolved under both principles.

i. ALI Principles

The ALI Principles are a set of principles adopted by the American Law Institute in May 2007. The ALI Principles address issues concerning jurisdiction, recognition of judgments, and applicable

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[739] For a general overview of the APPIL principles, see e.g. Weizuo Chen and Gerald Goldstein, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law," *Journal of Private International Law* 13, no. 2 (May 4, 2017): 411–34, https://doi.org/10.1080/17441048.2017.1355508; Garth J Bouwers, "Tacit Choice of Law in International Commercial Contracts: An Analysis of Asian Jurisdictions and the Asian Principles of Private International Law," *Uniform Law Review* 26, no. 1 (March 1, 2021): 14–42, https://doi.org/10.1093/ulr/unab002.

[740] See e.g. Rungnapa Adisornmongkon, "Recognition and Enforcement of Foreign Judgments among ASEAN Countries," *MFU Connexion* 7, no. 1 (2018): 210–32.

law in transnational IP civil disputes. The principles strive to balance civil and common law approaches as it seeks to present to national authorities a template for adoption or adjust the principles as according to the circumstances of their own country.

The principles provide several grounds for establishing jurisdiction. First, courts may assume jurisdiction over both infringement suits and declaratory judgment under Sec. 213(1). Second, courts may assume jurisdiction over a defendant if any of the following conditions are fulfilled: (1) the court is located at the defendant's habitual residence,[741] (2) the parties agree to submit their case to the court, (3) the defendant appears at the court, (4) the court is located at the place where infringement was prepared, initiated, or furthered, wherever the injuries occur, and (5) the court is located where the infringement occurred.[742] The law of the granting state will be the applicable law to determining the existence, validity, duration, attributes and infringement of patents.[743]

The principles also enable cross-border supplying of components to be held liable. Sec. 301 of the principles provide for the "facilitation of infringement", which includes inducement infringement and contributory infringement. However, the principles do not further characterize these concepts, and states may very well choose to characterize the facilitation of infringement as direct infringement.[744]

The ALI Principles also provide that courts may rule on the validity of a patent: if a proceeding is raised in the country where the patent was issued, the ruling on the validity of the patent will have an *erga omnes* effect; whereas if a proceeding concerns the validity of a foreign patent, the court may resolve the issue *inter partes*.[745] This means that courts will be able to assume jurisdiction over foreign patents, but limit the effect to only between the parties. As a hypothetical example, a patentee holding parallel patents in Malaysia, Singapore, and Thailand initiates an action in a Thai court against a defendant carrying out infringing activities in all three jurisdictions, claiming that the defendant has

[741] "Habitual residence" refers to the state in which the person is habitually found or maintains significant professional or personal connections. The notion of "residence" is further clarified that the legal person is located in any state where (1) it has statutory seat; (2) it is incorporated or formed; (3) its central administration is located; or (4) it maintains its principal of business.
[742] Sec. 201-204, *ALI Principles.*
[743] Sec. 301, *ALI Principles.*
[744] Sec. 311, *ALI Principles.*
[745] Sec. 211(2), 212(4), *ALI Principles.*

infringed all of the patents. The defendant then raises a claim of invalidity on all of the patents concerned. Under the principles, the Thai court will be able to assume both personal and subject-matter jurisdiction over the proceeding,[746] and may choose to determine the validity of all the patents raised under the national patent law but limits the outcome of the decision on the validity of foreign patents only to the parties.

In the aforementioned hypothetical scenario, the patentee may still be able to initiate parallel proceedings or declaratory judgment in Malaysia and Singapore. In that case, the ALI Principles combined civil law's *lis pendens* rule and common law's *forum non conveniens* principle to promote efficiency via coordinated adjudication.[747] *Lis pendens* prevents parallel litigation by channelling disputes to the court first seized, whereas *forum non conveniens* provides a court with the power to stay or dismiss proceedings on the basis that a better forum exists elsewhere. If the patentee in the above case first initiates the proceeding in Thailand, the Thai court then has primacy under the *lis pendens* rule, and the other courts litigating related claims must dismiss or stay their cases in favour of the Thai forum.[748] The Thai court will then be able to determine if the case should be streamlined according to cooperation or consolidation. In the case of cooperation, each court involved will apply its own law, but the acquiring and taking of evidence process will be streamlined;[749] whereas if consolidation is decided, then the court must, in line with the *forum non conveniens* determination, decide the appropriate court to hear the case,[750] and the other court(s) will stay the proceeding(s).[751] Once a judgment has been rendered, other court(s) which stay the proceedings will dismiss the action; or lift the stay if the case is not prosecuted within reasonable time.[752]

Apart from the validity issues, the ALI Principles also provides for the possibility to consolidate multiple proceedings occurring in multiple countries.[753] The principles also deal with

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[746] Jurčys has pointed out that as the ALI Principles has been drafted bearing the US legal system in mind, which differentiates between *in personam* and subject-matter jurisdiction. This is in contrast to the CLIP Principles. See: Paulius Jurčys, "International Jurisdiction in Intellectual Property Disputes: CLIP, ALI Principles and Other Legislative Proposals in a Comparative Perspective," *JIPITEC* 3, no. 3 (2012): 175–76.
[747] Chapter III, Part II, *ALI Principles.*
[748] Sec. 221, *ALI Principles.*
[749] Sec. 301, *ALI Principles.*
[750] Sec. 222, *ALI Principles.*
[751] Sec. 223, *ALI Principles.*
[752] Sec. 221(6), 223(4), *ALI Principles.*
[753] Sec. 221, *ALI Principles.*

issues raised by the internet such as remote access and divided infringement. It also preserves procedural due process and the public policy aspect of IP laws. As for the recognition and enforcement of foreign judgments in transnational cases are also provided under the principles. If a judgment was rendered under the principles, the judgment can be recognized and enforced in a foreign state if the ALI Principles are enforceable in the rendering state.[754] Enforcement of the judgment is left to the domestic law, but the principles may be used as a guidance.[755] The principles also provides flexibility in providing remedial obligation, which allows the enforcement court to conform its award of injunctive relief to what could have been granted under the domestic law.[756] The drafters of the principles took into account the special circumstances on how private judgments on IP may affect the public interest, and the enforcement court should be allowed to alter the remedy to not exceed the award that would have been available if the case were to be decided locally.[757]

There are several advantages if ASEAN were to adopt the ALI Principles in governing cross-border patent disputes. First, if the courts are able to decide the validity of foreign patents on an *inter partes* basis, not only will the courts be able to find jurisdiction over the case, but also avoid challenging the public policy of the foreign country and the problems associated with enforcing the judgment in a foreign court. This will also enable courts in ASEAN MS to extend their jurisdiction in cross-border manufacturing cases, thereby reducing infringing activities within the region. Second, the ALI Principles promotes judicial cooperation and consolidation of proceedings, which will speed up the litigation process as it prevents the duplication of work in evidence collection. Third, the codification of the principles will also provide for greater legal certainty for patentees and reduces the need for parallel proceedings.

[754] Sec. 401, *ALI Principles.*
[755] Comment, Part IV, Chapter I, *ALI Principles.*
[756] This is consistent with Art. 44(2) of the TRIPS agreement which provides a member state to limit injunctive relief in dealing with local needs when monetary compensation is provided.
[757] Sec. 411-413, *ALI Principles.*

ii. CLIP Principles

The CLIP Principles are a set of principles developed by the European Max Planck Group for Conflict of Laws in Intellectual Property, which was finalized in 2011.[758] The first aim of the preamble of the CLIP Principles is similar to the TRIPS Agreement, which aims to "reducing distortions and impediments to international trade." While the ALI Principles is rooted in US law, the CLIP Principles stays close to the existing EU instruments wherever feasible. The objective of the CLIP Principles is also to serve as an interpretive tool to international and domestic rules, and as a set of model provisions for countries to adopt.

Under the principles, jurisdiction is divided into general and special jurisdiction: general jurisdiction is found over a person in which the person is habitually resident, whereas special jurisdiction is found over matters relating to a contract, civil claims arising out of criminal proceedings, entitlement and ownership, multiple defendants, indemnification and third-party notice, and counterclaim.[759] The applicable law with regards to infringement, existence, validity, scope, duration, and transferability is determined by the *lex loci protectionis*.[760]

In addition, infringement needs to occur in the state where the defendant has acted or prepared action,[761] or in the state where the activity is directed or in which the activity has substantial effect.[762] This allows for the concentration of world-wide infringement actions in one forum apart from the infringer's residence as long as it meets either criteria. In the event where multiple defendants are involved, the courts in the state where one of the defendant is habitual resident[763] shall have jurisdiction against all defendants if the claims are closely connected, the defendant has coordinated the activities leading to the infringements, or is otherwise most closely connected with the dispute in its entirety. Concentrating worldwide infringement before the courts of one state would also avoid the risk of irreconcilable judgments.

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[758] *Principles for Conflict of Laws in Intellectual Property: Prepared by the European Max Planck Group on Conflict of Laws in Intellectual Property (The Draft), March 25, 2011.*
[759] Arts. 2:201 – 2:209, *CLIP Principles.*
[760] Arts. 3:102, 3:301, *CLIP Principles.*
[761] Art. 2:202(2)(a), *CLIP Principles.*
[762] Art. 2:202(2)(b), *CLIP Principles.*
[763] The definition of "habitual residence" under the CLIP Principles (Arts. 2:601(2) and 2:601(3)) is the same as the ALI Principles (Sec. 201(3)).

Similar to the ALI Principles, the extent to which the granting state can assume exclusive jurisdiction under the CLIP Principles is limited.[764] In determining the validity of patent, exclusive jurisdiction under the ALI Principles is limited to declaratory judgments, but for the CLIP Principles, exclusive jurisdiction can only be assumed if the validity or registration matters constitute the principal claim or the counterclaim, and as long as the resulting decision will not affect the validity or registration of those rights against third parties..[765] If a defendant were to raise the invalidity of the right as a defence, the infringement court would not need to stay the case, and the decision of the court is limited to determining between the parties whether the right of the patentee has been infringed upon.[766]

In addition, if the proceedings involve the same cause of action and the same parties are brought in the courts of different states, courts other than the court first seized are required to stay its proceedings.[767] The exception to this is if the court later seized has exclusive jurisdiction over the proceedings,[768] or if it is clear that the judgment from the court first seized will not be recognized under the Principles.[769] Courts other than the court first seized may also terminate the stay of its proceedings if the court first seized do not proceed within reasonable time, or if the court first seized has decided to not hear the case.[770] If related proceedings are pending before the courts of different states, courts other than the court first seized may also stay its proceedings.[771] In multistate proceedings, courts may also take into account the evidence produced in another proceeding and the finding of another court on the validity of an IP right, and are expected to cooperate with one another to facilitate cooperation and prevent inconsistent holdings and judgments to promote efficiency.[772]

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[764] Art. 2:401(1), *CLIP Principles.*
[765] Art. 2:401(2), *CLIP Principles.* See also: Benedetta Ubertazzi, "Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law," *Marquette Intellectual Property Law Review* 15, no. 2 (2011): 375–79.
[766] Paul Torremans, "An International Perspective II: A View from Private International Law," in *The Unitary EU Patent System*, ed. Justine Pila and Christopher Wadlow (United Kingdom: Hart Publishing, 2014), 171.
[767] Art. 2:701(1), *CLIP Principles.*
[768] Art. 2:701(1)(a), *CLIP Principles.*
[769] Art. 2:701(1)(b), *CLIP Principles.*
[770] Art. 2:701(2), *CLIP Principles.*
[771] Art. 2:702, *CLIP Principles.*
[772] Art. 2:704, *CLIP Principles.*

As for the provisional measures, court having jurisdiction over the substantive aspects of a case also has jurisdiction to order any provisional measures as necessary, without being subjected to further conditions. The CLIP Principles are aligned with the ALI Principles in the approach to cross-border injunctions, where injunctions are allowed to be issued for all jurisdictions to which infringement has been established,[773] but provides for more elaborate requirements on provisional measures. Provisional measures must occur in either the state where the measure is to be enforced or the state where protection is sought,[774] and the effect of such measures are limited to the country where they were granted.[775] The scope is also limited to activities affecting IPR protected under national laws.[776] An exception is made for conduct carried out through ubiquitous media such as the internet, where injunction is presumed to states where the IPR is protected and signals can be received, apart from the state whose law is not applied in the judgment.[777]

Another distinction between the principles may be observed in the recognition and enforcement of judgment. The CLIP Principles provide that a judgment should not be recognized or enforced if the recognition or enforcement is manifestly incompatible with the public policy[778] or procedural fairness[779] of the rendering state. This suggests that under the CLIP principles, public policy may be used as a ground to reject the recognition and enforcement of a foreign judgment, such as judgments concerning patentable subject matter.[780] Furthermore, the CLIP Principles do not allow the rendering state to review the merits of the case, and prevents the rendering state from refusing recognition of a foreign judgment if the substantive laws of the state of origin and the rendering state differ.

The differences between the ALI Principles and the CLIP Principles along with other choice of law projects are all potential options for ASEAN MS to determine the best means available in resolving patent disputes. These principles may also be applied in conjunction with other regional efforts such

[773] Art. 2:604(1), *CLIP Principles.*
[774] Art. 2:501(2), *CLIP Principles.*
[775] Art. 4:301(1), *CLIP Principles.*
[776] Art. 2:601(1), *CLIP Principles.*
[777] Art. 2:601(2), *CLIP Principles.*
[778] Art. 4:401(1), *CLIP Principles.*
[779] Art. 4:401(2), *CLIP Principles.*
[780] Toshiyuki Kono and Paulius Jurcys, "General Report," in *Intellectual Property and Private International Law: Comparative Perspectives*, ed. Toshiyuki Kono (United Kingdom: Hart Publishing, 2012), 202.

as the establishment of an ASEAN patent office, where in the event of an infringement and parallel proceedings are raised, the competence of national courts may be determined more effectively. The reality however, as pointed out by Trimble,[781] is that (i) first, both principles require a high degree of cooperation among courts in various countries, and would require an "orchestrated effort by countries and their judiciaries," where an international convention specifically is required to attain the compatibility of procedures, and (ii) there is a necessity for countries to overcome views of patent grant as "an act of sovereign state that cannot be scrutinized by the courts of a foreign country." In order for ASEAN MS to halt widespread cross-border infringing activities and limit the effects of patent laws in fragmenting trade, ASEAN simply needs to amplify current cooperative efforts and adopt some form of common procedural rules in the adjudication of patent disputes.

4.3 Cautious Approach to Regional Patent Protection in line with the ASEAN Way

Removing all barriers to trade and instituting a centralised patent system is the way to go if ASEAN intends to create a single market and a single production base. To prevent reducing the Charter to a future rhetoric of nominal international legality, the design, mandate and powers of ASEAN institutions must evolve to embrace and realize the new Charter ideologies.[782] However, the will of the ASEAN MS remains paramount in determining the mode and structure of ASEAN integration. Institutional design is also posited across a spectrum of scope and range of issues, depth and extent of policy harmonisation, extent of formal institutionalisation, and centralisation of authority.[783] If ASEAN MS continue to prioritise the ASEAN Way and are unable to accept a supranational system overseeing patent disputes, or consider ways to localise patent disputes, ASEAN MS can seek other intermediary solutions which are politically viable.

In contrast to the comparatively positive outlook in Chapter 4.2 on the erosion of the ASEAN Way, other studies have emphasised ASEAN's principle of non-interference as occupying absolute

[781] Trimble, *Global Patents: Limits of Transnational Enforcement*, 64–65.
[782] Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," 319–20.
[783] See e.g. Lenz and Marks, "Regional Institutional Design: Pooling and Delegation," 515.

centrality,[784] drawing from instances where ASEAN MS' expressed hyper-sensitivity to any "intervention" or "interference" in their domestic affairs.[785] The accommodative relationship between ASEAN MS bears an important aspect as each ASEAN MS "must consciously consider the effects their domestic policies might have on a neighbour"[786] despite the lack of sanctions to the contrary.[787] Scholars have also view the principle of non-interference as imposing "extraordinarily strict" limitations on the conduct of ASEAN MS, "prohibiting even verbal commentary on domestic affairs to avoid disrupting regional order."[788] Further, ASEAN's attitude towards sovereignty and non-interference have also been dubbed by scholars as "Eastphalia," in contrast to Western states advocating for a liberal, post-Westphalian order.[789]

There is also reason to believe that ASEAN would likely continue to prioritise the ASEAN Way moving forward. According to Lenz and Marks, intergovernmentalism and supranationalism are both posited at the end of the spectrums of institutional design, the difference being pooling and delegation: pooling refers to a transfer of authority where decision-making capabilities are shared among MS, whereas delegation refers to the delegation of authority with condition from MS to the institution, empowering the latter to act on behalf of the former, thus allowing a degree of autonomy for the

[784] For a succinct overview of discussions involving ASEAN's regionalism among international relations theorists, see: Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia*, Critical Studies of the Asia Pacific Series (London: Palgrave Macmillan UK, 2012), 2–8.
[785] Jones, 4.
[786] Antolik, *ASEAN and the Diplomacy of Accommodation*, 2016.
[787] Woon, *The ASEAN Charter: A Commentary*, 61.
[788] Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia*, 4. Bellamy and Drummond have also noted that regional practice ranges from "the mildest of political commentary through to coercive military intervention." See: Alex J. Bellamy and Catherine Drummond, "The Responsibility to Protect in Southeast Asia: Between Non-Interference and Sovereignty as Responsibility," *The Pacific Review* 24, no. 2 (2011): 185. On the other hand, Woon explained that explains that the principle of non-interference in ASEAN means that "member States do not resort to publicly lecturing one another (or other countries) about their domestic situation," but issues of common concerns are still raised at the informal Foreign Ministers' and leader's meetings. This is because "advice from family, even when the message is unwelcome, is more palatable than hectoring from outsiders." See: Woon, *The ASEAN Charter: A Commentary*, 60–61.
[789] The Eastphalia inquiry invigorates concepts of national sovereignty and non-intervention, which is at odds with the view that the EU legal order constitute a harbinger of the future. See e.g. David P. Fidler, Sumit Ganguly, and Sung Won Kim, "Eastphalia Rising?: Asian Influence and the Fate of Human Security," *World Policy Journal* 26, no. 2 (2009): 53–64, https://doi.org/10.1162/wopj.2009.26.2.53; Fidler, "Introduction: Eastphalia Emerging?: Asia, International Law, and Global Governance," *Indiana Journal of Global Legal Studies* 17, no. 1 (2010): 1–12, https://doi.org/10.2979/gls.2010.17.1.1; Tom Ginsburg, "Eastphalia as the Perfection of Westphalia," *Indiana Journal of Global Legal Studies* 17, no. 1 (2010): 27–45.

institution to pursue its own agenda.[790] In a broad sense, an intergovernmental model of international cooperation would be low on both pooling and delegation: MS retain full sovereignty and regional organs are designed to act on a Secretarial role; whereas a supranational approach would be higher on both pooling and delegation as MS generally adopt a ballot approach in decision-making, and grants the regional organisation part of its sovereignty to carry out certain functions.

Under the framework, ASEAN has been posited at the lower end of the spectrum of delegation and pooling,[791] which is in line with many regional organisations within the developing world, where membership in regional organisations are meant to reinforce sovereignty, and in the ASEAN context, the fight for independence from colonial powers.[792] In the same classification, EU is rated as high in delegation and medium in pooling, and the African Union is medium in delegation and high in pooling.[793] For developing countries, weaker states within integration groups would prefer a lack of structure due to worries that only the interests of the stronger states would be promoted.[794] For ASEAN which has a mix of developed and least developed countries, and the fact that each ASEAN MS are diverse in terms of culture, economic development, and political systems,[795] the preference for informality and diplomatic consultations becomes all the more important. As it is difficult to obtain unanimous consent of the MS to surrender any portion of their state power, initiatives to further

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[790] See: Börzel and Risse, "Introduction: Framework of the Handbook and Conceptual Clarifications," 8; Lenz and Marks, "Regional Institutional Design: Pooling and Delegation," 514..
[791] Lenz and Marks, "Regional Institutional Design: Pooling and Delegation," 515, 530.
[792] According to Deinla, ASEAN's experience with colonialism has fostered a top-down approach conception of the rule of law, leading to a "strong centralising state in the postcolonial era." See: Deinla, *From ASEAN Way to the ASEAN Charter*, 191. Other regional organisations which are medium to low in delegation and pooling include the Commonwealth of Independent States (CIS), Common Market of the South (MERCOSUR), and the South Asian Association for Regional Cooperation (SAARC). See: Lenz and Marks, "Regional Institutional Design: Pooling and Delegation," 530.
[793] Lenz and Marks, "Regional Institutional Design: Pooling and Delegation," 530.
[794] Klučka and Elbert, *Regionalism and Its Contribution to General International Law*, 76–77.
[795] Huck has pointed out such differences in terms of constitutional foundations: English parliamentary democracy influenced by Westminster in Malaysia and Singapore, socialist constitutions that characterise Viet Nam and Laos, presidential systems in Indonesia and the Philippines, constitutional monarchy associated with the military in Thailand, parliamentary democracy associated with the military in Myanmar, and a Malay Muslim monarchy in Brunei. While not specifically mentioned in the article, Cambodia maintains a constitutional monarchy system. See: Huck, "Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability," 107.

enhance the institutional mechanism structure is likely challenging to be realised, especially with ASEAN's modus operandi to move at a pace comfortable to all.[796]

Further, economic integration to ASEAN MS is also seen as a trade-off between the perceived benefits of economic integration and the potential loss of national sovereignty.[797] The establishment of a single market and production base in ASEAN is a response to the perceptions of external threats in trade, much less an inward-looking of the advantages of deeper intra-regional cooperation.[798] The ASEAN Charter if anything, has been described as formalising ASEAN's penchant for informality.[799] The biggest looming barrier to ASEAN's economic integration is also the lack of political will,[800] which Ravenhill describes as "a shorthand expression for the response of governments to the imbalance between the damage that domestic actors believe regional economic cooperation will do to their interests, and the expected gains to be derived from collaboration."[801] In other words, the benefits of regional economic integration should outweigh the cost, and in Ravenhill's analysis, ASEAN's supply for intra-ASEAN trade has exceeded that of demand from businesses, and thus further integration may not seem necessary. Severino and Menon further suggested that the formation of a regional ASEAN economy was more for appearance in order to "impress" the international business sector, than ASEAN is serious about integrating the regional economy.[802] Referring to the European experience on an economic union, Vajda has also noted that political interest and political will needs to override mere economic interest,[803] and according to Balassa, the outcome of economic integration is

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[796] Klučka and Elbert, *Regionalism and Its Contribution to General International Law*, 78. Narine further noted that Asian states would reject the "pooling" state sovereignty to create regional institutions, but supports the creation of regional institution to support and enhance the sovereignty of member states. See: Narine, "State Sovereignty and Regional Institutionalism in the Asia Pacific," 14.
[797] Balassa, "Types of Economic Integration," 29.
[798] Chia and Plummer, *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions*, 3.
[799] Bagulaya has also described the ASEAN Charter as institutionalising the control of ASEAN MS over ASEAN. See: Jose Duke Bagulaya, "ASEAN as Wayang Kulit: A Critique of the Constitutional, Extra-Constitutional, and Practical Fetters of ASEAN," *Asian Journal of International Law* 9, no. 2 (July 2019): 275–97, https://doi.org/10.1017/S2044251319000018.
[800] Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?," 947–48; Plummer, *The ASEAN Economic Community and the European Experience*, 1–15.
[801] Ravenhill, "Economic Cooperation in Southeast Asia," 850–51.
[802] Rodolfo C. Severino and Jayant Menon, "Overview," in *The ASEAN Economic Community: A Work in Progress*, ed. Sanchita Basu Das et al. (Singapore: ISEAS Publishing, 2013), 4.
[803] Imre Vajda, "Integration, Economic Union and the National State," in *Foreign Trade in a Planned Economy*, ed. Imre Vajda and Mihaly Simai (London; New York: Cambridge University Press, 1971), 41.

determined essentially by political factors.[804] As long as ASEAN leaders continue to see membership in ASEAN as sovereignty-reinforcing, instituting a supranational system may still be difficult.

In addition to the current lack of political will to adequately match implementation to AEC's goals, ASEAN's move to integrate its economy and enhancing the rule of law must ultimately meet the national interests of each ASEAN MS[805] and consider the different development levels of ASEAN MS.[806] As noted in the introduction and Chapter 2 of this dissertation, ASEAN membership was extended to Cambodia, Lao PDR, Myanmar, and Viet Nam. The establishment of AFTA in 1994 in particular was worrisome for the new members given that they had just begun the arduous process of reorienting their economies. The development gap was harder and more difficult to bridge, particularly when customs and tariff moneys constituted a significant part of their state revenue, and the lack of technical capacity necessary to actually implement the requirements.[807] Extending ASEAN membership was also concerning to its founding members as it run the risk of unity carefully crafted, whether this would create two tiers of ASEAN MS – one richer, one poorer.[808]

Thus, this section raises two potential solutions should ASEAN retain its current approach to economic integration – (i) recognition of foreign patents and (ii) interoperability, which would serve as intermediary solutions for ASEAN to strengthen patent protection within the region, but still within the scope of the ASEAN Way.

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[804] Balassa, "Types of Economic Integration," 30.
[805] See e.g. Asian Development Bank, *Asian Economic Integration Report 2022: Advancing Digital Services Trade in Asia and the Pacific* (The Philippines: Asian Development Bank, 2022), 71, https://www.adb.org/publications/asian-economic-integration-report-2022.
[806] See e.g. Seah, "The ASEAN Charter," 200. Mantra has also pointed out that despite the optimism of Indonesian leaders towards the creation of a single market, industries sectors in Indonesia are still unequipped in competing with other ASEAN MS. See: Dodi Mantra, *Hegemoni Dan Diskursus Neoliberalisme: Menelusuri Langkah Indonesia Menuju Masyarakat Ekonomi ASEAN 2015* (Jawa Barat: Manta Press, 2011), 1–16. Kimura has similarly pointed out that ASEAN's objective in creating a single market is the right direction, but cannot be taken at face value since development gaps between ASEAN MS would render it impossible. See: Kimura, "Reconstructing the Concept of 'Single Market and Production Base' for ASEAN beyond 2015," 1–18. Further, Jiang cautioned against reading into aspirations that regional organisations in Asia-Pacific do not intend to adhere to, and that they may instead prefer "less robust models" particularly as political organisations. See: Jiangyu Wang, "International Economic Law and Asia," in *Oxford Scholarly Authorities on International Law*, ed. Simon Chesterman, Hisashi Owada, and Ben Saul, September 2019, 41, https://opil.ouplaw.com/view/10.1093/law/9780198793854.001.0001/law-9780198793854-chapter-10?prd=OPIL.
[807] Ba, *(Re)Negotiating East and Southeast Asia*, 114.
[808] Ba, 114–15.

4.3.1 Recognition of Foreign Patents

Through the ASEAN minus X approach, ASEAN MS could also opt to recognise the patents issued by another ASEAN MS. Mutual recognition of national patents entails the recognition of another country's patents. As patent registration and the associated search and examination process becomes standardised globally, the most obvious advantage of this arrangement is that it decreases the cost and time associated with patent granting in addition to enabling acts occurring between the territories of the countries to be considered. Under the Paris Convention, patents that are granted based on an existing foreign patent, called "patents of importation," "introduction," "confirmation," or "revalidation." These types of patents have lost their novelty at the time of the patent application but are granted on the basis of an existing foreign patent, and the duration of which is made dependent on the duration of the corresponding foreign patent.[809] The purpose of granting these patents, patents of importation in particular, is to induce the introduction of the invention into the country, and the difficulty associated with registering the patent within the 12 month priority period in another Union state.[810] Whether the validity of such patents are dependent on the principal patent is construed as a matter of national law.[811] These patents were present in countries such as Spain and Belgium, and is still available in the national patent laws of countries such as Ethiopia (patents of introduction)[812] and Democratic Republic of Congo (patents of importation).[813]

For ASEAN MS, the mode of recognising the validity of a foreign patent is now more generally carried out through a validation or re-registration process without explicitly noting the different types of patents listed in the Paris Convention, in local law legislation. Patents granted by IPOS may be re-registered in the patent office of the Ministry of Industry and Handicrafts in Cambodia ("MIH") starting

[809] G. H. C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (Geneva, Switzerland: United International Bureaux for the Protection of Intellectual Property (BIRPI), 1968), 26, 62, https://doi.org/10.1007/978-1-137-35471-6_5.
[810] Art. 15, Paris Convention. See also: Ladas, *Patents, Trademarks, and Related Rights*, 374–77.
[811] Ladas argued that the automatic cancelling of a patent of importation when the corresponding principal patent has lapsed in a foreign country for any reason, such as failure to pay annuities, would be a violation of Art. 4*bis* of the Paris Convention. See: Ladas, 511.
[812] Section 5, *Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/1995.*
[813] Art. 5, *Democratic Republic of Congo Industrial Property, Law No. 82-001 of January 7, 1982.*

from 25 July 2016.[814] In addition, Cambodia also validates European patents since March 1, 2018. Brunei at one point allowed the re-registration of patents issued by Malaysia, Singapore and United Kingdom, but the option has been discontinued after the 2012 Patents Order came into effect.

To reduce the complexities associated with patent applications, ASEAN MS could consider validating another MS's patent, which not only eliminates duplicative search and examination work, but in the case of cross-border infringement, reduce procedural and substantive considerations in establishing direct infringement, such as the admissibility of evidence of infringement. Another potential outcome of such recognition also allows for a *de facto* regional exhaustion effect, since not all ASEAN MS have adopted an international exhaustion approach.[815]

While forging agreements among all ten ASEAN MS can be challenging, ASEAN MS can opt to engage the ASEAN minus X or "2 plus X" formula to initiate flexible participation, a mechanism to allow ASEAN MS who are ready to cooperate on specific issues to do so without compelling other ASEAN MS who are not ready. Drawing from examples from other jurisdictions, there are three main ways the recognition of a foreign patent has been carried out: recognition of a foreign patent as a local patent, or the mutual recognition of patents with unitary effect, or issuance of patents with unitary effect by national patent offices.

i. Recognition of Foreign Patent as Local Patent

An option for ASEAN MS to consider would be to recognise another member state's patents as local patents. An example of this arrangement would be the Convention of Friendship and Good Neighbourhood 1939 between Italy and San Marino concerning IP protection. Under the convention,

[814] A memorandum of understanding ("MOU") was signed to that effect, and is effective for five years from 20 January 2015, and can be extended upon consultation. See: Art. 10, *Memorandum of Understanding on the Co-operation in Industrial Property between the Ministry of Industry and Handicraft (MIH) and the Intellectual Property Office of Singapore (IPOS).* As for the regulations concerning the re-registration, see: Intellectual Property Office of Singapore, "Guide to Re-Register a Singapore Patent in Cambodia," August 22, 2016, https://www.ipos.gov.sg/docs/default-source/Protecting-your-ideas/Patent/(updated-22-august-2016)-guide-to-re-register-a-singapore-patent-in-cambodia.pdf.
[815] The only limitation to this concept is when the mutual recognition of patents occurs in accordance to national laws. Infra 4.3.1(i) of this dissertation. Calboli has similarly argued that the adoption of international exhaustion individually by ASEAN MS would be more fitting under the ASEAN Way's emphasis on the principle of non-interference in contrast to a region-wide exhaustion principle. See: Calboli, "The ASEAN Way or No Way?," 389–90.

all registered IP rights in Italy were recognised as valid in San Marino, and vice versa. However, due to competing legal instruments claiming exclusive rights which led to uncertainty concerning the validity of certain IP rights, Italy and San Marino reached an agreement on December 23, 2014 to supply the interpretation of the convention on patents and trademarks.[816] The current interpretation provides that protection in both countries may be obtained through filing a single application in either Italy or San Marino. However, applications under international systems need to be prosecuted separately in each country and that the reciprocity protection clause no longer applies.[817]

Under this arrangement, given that the patent is recognised as a national patent which is independent of one another, parallel proceedings would still be required in the case of cross-border infringement. This could result in contradictory judgements for the same patent as demonstrated by the European patent system under the EPC. Opposition procedures or invalidation trials will also need to be carried out separately.

If ASEAN MS were to consider this option, ASEAN MS could tie the validity of the local corresponding patent to the principal foreign patent.[818] In a hypothetical scenario, Singapore and Indonesia agree to recognize each other's patents. A patentee in Indonesia then initiates a suit against a Singaporean manufacturer in a Singaporean court, where the defendant raises an invalidity defence. In this case, whether the courts in Singapore may be able to invalidate the patent only within the jurisdiction of Singapore, or refer the invalidation process back to the Indonesian courts is an open question. Perhaps a prior agreement can be struck between the two ASEAN MS - in the event where the patent has been invalidated, the patent then loses validity in Singapore as well since there is no longer a need to recognize invalidated patents. This mutual recognition of national patent could be a viable option to some ASEAN MS who do not have the capacity to conduct patent search and examination. The potential downside to this arrangement however is that this may lead to "forum shopping" by the patentees in choosing the most opportune court.

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[816] European Patent Office, "SM San Marino," Official Journal March 2015, March 31, 2015, https://www.epo.org/law-practice/legal-texts/official-journal/2015/03/a34.html.

[817] Edgardo Deambrogi, "Interpretation of Reciprocity of IP Rights Protection in Italy and San Marino," IAM, February 4, 2015, https://www.iam-media.com/article/interpretation-of-reciprocity-of-ip-rights-protection-in-italy-and-san-marino.

[818] Notwithstanding Ladas' criticism, this arrangement is not expressly prohibited under the Paris Convention. Cf. fn 811.

However, the effects of exhaustion in impeding trade may not be addressed if the mutual recognition of patents does not include the exhaustion of rights once the goods are put into any of the markets where protection is conferred. Hypothetically, Thailand and Malaysia enter into an agreement to recognize each other's patents. A patentee holding a patent from Thailand, which is equivalent to the Malaysian patent, puts the product in the Malaysian market but not the Thai market, then attempts to block the importation of the goods from Malaysia to Thailand. Since the patent law of Thailand is unclear on whether exhaustion is national or international,[819] it is possible that the Thai patent is deemed to not have been exhausted by the act of putting the good on the Malaysian market. In order to remedy this situation, the rights of the patentee must be deemed to have been exhausted once it enters into the market of either Malaysia or Thailand.

ii. Mutual Recognition of National Patents with Unitary Effect

Another possibility in the mutual recognition of patents is for states to mutually agree on automatically recognizing each other's national patents issued, but confer upon a unitary effect to the patent. This means that the patent will be valid throughout the territory of protection, and may be granted, annulled or lapse in respect of the entire territory of protection. This mode of protection also likely needs to be complemented by prior agreement on dispute resolution, especially on the jurisdiction and applicable law.

An example of this arrangement is the Treaty between the Swiss Confederation and the Principality of Liechtenstein on Patent Protection. Both Switzerland and the Principality of Liechtenstein form a unified territory for the purposes of patent law,[820] and both of these countries may only be designated jointly under the EPC and the PCT.[821] The applicable law to the agreement is the Federal Law of Switzerland on Patents for Inventions, which means that Swiss Patent law is applicable in both Liechtenstein and Switzerland. Liechtenstein also shares a common court structure with Switzerland in patent matters. The Court of Second Instance (Obergericht) has competence over

[819] Section 36(7) of the Thai Patent Act 1979 for instance does not designate the territorial scope.
[820] Art. 1, *Treaty between the Swiss Confederation and the Principality of Liechtenstein on Patent Protection.*
[821] Arts. 2-3, *Treaty between the Swiss Confederation and the Principality of Liechtenstein on Patent Protection.*

patent issues in Liechtenstein at first instance, and any appeals can be filed with the Swiss Federal Supreme Court in Lausanne.[822] Since 2012, the Federal Patent Court in Switzerland has exclusive jurisdiction over validity and infringement disputes, preliminary measures and enforcement of decisions under its exclusive jurisdiction.

The advantage of this system is that infringing acts that occur in any of the two territories may be able to be considered fully under the consolidated jurisdiction of the Swiss Federal Supreme Court, which enable greater legal certainty in resolving patent cases. The unitary nature of the patent also allows weak or bad patents to be struck down more easily rather than initiating opposition proceedings or invalidation trials in both of the jurisdictions.

In the context of Southeast Asia, the adoption of patent law of another MS to be applied locally is unprecedented, not to mention allowing a fellow ASEAN MS to determine the outcome of a patent which could materially affect the state's welfare. However, this could be a recourse for ASEAN MS who are categorised as LDCs and is still in the process of establishing a patent system to consolidate their patent system with another jurisdiction.

iii. Issuance of Unitary Patents through National Offices

Yet another way of implementing a mutual recognition system to enable national patent offices to grant national patents of another country, or grant patents with a unitary effect to cover all the participating states. This solution was notably proposed by Eduard Reimer, the first president of the German patent office, where national patent offices are able to grant European Patents.[823] The granting of the patent would occur not on the basis of national laws, but would be determined by an agreement between the parties.

Under this system, LDCs in ASEAN MS without developed patent infrastructure may be able to benefit from the patent office of another country with a more developed system to issue a national patent enforceable in the LDC. The downside to this arrangement is that it deprives the LDC of

[822] Art. 11, *Treaty between the Swiss Confederation and the Principality of Liechtenstein on Patent Protection.*
[823] Paul Abel, review of *Review of Eurpäisierung des Patentrechts*, by Eduard Reimer, *The International and Comparative Law Quarterly* 4, no. 3 (1955): 408.

developing patent expertise of its own. What could be done to overcome this shortcoming is to divide the tasks of search and examination of different subject matters to different countries. For instance, Myanmar which has yet to issue any patents[824] or Lao PDR which have yet to grant any patents to its residents[825] may consider forming an agreement with other ASEAN MS to develop subject-matter expertise. Each patent office would be responsible for specific subject matters most relevant to their respective local industries with cooperative assistance from other ASEAN MS as part of capacity-building activities.

Similar to the assessment in 4.2.1(i), if the patents issued are national patents limited by territory, problems such as exhaustion, invalidation, and cross-border infringement may not be readily addressed, and thus lowering the legal certainty associated with patent protection. On the other hand, if the patents have a unitary effect, exhaustion on a regional scale will be ensured, thereby enabling greater protection for patentees due to the enlarged jurisdiction for patent protection.

4.3.2 Interoperability

The interoperability concept to patent rights protection in ASEAN has gained strong traction in both IP policy making and scholarly works in recent years. This approach has been popularised by Ng and Austin's seminal compilation of scholarly works, and through linking the ASEAN Way with IPR protection, the compilation explores the different pathways that ASEAN can take to strengthen IP protection on a regional basis.[826] Writing for the foreword, Menon understood the ASEAN Way as envisaging "greater cooperation and collaboration among member states," but "undergirded by an acknowledgement of, and deep respect for, national sovereignty and diversity."[827] Ng and Austin further notes that IP initiatives under the AEC aligns with the ASEAN Way since it is premised on

[824] World Intellectual Property Organization, "Myanmar."
[825] World Intellectual Property Organization, "Lao People's Democratic Republic," Statistical Country Profiles, December 2022, https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=LA.
[826] Elizabeth Siew-Kuan Ng and Graeme W. Austin, eds., *International Intellectual Property and the ASEAN Way: Pathways to Interoperability* (Cambridge, United Kingdom: Cambridge University Press, 2017).
[827] Ng and Austin, xxiii.

consensus and non-interference, respecting the sovereignty of each nation and support flexibilities provided under the international IP framework, enabling ASEAN MS to move forward collectively.[828]

The term interoperability in the context of IP protection in ASEAN can be traced to a speech delivered by the then Chief Executive of the International Property Office of Singapore (IPOS) in 2014, where patent offices of ASEAN MS should strive towards interoperability rather than the harmonisation of patent laws.[829] This concept is then further emphasised by the subsequent Chief Executive, which stated that one of the strategic objectives of the ASEAN IPR 2016-2025 includes interoperability of IP offices in ASEAN.[830] Referencing the action plans, this understanding of interoperability points to the creation of linkages between agencies, streamlining procedures, and technical and procedural convergence.

The interoperability concept has gained traction precisely for its emphasis on inter-agency cooperation. Among the proposed cooperation under interoperability, examples include to connect and transfer workings between patent offices rather than explicitly requiring patent offices to change their inner working structure which would otherwise be required by further harmonisation efforts to the procedural aspects; establishment of the Council of ASEAN Chief Justices to share best practices and promote stronger collaboration; work-sharing programs; and workplans to support regional trade liberalisation are all pathways to facilitate inter-agency dialogue.[831] The cooperative element from the interoperability concept can also be gleaned from the ASEAN IPR Action Plan at which teamwork and collective responsibility is emphasised, each initiative led by "Country Champions" without any ASEAN MS assuming a dominant leadership role.[832]

There are also two inferences that may be drawn from pursuing a purely interoperable approach to IP protection. First, interoperability is a manifestation of the ASEAN Way in emphasising consensus, non-interference, respect for each nation's sovereignty interests, a desire to move forward

[828] Ng, "Intellectual Property Interoperability in ASEAN and Beyond: An Integration Model," 4.
[829] "Speech by Mr Tan Yih San, Chief Executive of IPOS at the NUS Centre for Business and Law."
[830] "Speech by Mr Daren Tang, IPOS Chief Executive, at the Thailand Department of IP Symposium, on 'ASEAN POST-AEC on IPR: Turning Point For Entrepreneurs,'" Speeches, March 2016, https://www.ipos.gov.sg/media-events/speeches. It is interesting to note that the term "interoperability" is not expressly utilised in the ASEAN IPR Action Plan, but does correspond to the first strategic goal, which aims to strengthen IP offices and build IP infrastructures in the region.
[831] Ng, "Intellectual Property Interoperability in ASEAN and Beyond: An Integration Model," 21.
[832] Ng, 19–20.

together in a cooperative fashion, and give due recognition to different levels of development.[833] Interoperability when understood under this manner, implies the impossibility of a supranational authority in the ASEAN region, and rather than having a single centralised patent system, it would be preferable for ASEAN MS to create linkages to enhance dialogue.

Second, interoperability is also understood in the context in which harmonisation of substantive patent laws is no longer desirable and unlikely to be attained in the future, at least under the ambit of ASEAN.[834] Notably, any form of harmonisation under the ASEAN action plans have not centred on the substantive aspects of patent laws, but rather on the patent registration process and practices.[835] Contrary to the EU which can enforce harmonisation through directives, ASEAN does not have the same legal and institutional structure. In fact, it can be argued that harmonisation of patent laws is rather driven among ASEAN MS through other regional trade agreements. Notably, RCEP and CPTPP has driven ASEAN MS to align their patent laws with international standards – to comply with the Art. 18.38 of the CPTPP, Viet Nam for instance amended their patent act and extended the grace period from 6 months to 12 months;[836] and as explored in Chapter 4.1.2, both the RCEP and CPTPP requires its members to accede to among all, the PCT and the Budapest Treaty, which some ASEAN MS did not ratify or accede to.

Among all other approaches proposed in this Chapter, interoperability is both descriptive of ASEAN's current cooperative approach towards IPR protection, and prescriptive in that the same approach can be extended to other areas, such as the judicial processes of cross-border IPR disputes and the operation of private international law. It does not specifically address the creation of a single

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[833] Ng, 3–23.
[834] Richard Garnett, "Intellectual Property Remedies across Borders," in *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, ed. Elizabeth Siew-Kuan Ng and Graeme W. Austin (United Kingdom: Cambridge University Press, 2017), 128.
[835] This is best illustrated by the introduction to the ASEAN IPR Action Plan 2011-2015: "Instead of trying to formulate a single set of laws and designing a harmonized 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." The ASEAN IPR Action Plan 2016-2025 further notes the importance of linking IP to the socio-economic context: "IP, as one instrument of development, should also be considered in terms of its linkage to other components of socio-economic development strategy, including (among others) poverty reduction, health, education, industrial development, and especially trade."
[836] Le Xuan Thao, "Vietnam's Intellectual Property Law Amended to Comply with CPTPP," Asia IP, July 31, 2019, https://asiaiplaw.com/article/vietnams-intellectual-property-law-amended-to-comply-with-cptpp.

market and production base, but focuses on ASEAN's broader and dynamic goals in pursuit of a competitive and innovative economy. However, merely focusing on pursuing interoperability would be insufficient. At the core of ASEAN's integration is a commitment and to pursue rules-based economic integration, which does not refer to solely individual ASEAN MS strengthening their own local laws, but also the eventual evolvement of ASEAN into a "rules-based" institution in managing revolving regional issues. Focusing solely on ad-hoc workings or a purely collaborative interoperable model would deprive ASEAN of the opportunity to develop its own legal regime, and would not meet the vision as set out by ASEAN in pursuing economic integration.

Summary of Chapter 4

This Chapter seeks to prescribe solutions to ASEAN moving forward, by first providing an overview of the patent-related treaties which ASEAN MS are parties to, and demonstrate that the patent systems of ASEAN MS are largely in line with international standards. In order to implement what is required under the ASEAN Charter in establishing the AEC, given the convergence of ASEAN's patentability standards, this Chapter proposes solutions based on (i) the erosion of the ASEAN Way which allows ASEAN to consider a unified patent system or a common private international law, or for ASEAN MS to consider the extraterritorial application of patent law, and (ii) continued insistence of the ASEAN Way, where ASEAN can still take incremental steps to recognising a foreign patent, or to engage in the ongoing interoperability agenda which focuses on inter-agency cooperation. Ultimately, this Chapter notes that a unified patent system remains necessary for ASEAN to attain its goals under the AEC, in particular the creation of a single market and production base.

Chapter 5. Conclusion

Respect for national sovereignty and its necessary corollary, the principle of non-interference, constitute the "single most important principle underpinning ASEAN regionalism."[837] Since its founding in 1967 at the height of the Cold War, the ASEAN Way as a regional norm and mode of diplomacy has enabled ASEAN MS to foster trust, consultation, and consensus, bringing about relative regional peace to Southeast Asia. Building upon the ASEAN Way, ASEAN gradually developed into an intergovernmental organisation with a legal personality, and continued to strive towards consensus-building, placing no burdens on its participating MS and to avoid confrontation, heralding non-interference in domestic affairs, territorial integrity, and sovereign equality.

While the ASEAN Way remains paramount in maintaining mutual trust and regional peace and has enjoyed longevity since its conception, the same approach need not be reflected similarly in other areas apart from regional security purposes, and certainly not necessary in the protection of patent rights. Adherence to ASEAN Way in all areas of cooperation is precisely the cause of lack of legalisation and formalisation in ASEAN, both of which are preconditions in advancing meaningful economic integration and strengthen the protection of patent rights on a regional level. Further, while the ASEAN Charter demonstrated a signal of political resolve and commitment to legalisation, the ASEAN Way continues to influence ASEAN's pathway to legalisation due to underpowered institutional organs and the lack of binding statutory laws. In order for ASEAN to meet its goals under the AEC, ASEAN needs to be endowed with greater functions to prescribe and enforce rules. In particular, ASEAN's strategy through the AEC is to attract FDIs and access export markets, and that AEC would help improve its competitiveness in the global struggle of generating economic growth. To that end, it is foreseeable that enhancing the rule of law would increase the confidence required in business decision-making, making the region ASEAN more attractive to FDIs and technology transfer.

As the AEC strives to improve the global competitiveness of ASEAN MS and create a single market and production base, issues that may arise from the movement of patented goods across borders along with the need for increased technology transfer must be addressed. This dissertation

[837] Acharya, *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*, 57.

has anticipated the legal and regulatory hurdles that may occur under the AEC in Chapter 2, explained how ASEAN Way as an underlying norm limits what ASEAN can do in Chapter 3, and prescribed potential solutions for ASEAN should the ASEAN Way prevails or erodes in Chapter 4. The proposed solutions of (i) establishing a centralised patent system, (ii) creation of an ASEAN patent office, (iii) extraterritorial application of national laws, (iv) adoption of private international law, (v) recognition of foreign patents, and (vi) interoperability are not mutually exclusive, and one alternative may be applied in conjunction with the other. The adoption of any of the solutions would, to some extent reduce the complexities and legal uncertainties in the resolution of patent disputes, and strengthen the formation of a single market and production base under the AEC.

However, this dissertation contends that the best way for ASEAN to regulate patent activities within ASEAN MS is none other than instituting an ASEAN regional patent system which integrates all existing national patent systems. Not only does such an establishment promote the rule of law within the region, a supranational institution overseeing patent granting and enforcing would allow ASEAN to develop its own legal methodology for regional patent rights protection, and simplifies the entire granting and enforcement process on a regional scale. While the creation of a unitary ASEAN patent system will perfect the creation of a single market under the AEC, this dissertation also recognises the realistic constraints associated with this establishment. The lack of institutional support, political will, and economic disparities between ASEAN MS are among the reasons cited in this dissertation, which impede the immediate institution of a unitary ASEAN patent system. However, ASEAN should continue to strive towards greater legalisation and formalisation of its instruments and institutions in pursuing a rules-based economic integration. Furthermore, ASEAN MS should still carry out gradual steps towards a more cohesive patent system and utilise the ASEAN minus X process fully to strengthen the protection of patent rights.

Further, despite interoperability gaining traction as the ASEAN Way approach to patent protection, the juxtaposition between the formation of a single market and the territorial nature of patents cannot be resolved by the mere focus on interoperability. The loose binding organisation of ASEAN needs to be further strengthened by adopting common rules to ensure transparency, certainty, and accountability. While interoperability would continue to be important as the first step in

facilitating discussions and forming linkages in building a cohesive ASEAN patent system. Ultimately, a regional patent system among ASEAN MS is indispensable. So long as markets in ASEAN remain fragmented due to divergent national patent systems, the creation of a single market and production base would be impeded.

Bibliography

Abbott, Frederick M. "Intellectual Property, International Protection." edited by Rüdiger Wolfrum, 228–43. Oxford, New York: Oxford University Press, May 30, 2013.

———. "The TRIPS Agreement, Access to Medicines, and the WTO Doha Ministerial Conference." *The Journal of World Intellectual Property* 5, no. 1 (2005): 15–52. https://doi.org/10.1111/j.1747-1796.2002.tb00147.x.

———. "The WTO Trips Agreement and Global Economic Development." *Chicago-Kent Law Review* 72, no. 2 (1996): 385–406.

Abbott, Frederick M., Ryan Abbott, Wilbert Bannenberg, and Marianne Schürmann. "Regional Assessment of Patent and Related Issues and Access to Medicines: Caricom Member States and the Dominican Republic (HERA)." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, December 31, 2009. https://papers.ssrn.com/abstract=1909978.

Abbott, Frederick M., and Carlos M. Correa. "World Trade Organization Accession Agreements: Intellectual Property Issues." SSRN Scholarly Paper. Rochester, NY, May 30, 2007. https://papers.ssrn.com/abstract=1915338.

Abbott, Frederick M., Thomas Cottier, and Francis Gurry. *International Intellectual Property in an Integrated World Economy*. Fourth edition. Aspen Casebook Series. New York: Wolters Kluwer, 2019.

Abbott, Kenneth W, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." *International Organization* 54, no. 3 (2000): 401–19.

Abbott, Kenneth W., and Duncan Snidal. "Hard and Soft Law in International Governance." *International Organization* 54, no. 3 (2000): 421–56.

———. "Why States Act through Formal International Organizations." *The Journal of Conflict Resolution* 42, no. 1 (1998): 3–32.

Abdul Aziz, Davinia, and Renaud Dehousse. "The Instruments of Governance of ASEAN." In *The ASEAN Way in a Comparative Context - ASEAN Governance, Management and External Relations*, 7. Jakarta, Indonesia, 2013.

Abel, Paul. Review of *Review of Eurpäisierung des Patentrechts*, by Eduard Reimer. *The International and Comparative Law Quarterly* 4, no. 3 (1955): 407–9.

Acharya, Amitav. *Constructing a Security Community in Southeast Asia ASEAN and the Problem of Regional Order*. London; New York: Routledge/Taylor & Francis Group, 2009.

———. "Ideas, Identity, and Institution-Building: From the 'ASEAN Way' to the 'Asia-Pacific Way'?" *Pacific Review* 10, no. 3 (1997): 319–64.

Acharya, Amitav, and Alastair I. Johnston. "Conclusion: Institutional Features, Cooperation Effects, and the Agenda for Further Research on Comparative Regionalism." In *Crafting Cooperation: Regional International Institutions in Comparative Perspective*, edited by Amitav Acharya and Alastair I. Johnston, 244–78. Cambridge: Cambridge University Press, 2007. https://doi.org/10.1017/CBO9780511491436.

Adisornmongkon, Rungnapa. "Recognition and Enforcement of Foreign Judgments among ASEAN Countries." *MFU Connexion* 7, no. 1 (2018): 210–32.

Aggarwal, Vinod K., and Jonathan T. Chow. "The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation." S. Rajaratnam School of International Studies, 2009. JSTOR. https://www.jstor.org/stable/resrep17183.

Ambrizal, Melinda. "Proposed Amendments to Indonesia's Patent Law." Tilleke & Gibbins, October 18, 2021. https://www.tilleke.com/insights/proposed-amendments-to-indonesias-patent-law/.

Ancel, Marie-Elodie, Nicolas Binctin, Josef Drexl, Mireille van Eechoud, Jane C Ginsburg, Toshiyuki Kono, Gyooho Lee, Rita Matulionyte, Edouard Treppoz, and Dário Moura Vicente. "International Law Association's Guidelines on Intellectual Property and Private International Law ('Kyoto Guidelines'): Applicable Law." Edited by Toshiyuki Kono, Axel Metzger, and Pedro de Miguel Asensio. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, International Law Association's Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines"), 12, no. 1 (2021): 44–73.

Antolik, Michael. *ASEAN and the Diplomacy of Accommodation*. London; New York: Routledge, Taylor & Francis Group, 2016. https://doi.org/10.4324/9781003069744.

———. *ASEAN and the Diplomacy of Accommodation*. Routledge, 2020.
Arendshorst, John. "The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter." *Northwestern University Journal of International Human Rights* 8 (2010 2009): 102.
Arundel, Anthony, Suma Athreye, and Sacha Wunsch-Vincent, eds. *Harnessing Public Research for Innovation in the 21st Century: An International Assessment of Knowledge Transfer Policies*. 1st ed. Cambridge University Press, 2021. https://doi.org/10.1017/9781108904230.
ASEAN. "Chairman's Statement of the 13th ASEAN Summit, 'One ASEAN at the Heart of Dynamic Asia' Singapore, 20 November 2007." Association of Southeast Asian Nations, June 13, 2012. https://asean.org/chairmans-statement-of-the-13th-asean-summit-one-asean-at-the-heart-of-dynamic-asia-singapore-20-november-2007/.
———. "Signing Ceremony of the Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia (TAC) by the Republic of Peru." Association of Southeast Asian Nations, August 21, 2019. https://asean.org/?flickr=signing-ceremony-instrument-accession-treaty-amity-cooperation-southeast-asia-tac-republic-peru.
ASEAN Intellectual Property Portal. "ASEAN Patent Examination Co-Operation (ASPEC): Document Submission Guideline," June 2022. https://www.aseanip.org/Portals/0/Document%20Submission%20Guideline%20for%20ASPEC%20-%20Release%20Version_June%202022.pdf?ver=2022-06-15-144110-227.
———. "ASEAN Patent Examination Cooperation (ASPEC) Statistics," January 2022. https://www.aseanip.org/Statistics/ASEAN-Patent-Examination-Cooperation-ASPEC-Statistics.
ASEAN Secretariat. *ASEAN Intellectual Property Rights Enforcement Handbook*. 978-602-5798-86–3. Jakarta, Indonesia: Association of Southeast Asian Nations, 2020. https://www.aseanip.org/Portals/0/ASEAN%20IPR%20Enforcement%20Handbook_with%20ISBN%20and%20Logo%20Final.pdf.
Asian Development Bank. *Asian Economic Integration Report 2022: Advancing Digital Services Trade in Asia and the Pacific*. The Philippines: Asian Development Bank, 2022. https://www.adb.org/publications/asian-economic-integration-report-2022.
———. *Toward a New Pacific Regionalism: An Asian Development Bank-Commonwealth Secretariat Joint Report to the Pacific Islands Forum Secretariat*. Pacific Studies Series. Mandaluyong City, Metro Manila, Philippines: Asian Development Bank, 2005. https://www.adb.org/sites/default/files/publication/28797/pacific-regionalism-vol2.pdf.
Asian Trade Center. "Non-Tariff Barriers (NTBs) in ASEAN and Their Elimination from a Business Perspective." Singapore, 2019. https://www.eabc-thailand.org/wp-content/uploads/2019/06/NTB_Study_Report_FINAL.pdf.
Association of Southeast Asian Nations. "About." ASEAN Trade Repository. Accessed August 16, 2020. https://atr.asean.org/read/about-asean-trade-repository/22.
———. "ASEAN Economic Community 2025 Consolidated Strategic Action Plan," August 14, 2018. https://asean.org/wp-content/uploads/2012/05/Updated-AEC-2025-CSAP-14-Aug-2018-final.pdf.
———. "ASEAN Leaders' Statement on the Application of Timor-Leste for ASEAN Membership," November 11, 2022. https://asean.org/asean-leaders-statement-on-the-application-of-timor-leste-for-asean-membership/.
———. "ASEAN Legal Instruments." Accessed January 30, 2023. https://agreement.asean.org/explanatory/show.html.
———. "CEPT Product Profile: Structure of the CEPT Product List," October 3, 2012. https://asean.org/cept-product-profile/.
———. "Cooperation in Intellectual Property," October 3, 2012. https://asean.org/cooperation-in-intellectual-property/.
———. "Explanatory Notes." ASEAN Legal Instruments. Accessed March 28, 2021. http://agreement.asean.org/explanatory/show.html.
———. "Intellectual Property." ASEAN Trade Repository. Accessed August 16, 2020. https://atr.asean.org/read/intellectual-property/315.

———. "Major Sectoral Bodies/Committees," 2020. https://asean.org/our-communities/economic-community/competitive-innovative-and-inclusive-economic-region/intellectual-property-rights/major-sectoral-bodies-committees/.

———. "Opening Statement by H.E. Professor S.Jayakumar Minister for Foreign Affairs of Singapore," July 24, 1997. https://asean.org/opening-statement-by-h-e-professor-s-jayakumar-minister-for-foreign-affairs-of-singapore/.

———. "Overview of the AEC Monitoring." AEC Monitoring, 2020. https://asean.org/our-communities/economic-community/monitoring-regional-economic-integration/aec-monitoring/.

———. "Press Release The First Pre-ASEAN Summit Ministerial Meeting Pattaya, 10 February 1976," May 14, 2012. https://asean.org/press-release-the-first-pre-asean-summit-ministerial-meeting-pattaya-10-february-1976/.

———. "Priority Areas of Cooperation." Standard and Conformance, 2020. https://asean.org/our-communities/economic-community/standard-and-conformance/priority-areas/.

———. "The ASEAN Free Trade Area (AFTA)." ASEAN, 2012. http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/.

———. "The ASEAN Intellectual Property Rights (IPR) Action Plan 2016-2025: Updates to the ASEAN IPR Action Plan (Version 2.0)," 2021. https://www.aseanip.org/Portals/0/PDF/ASEAN%20IPR%20Action%20Plan%202016-2025%20v2.0.pdf?ver=2021-06-10-135518-427.

———. "The Declaration of ASEAN Concord, Bali, Indonesia, 24 February 1976," May 14, 2012. https://asean.org/the-declaration-of-asean-concord-bali-indonesia-24-february-1976/.

Athukorala, Prema-chandra. "Southeast Asian Countries in Global Production Networks." In *ASEAN Economic Community: A Model for Asia-Wide Regional Integration?*, edited by Bruno Jetin and Mia Mikic, 79–100. United Kingdom: Palgrave Macmillan, 2016.

Ba, Alice D. *(Re)Negotiating East and Southeast Asia: Region, Regionalism, and the Association of Southeast Asian Nations*. Studies in Asian Security. Stanford, Calif.: Stanford University Press, 2009.

Ba, Alice D. *(Re)Negotiating East and Southeast Asia: Region, Regionalism, and the Association of Southeast Asian Nations*. Stanford, Calif.: Stanford University Press, 2009.

Bagulaya, Jose Duke. "ASEAN as Wayang Kulit: A Critique of the Constitutional, Extra-Constitutional, and Practical Fetters of ASEAN." *Asian Journal of International Law* 9, no. 2 (July 2019): 275–97. https://doi.org/10.1017/S2044251319000018.

Balassa, Bela. "Towards a Theory of Economic Integration." *Kyklos* 14, no. 1 (1961).

———. "Types of Economic Integration." In *Economic Integration: Worldwide, Regional, Sectoral*, edited by Fritz Machlup, 17–31. World Bank Reprint Series 69. London: Palgrave Macmillan UK, 1976. https://doi.org/10.1007/978-1-349-02571-8_2.

Baldwin, Richard E. "A Domino Theory of Regionalism." SSRN Scholarly Paper. Rochester, NY, September 1, 1993. https://papers.ssrn.com/abstract=252201.

Ballardini, Rosa Maria, Marcus Norrgård, and Niklas Bruun. "European Patent Law: The Case for Reform." In *Transitions in European Patent Law: Influences of the Unitary Patent Package*, edited by Rosa Maria Ballardini, Marcus Norrgård, and Niklas Bruun, 3–12. The Netherlands: Kluwer Law International, 2015.

Beard, T. Randolph, George S. Ford, Thomas M. Koutsky, and Lawrence J. Spiwak. "Quantifying the Cost of Substandard Patents: Some Preliminary Evidence." *Yale Journal of Law and Technology* 12 (2010): 240–68.

Beeson, Mark. "ASEAN's Ways: Still Fit for Purpose?" *Cambridge Review of International Affairs* 22, no. 3 (September 2009): 333–43. https://doi.org/10.1080/09557570903137776.

Bellamy, Alex J., and Catherine Drummond. "The Responsibility to Protect in Southeast Asia: Between Non-Interference and Sovereignty as Responsibility." *The Pacific Review* 24, no. 2 (2011): 179–200.

Besson, Samantha. "Sovereignty." Oxford Public International Law, 2011. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472.

Bhagwati, Jagdish. "Regionalism versus Multilateralism." *The World Economy* 15, no. 5 (1992): 535–56. https://doi.org/10.1111/j.1467-9701.1992.tb00536.x.

Bhagwati, Jagdish N, Pravin Krishna, and Arvind Panagariya. *The World Trade System: Trends and Challenges*, 2017. https://doi.org/10.7551/mitpress/9780262035231.001.0001.

Birss, Colin, Andrew Waugh, Tom Mitcheson, Douglas Campbell, Justin Turner, and Tom Hinchliffe. *Terrell on the Law of Patents*. 18th ed. London: Sweet & Maxwell, 2017.

Blancaflor, Ricardo R. "Enforcement of Intellectual Property Rights." In *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, edited by Elizabeth Siew-Kuan Ng and Graeme W. Austin, 103–10. United Kingdom: Cambridge University Press, 2017.

Blinnikov, V. I. "The Eurasian Patent Organization: The First Five Years." *World Patent Information* 23, no. 3 (September 1, 2001): 269–75. https://doi.org/10.1016/S0172-2190(01)00026-6.

Blizkovsky, Petr, and Alberto De Gregorio Merino. "ASEAN and The European Union: From Strong Regional Integration to Closer External Links | Asia-Europe Institute, Universiti Malaya." *AEI Insights* 2, no. 1 (January 2016). https://aei.um.edu.my/asean-and-the-european-union-from-strong-regional-integration-to-closer-external-links.

Bodenhausen, G. H. C. *Guide to the Application of the Paris Convention for the Protection of Industrial Property*. Geneva, Switzerland: United International Bureaux for the Protection of Intellectual Property (BIRPI), 1968. https://doi.org/10.1007/978-1-137-35471-6_5.

Börzel, Tanja A., and Thomas Risse. "Introduction: Framework of the Handbook and Conceptual Clarifications." In *The Oxford Handbook of Comparative Regionalism*, 3–15. Oxford, United Kingdom: Oxford University Press, 2016. https://doi.org/10.1093/oxfordhb/9780199682300.013.1.

Bouwers, Garth J. "Tacit Choice of Law in International Commercial Contracts: An Analysis of Asian Jurisdictions and the Asian Principles of Private International Law." *Uniform Law Review* 26, no. 1 (March 1, 2021): 14–42. https://doi.org/10.1093/ulr/unab002.

Bulmer-Thomas, Victor. "Regional Integration in Latin America and the Caribbean." *Bulletin of Latin American Research* 20, no. 3 (2001): 360–69.

Burk, Dan L. "Patents and Related Rights: A Global Kaleidoscope." In *The Oxford Handbook of Intellectual Property Law*, edited by Rochelle C. Dreyfuss and Justine Pila, 461–86. New York, United States of America: Oxford University Press, 2018. https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198758457.001.0001/oxfordhb-9780198758457-e-32.

European Patent Office. "Business-Friendly Fee Pattern Adopted for the Unitary Patent," 2015. https://www.epo.org/news-issues/news/2015/20150624.html.

Bux, Udo. "The Unified Patent Court after Brexit." Policy Department for Citizen's Rights and Constitutional Affairs, March 2020. https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649575/IPOL_ATA(2020)649575_EN.pdf.

Caballero-Anthony, Mely. "Mechanisms of Dispute Settlement: The ASEAN Experience." *Contemporary Southeast Asia* 20, no. 1 (1998): 38–66.

———. "The ASEAN Way and the Changing Security Environment: Navigating Challenges to Informality and Centrality." *International Politics*, June 11, 2022. https://doi.org/10.1057/s41311-022-00400-0.

Calboli, Irene. "Free Movement of Goods and Intellectual Property Exhaustion in ASEAN: A Road Block in the ASEAN Way?" *Faculty Scholarship*, March 1, 2019, 317–41. https://doi.org/10.1017/9781108563208.017.

———. "The ASEAN Way or No Way? A Closer Look at the Absence of a Common Rule on Intellectual Property Exhaustion in ASEAN and the Impact on the ASEAN Market." *U. Pa. Asian L. Rev. 363*, May 1, 2019. https://papers.ssrn.com/abstract=3474490.

Callens, Pieter, and Sam Granata. *Introduction to the Unitary Patent and the Unified Patent Court: The (Draft) Rules of Procedure of the Unified Patent Court*. The Netherlands: Kluwer Law International, 2013.

Carpenter, David, Rokiah Alavi, and Izyani Zulkifli. "Regional Development Cooperation and Narrowing the Development Gap in ASEAN." In *Narrowing the Development Gap in ASEAN*, edited by Mark McGillivray and David Carpenter. United Kingdom: Routledge, 2016.

Certilman, Steven A., and Joel E. Lutzker. "Arbitrability of Intellectual Property Disputes." In *Arbitration of International Intellectual Property Disputes*, edited by Thomas D. Halket, 55–96. United States: JurisNet, LLC, 2012.

Chan, Jason, and Lam Liza. "Patent Litigation in Singapore: Overview." Thomson Reuters Practical Law, February 1, 2022. http://uk.practicallaw.thomsonreuters.com/w-014-9923?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Chanda, Nayan, and Shada Islam. "In the Bunker." *Far Eastern Economic Review; Hong Kong* 161, no. 32 (August 6, 1998): 24–28.

Chatterjee, Srikanta. "ASEAN Economic Co-Operation in the 1980s and 1990s." In *ASEAN into the 1990s*, edited by Alison Broinowski, 58–82. London: Palgrave Macmillan UK, 1990. https://doi.org/10.1007/978-1-349-20886-9_3.

Chen, Weizuo, and Gerald Goldstein. "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law." *Journal of Private International Law* 13, no. 2 (May 4, 2017): 411–34. https://doi.org/10.1080/17441048.2017.1355508.

Cheong, David, and Michael G. Plummer. "FDI Effects of ASEAN Integration." *LEAD (Laboratory of Economics Applied to Development), Université Du Sud Toulon-Var, France*, March 13, 2009. https://mpra.ub.uni-muenchen.de/26004/.

Chesterman, Simon. "Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person ASEAN Feature." *Singapore Year Book of International Law* 12 (2008): 199–212.

———. *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN*. Integration through Law: The Role of Law and the Rule of Law in ASEAN Integration. United Kingdom: Cambridge University Press, 2015.

Chia, Siow Yue. "The ASEAN Economic Community: Progress, Challenges, and Prospects." *Asian Development Bank Institute*, ADBI Working Paper Series, 440 (October 2013). https://www.adb.org/sites/default/files/publication/156295/adbi-wp440.pdf.

Chia, Siow Yue, and Michael G. Plummer. *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions*. United Kingdom: Cambridge University Press, 2015.

Chin, Kin Wah. "ASEAN: Consolidation and Institutional Change." *The Pacific Review* 8, no. 3 (January 1, 1995): 424–39. https://doi.org/10.1080/09512749508719148.

———. "ASEAN: The Long Road to 'One Southeast Asia.'" *Asian Journal of Political Science* 5, no. 1 (June 1, 1997): 1–19. https://doi.org/10.1080/02185379708434091.

Chisum, Donald S. "Normative and Empirical Territoriality in Intellectual Property: Lessons from Patent Law Symposium: Intellectual Property Law in the International Marketplace." *Virginia Journal of International Law* 37, no. 2 (1997): 603–18.

Cho, Sungjoon, and Jürgen Kurtz. "Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime." *The American Journal of Comparative Law* 66, no. 2 (August 24, 2018): 233–66. https://doi.org/10.1093/ajcl/avy026.

Chun, Dongwook. "Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome." *Journal of Patent and Trademark Office Society* 93, no. 2 (2011).

Closa, Carlos, Lorenzo Casini, Omri Sender, National University of Singapore, and Centre for International Law. *Comparative Regional Integration Governance and Legal Models*. Cambridge, United Kingdom: Cambridge University Press, 2016.

Cockerham, Geoffrey B. "Regional Integration in ASEAN: Institutional Design and the ASEAN Way." *East Asia* 27, no. 2 (June 1, 2010): 165–85. https://doi.org/10.1007/s12140-009-9092-1.

"Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accession Process." Accessed November 14, 2022. http://www.sice.oas.org/tpd/tpp/Implementation/CPTPP_Dec_002_Anx_e.pdf.

Cook, Arthur G. "Patents as Non-Tariff Trade Barriers." *Trends in Biotechnology* 7, no. 10 (October 1, 1989): 258–63. https://doi.org/10.1016/0167-7799(89)90043-7.

Correa, Carlos M. "Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?" In *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, translated by Keith E. Maskus and Jerome H.H. Reichman, 227–56. Cambridge University Press, 2005.

———. “The Bolar Exception: Legislative Models and Drafting Options.” Research Paper. Geneva, Switzerland: South Centre, March 2016. https://www.southcentre.int/wp-content/uploads/2016/03/RP66_The-Bolar-Exception_EN1.pdf.

Corthay, Eric. “The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention” 17, no. 2 (2016): 1–41.

Cottier, Thomas. “Industrial Property, International Protection.” In *The Max Planck Encyclopedia of Public International Law: Print Edition*, edited by Rüdiger Wolfrum, 160–84. Oxford, New York: Oxford University Press, May 30, 2013.

———. “Working Together towards TRIPS.” In *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, edited by Jayashree Watal and Antony Taubman, 79–91. Geneva, Switzerland: World Trade Organization, 2015.

Crawford, James. *Brownlie’s Principles of Public International Law*. 8th ed. Oxford University Press, 2012.

Croze, Denis. “Integrating Intellectual Property Systems in Light of Plurilateral and Regional Agreements.” In *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, edited by Elizabeth Siew-Kuan Ng and Graeme W. Austin, 24–34. United Kingdom: Cambridge University Press, 2017.

Currie, John H. *Public International Law*. 2nd ed. Ontario: Irwin Law Inc., 2008.

Das, Sanchita Basu. “Assessing the Progress and Impediments towards an ASEAN Economic Community.” In *ASEAN Economic Community Scorecard: Performance and Perception*. Singapore: Institute of Southeast Asian Studies, 2013.

———. “Huge Challenges Await AEC 2025.” *ISEAS Yusof Ishak Institute: Perspective*, no. 48 (August 29, 2016).

———. *The ASEAN Economic Community and Beyond*. ISEAS-Yusof Ishak Institute, 2016.

Das, Sanchita Basu, Rahul Sen, and Sadhana Srivastava. “A Partial ASEAN Customs Union Post 2015?” *The Singapore Economic Review*, August 29, 2016. https://doi.org/10.1142/S0217590818400027.

Davidson, Paul J. “The ASEAN Way and the Role of Law in ASEAN Economic Cooperation.” *Singapore Year Book of International Law* 8 (2004): 165–76.

Davidson, Paul J. “The Role of International Law in the Governance of International Economic Relations in ASEAN.” *Singapore Year Book of International Law* 12 (2008): 213–24.

———. “The Role of Law in Governing Regionalism in Asia.” In *Governance and Regionalism in Asia*, edited by Nicholas Thomas. United Kingdom: Routledge, 2009.

Deambrogi, Edgardo. “Interpretation of Reciprocity of IP Rights Protection in Italy and San Marino.” IAM, February 4, 2015. https://www.iam-media.com/article/interpretation-of-reciprocity-of-ip-rights-protection-in-italy-and-san-marino.

“Decision by the Commission of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Regarding Administration for Implementation of the CPTPP,” January 19, 2019. http://www.sice.oas.org/tpd/tpp/Implementation/CPTPP_Dec_001_e.pdf.

Deinla, Imelda, ed. *From ASEAN Way to the ASEAN Charter: Towards the Rule of Law?* Cambridge: Cambridge University Press, 2017. https://doi.org/10.1017/9781108147934.001.

Desierto, Diane A. “ASEAN’s Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter.” *Columbia Journal of Transnational Law* 49 (2011): 268–320.

Devan, Janamitra. “The ASEAN Preferential Trading Arrangement: Some Problems, Ex Ante Results, and a Multipronged Approach to Future Intra-ASEAN Trade Development.” *ASEAN Economic Bulletin* 4, no. 2 (1987): 197–212.

Dieter, Heribert. “Transnational Production Networks in the Automobile Industry and the Function of Trade-Facilitating Measures.” *Notre Europe*, no. 58 (2007). https://institutdelors.eu/wp-content/uploads/2020/08/automobileindustrydieternejune07-1.pdf.

Dinwoodie, Graeme B. “Commitments to Territoriality in International Copyright Scholarship.” Report of the Neuchâtel Study Session of ALAI 74, 2002.

———. “Developing a Private International Intellectual Property Law: The Demise of Territoriality?” *William & Mary Law Review* 51, no. 2 (2009): 91.

Dinwoodie, Graeme B., William O. Hennessey, and Shira Perlmutter. *International and Comparative Patent Law*. Newark, NJ: LexisNexis/Matthew Bender, 2002.

Doan, Thi Thanh Ha, and Salvador M. Buban. "Managing Non-Tariff Measures in ASEAN." Edited by Ponciano Intal and Mari Pangestu. *Integrated and Connected Seamless ASEAN Economic Community*, May 2019, 21–33.

Dodge, William S. "International Comity in American Law." *Columbia Law Review* 115, no. 8 (December 2015): 2071–2142.

Dosch, Jörn. "Southeast Asia and the Asia-Pacific: ASEAN." In *The New Global Politics of the Asia Pacific*, edited by Michael K. Connors, Rémy Davidson, and Jörn Dosch, 48–59. London and New York: Routledge, 2004.

———. "The ASEAN Economic Community: Deep Integration or Just Political Window Dressing?" *TRaNS: Trans-Regional and -National Studies of Southeast Asia* 5, no. 1 (January 2017): 25–47. https://doi.org/10.1017/trn.2016.28.

Drahos, Peter. *The Global Governance of Knowledge*. United Kingdom: Cambridge University Press, 2010.

———. "The Universality of Intellectual Property Rights: Origins and Development." Intellectual Property and Human Rights. Geneva, Switzerland: World Intellectual Property Organization, October 28, 1998. https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=7604.

Duina, Francesco. "Varieties of Regional Integration: The EU, NAFTA and Mercosur." *Journal of European Integration* 28, no. 3 (July 1, 2006): 247–75. https://doi.org/10.1080/07036330600744456.

Dunst, Charles. "The Myanmar Coup as an ASEAN Inflection Point." *Journal of Indo-Pacific Affairs*, no. Special Issue (August 2021).

Dutta, Soumitra, Bruno Lanvin, Sacha Wunsch-Vincent, and Lorena Rivera León, eds. *Global Innovation Index 2022: What Is the Future of Innovation-Driven Growth?* 15th ed. Geneva: World Intellectual Property Organization, 2022. https://doi.org/10.34667/TIND.46596.

Embassy of Indonesia, Washington D.C. "Sukarno, Macapagal Meet in Manila." In *Report on Indonesia*, Vol. 13. Information Office, Embassy of Indonesia., 1964.

Encaoua, David, Dominique Guellec, and Catalina Martínez. "Patent Systems for Encouraging Innovation: Lessons from Economic Analysis." *Research Policy* 35, no. 9 (November 1, 2006): 1423–40. https://doi.org/10.1016/j.respol.2006.07.004.

Endeshaw, Assafa. "The Momentum for Review of TRIPs and Harmonisation of Intellectual Property in ASEAN." In *Intellectual Property Harmonisation Within ASEAN and APEC*, edited by Christoph Antons, Michael Blakeney, and Christopher Heath, 10:139–58. The Hague, Netherlands: Kluwer Law International, 2004.

ERIA Study team. "Analysis of Tariff Changes." In *Impact of the ASEAN Trade in Goods Agreements (ATIGA) on the Inter-ASEAN Trade*, 43–70. Jakarta, Indonesia: Economic Research Institute for ASEAN and East Asia, 2021. https://www.eria.org/uploads/media/Books/2021-Impact-of-the-ATIGA-on-Intra-ASEAN-Trade/09_Ch.5-Analysis-Tariff.pdf.

Eurasian Patent Organisation. "EAPO: A History of Establishment and Development," 2015. https://www.eapo.org/en/publications/reports/report2015/history.html.

———. "Grigory Ivliev: The Logic of the Development of Regional Law Is Especially Relevant in Connection with the Idea of the Greater Eurasian Partnership," September 13, 2022. https://www.eapo.org/en/index.php?newspress=view&d=1406.

Eurasian Patent Organization (EAPO). "Development of Eurasian Integration in IP Was Discussed at the Legal Forum," July 1, 2022. https://www.eapo.org/en/index.php?newspress=view&d=1364.

European Chamber of Commerce in Vietnam. "Whitebook 2020: Trade Investment Issues and Recommendations," 2020. https://www.eurochamvn.org/whitebook2020.

European Commission. "Commission Staff Working Document: Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries," April 27, 2021. https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159553.pdf.

———. Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions: Upgrading the Single Market: More Opportunities for People and Business, COM(2015) 550 final § (2015). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0550.

———. *Europe 2020 Flagship Initiative Innovation Union*. SEC(2010) 1161. Luxembourg: Publications Office of the European Union, 2011.
———. “Report from the Commission to the Parliament and the Council on Trade and Investment Barriers,” 2018. https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157929.pdf.
———. “The Long Road to Unitary Patent Protection in Europe.” Brussels, 2012. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/134393.pdf.
———. “The Single Market Strategy.” Internal Market, Industry, Entrepreneurship and SMEs, May 5, 2022. https://ec.europa.eu/growth/single-market/single-market-strategy_en.
———. “The Unitary Patent System.” Internal Market, Industry, Entrepreneurship and SMEs, 2022. https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/patent-protection-eu/unitary-patent-system_en.
European Council. “Agreement on a Unified Patent Court (UPC),” 2021. https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/.
European Patent Office. “Renewal Fees.” Cost of a Unitary Patent, September 5, 202AD. https://www.epo.org/applying/european/unitary/unitary-patent/cost.html.
———. “SM San Marino.” Official Journal March 2015, March 31, 2015. https://www.epo.org/law-practice/legal-texts/official-journal/2015/03/a34.html.
———. “Unified Patent Court,” October 6, 2022. https://www.epo.org/applying/european/unitary/upc.html.
———. *Unitary Patent Guide: Obtaining, Maintaining and Managing Unitary Patents*. 2nd ed., 2022.
———. “Validation of European Patents in Cambodia (KH) with Effect from 1 March 2018,” February 9, 2018. https://www.epo.org/law-practice/legal-texts/official-journal/information-epo/archive/20180209.html.
Ewing-Chow, Michael. “Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?” *Singapore Year Book of International Law* 12 (2008): 225–37.
Ewing-Chow, Michael, Junianto James Losari, and Melania Vilarasau Slade. “The Facilitation of Trade by the Rule of Law: The Cases of Singapore and ASEAN.” In *Connecting to Global Markets*, by World Trade Organization, 129–46. edited by Marion Jansen, Mustapha Sadni Jallab, and Maarten Smeets. WTO, 2014. https://doi.org/10.30875/e2ec3dab-en.
Ewing-Chow, Michael, and Hsien-Li Tan. “The Role of the Rule of Law in ASEAN Integration.” *Robert Schuman Centre for Advanced Studies*, no. EU Working Paper RSCAS 2013/16 (2013): 44.
Faria, José Angelo Estrella. “Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage ?” *Uniform Law Review* 14, no. 1–2 (2009): 5–34. https://doi.org/10.1093/ulr/14.1-2.5.
Fidler. “Introduction: Eastphalia Emerging?: Asia, International Law, and Global Governance.” *Indiana Journal of Global Legal Studies* 17, no. 1 (2010): 1–12. https://doi.org/10.2979/gls.2010.17.1.1.
Fidler, David P., Sumit Ganguly, and Sung Won Kim. “Eastphalia Rising?: Asian Influence and the Fate of Human Security.” *World Policy Journal* 26, no. 2 (2009): 53–64. https://doi.org/10.1162/wopj.2009.26.2.53.
Forteau, Mathias. “Regional Co-Operation.” In *Max Planck Encyclopedia of Public International Law*. Accessed October 19, 2020. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e671?prd=OPIL.
Fukunaga, Yoshifumi. “Use of Legal Instruments in the ASEAN Economic Community Building.” *Journal of Contemporary East Asia Studies* 10, no. 1 (January 2, 2021): 65–82. https://doi.org/10.1080/24761028.2021.1905199.
Gallagher, Kevin P. “Understanding Developing Country Resistance to the Doha Round.” *Review of International Political Economy* 15, no. 1 (2008): 62–85.
Gallini, Nancy, and Suzanne Scotchmer. “Intellectual Property: When Is It the Best Incentive System?” In *Innovation Policy and the Economy, Volume 2*, edited by Adam B. Jaffe, Josh Lerner, and Scott Stern, 51–77. United States: MIT Press, 2002.

Garnett, Richard. "Intellectual Property Remedies across Borders." In *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, edited by Elizabeth Siew-Kuan Ng and Graeme W. Austin, 128–51. United Kingdom: Cambridge University Press, 2017.
George, Alexandra. "The Metaphysics of Intellectual Property." *W.I.P.O.J* 7, no. 1 (2015).
Gepty, Allan. "Regional Cooperation on Intellectual Property Rights Enforcement in the Association of Southeast Asian Nations." In *Advisory Committee on Enforcement*, 23–27. Geneva, Switzerland: World Intellectual Property Organization, 2017. https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_12/wipo_ace_12_5.pdf.
Gero, John. "Why We Managed to Succeed in TRIPS." In *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, edited by Jayashree Watal and Antony Taubman, 95–98. Geneva, Switzerland: World Trade Organization, 2015.
Gilbert, Richard, and Carl Shapiro. "Optimal Patent Length and Breadth." *The RAND Journal of Economics* 21, no. 1 (1990): 106–12. https://doi.org/10.2307/2555497.
Ginsburg, Tom. "Eastphalia and Asian Regionalism" 44 (2010): 859–78.
———. "Eastphalia as the Perfection of Westphalia." *Indiana Journal of Global Legal Studies* 17, no. 1 (2010): 27–45.
Glanville, Luke. *Sovereignty and the Responsibility to Protect: A New History*. Chicago, London: University of Chicago Press, 2014.
Goh, Gillian. "The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management." *Stanford Journal of East Asian Affairs* 3, no. 1 (Spring 2003): 113–18.
Goodman, Matthew P. "From TPP to CPTPP," March 8, 2018. https://www.csis.org/analysis/tpp-cptpp.
Gordon, Bernard K. "Problems of Regional Cooperation in Southeast Asia." *World Politics* 16, no. 2 (1964): 222–53. https://doi.org/10.2307/2009506.
Hamanaka, Shintaro. "Legalization of International Economic Relations: Is Asia Unique?" *IDE Discussion Paper* 681 (December 2017): 15.
Hanson, David. *Limits to Free Trade: Non-Tariff Barriers in the European Union, Japan and United States*. United Kingdom: Edward Elgar Publishing, 2010.
Harms, L.T.C. *A Casebook on the Enforcement of Intellectual Property Rights*. 4th ed. Switzerland: World Intellectual Property Organization, 2018. https://www.wipo.int/edocs/pubdocs/en/wipo_pub_791_2018.pdf.
Heilmann, Daniel. "After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness as a Regional Environmental Governance Tool." *Journal of Current Southeast Asian Affairs* 34, no. 3 (2015): 95–121.
Helfer, Laurence. "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking." *Yale Journal of International Law* 29 (January 1, 2004): 1–83.
Hemel, Daniel J., and Lisa Larrimore Ouellette. "Trade and Tradeoffs: The Case of International Patent Exhaustion." *Columbia Law Review* 116 (2016): 17–31.
Hernandez, Carolina G. "Institution Building through an ASEAN Charter." *Panorama: Insights into Southeast Asian and European Affairs* 1 (2007).
Higgott, Richard. "The Politics of Economic Crisis in East Asia: Some Longer Term Implications." *CSGR Working Paper No. 02/98*, March 1998. https://doi.org/10.2139/ssrn.146971.
Hilty, Reto, and Roberto Romandini. "Developing a Common Patent System: Lessons to Be Learned from the European Experience." In *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, edited by Elizabeth Siew-Kuan Ng and Graeme W. Austin, 254–90. United Kingdom: Cambridge University Press, 2017.
Hoffman, Paul G. "Text of Statement by Paul G. Hoffman on European Economy, October 31, 1949. P. G. Hoffman Papers, Economic Cooperation Administration File. Speeches and Statements-Paul G. Hoffman, 1948-1952." Harry S. Truman Library & Museum, 2017. https://www.trumanlibrary.org/whistlestop/study_collections/marshall/large/documents/index.php?documentid=8-5&pagenumber=3.
Holbrook, Timothy R. "Extraterritoriality in U.S. Patent Law." *William & Mary Law Review* 49, no. 6 (2008): 2119–92.

Hsieh, Pasha L., and Bryan Mercurio. "ASEAN Law in the New Regional Economic Order: An Introductory Roadmap to the ASEAN Economic Community." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, August 14, 2018. https://papers.ssrn.com/abstract=3230488.

Hsien-Li, Tan. "Regional Organizations." In *The Oxford Handbook of International Law in Asia and the Pacific*, edited by Simon Chesterman, Hisashi Owada, and Ben Saul, 37–67. New York, United States of America: Oxford University Press, 2019.

Huck, Winfried. "Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability." *ZaöRV*, no. 80 (2020): 101–38.

Hurka, Steffen, and Yves Steinebach. "Legal Instrument Choice in the European Union." *JCMS: Journal of Common Market Studies* 59, no. 2 (March 2021): 278–96. https://doi.org/10.1111/jcms.13068.

Hurrell, Andrew. "Explaining the Resurgence of Regionalism in World Politics." *Review of International Studies* 21, no. 4 (1995): 331–58.

Huxley, Tim. "ASEAN Security Co-Operation — Past, Present and Future." In *ASEAN into the 1990s*, edited by Alison Broinowski, 83–111. London: Palgrave Macmillan UK, 1990. https://doi.org/10.1007/978-1-349-20886-9_4.

Inama, Stefano, and Edmund W. Sim. *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile*. Integration Through Law: The Role of Law and the Rule of Law in ASEAN Integration. United Kingdom: Cambridge University Press, 2015.

Intellectual Property Corporation of Malaysia. "Guidelines for Patent Examination in the Intellectual Property Corporation of Malaysia." Malaysia, October 2011. https://drive.google.com/file/d/0B526dR6VYUv-ajNES1ZseGl3Uzg/view?resourcekey=0-rHzMz62jaG8azt1Ciu9xhA.

Intellectual Property Corporation of Malaysia (MyIPO). "ASEAN Patent Examination Co-Operation (ASPEC) – The Official Portal of Intellectual Property Corporation of Malaysia." Accessed November 19, 2022. https://www.myipo.gov.my/en/asean-patent-examination-co-operation-aspec/.

Intellectual Property Office of Singapore. "ASEAN Patent Examination Co-Operation Programme." Accessed November 20, 2022. https://www.ipos.gov.sg/docs/default-source/protecting-your-ideas/patent/aspec-notice-and-procedures.pdf.

———. "Examination Guidelines for Patent Applications at IPOS." Singapore, 2022. https://www.ipos.gov.sg/docs/default-source/resources-library/patents/guidelines-and-useful-information/examination-guidelines-for-patent-applications.pdf.

———. "Guide to Re-Register a Singapore Patent in Cambodia," August 22, 2016. https://www.ipos.gov.sg/docs/default-source/Protecting-your-ideas/Patent/(updated-22-august-2016)-guide-to-re-register-a-singapore-patent-in-cambodia.pdf.

Intellectual Property Office of the Philippines. "Manual for Substantive Examination Procedure," 2017. https://drive.google.com/file/d/1vlZS7X81CdtRURtH9XSL8m44UiQtm0cJ/view?pli=1.

Irvine, Roger. "The Formative Years of ASEAN: 1967–1975." In *Understanding ASEAN*, edited by Alison Broinowski, 8–36. London: Macmillan Education UK, 1982. https://doi.org/10.1007/978-1-349-81250-9_2.

Ishikawa, Koichi. "The ASEAN Economic Community and ASEAN Economic Integration." *Journal of Contemporary East Asia Studies* 10, no. 1 (January 2, 2021): 24–41. https://doi.org/10.1080/24761028.2021.1891702.

Ivus, Olena. "Trade-Related Intellectual Property Rights, Trade Flows and National Welfare." In *Handbook on International Trade Policy*, edited by William A. Kerr and James D. Gaisford. United Kingdom, 2008.

Japan Patent Office. "Global PPH." PPH Portal. Accessed November 17, 2022. https://www.jpo.go.jp/e/toppage/pph-portal/globalpph.html.

Jetschke, Anja. "Institutionalizing ASEAN: Celebrating Europe through Network Governance." *Cambridge Review of International Affairs* 22, no. 3 (September 1, 2009): 407–26. https://doi.org/10.1080/09557570903107688.

Jones, David Martin. "ASEAN's Imitation Economic Community: The Primacy of Domestic Political Economy." In *ASEAN Economic Community: A Model for Asia-Wide Regional Integration?*, edited by Mia Mikic and Bruno Jetin. United Kingdom: Palgrave Macmillan, 2016.

Jones, David Martin, and M. L. R Smith. *ASEAN and East Asian International Relations: Regional Delusion*. Cheltenham-Northampton: Edward Elgar, 2007.

Jones, Lee. *ASEAN, Sovereignty and Intervention in Southeast Asia*. Critical Studies of the Asia Pacific Series. London: Palgrave Macmillan UK, 2012.

———. "ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement." *Asian Security* 4, no. 3 (September 23, 2008): 271–93. https://doi.org/10.1080/14799850802306484.

———. "ASEAN's Unchanged Melody? The Theory and Practice of 'Non-Interference' in Southeast Asia." *The Pacific Review* 23, no. 4 (August 13, 2010): 479–502. https://doi.org/10.1080/09512748.2010.495996.

Jurčys, Paulius. "International Jurisdiction in Intellectual Property Disputes: CLIP, ALI Principles and Other Legislative Proposals in a Comparative Perspective." *JIPITEC* 3, no. 3 (2012): 174–226.

Jusoh, Sufian, and Jia Yi Andrew Kam. "A Macro Analysis of Intellectual Property Rights in ASEAN Countries." Kuala Lumpur: Southeast Asia Network for Development, April 2016. http://ideas.org.my/wp-content/uploads/2017/03/PP_seanet_08_final.pdf.

Kahler, Miles. "Legalization as Strategy: The Asia-Pacific Case." *International Organization* 54, no. 3 (2000): 549–71.

Kartika, Pratiwi, and Raymond Atje. "Towards AEC 2015: Free Flow of Goods within ASEAN." In *ASEAN Economic Community Scorecard: Performance and Perception*, edited by Sanchita Basu Das, 28–46. Singapore: ISEAS Publishing, 2013.

Katsumata, Hiro. "The ASEAN Charter Controversy Between Big Talk and Modest Actions." RSIS Commentaries. Singapore: Nanyang Technological University, November 15, 2007. https://doi.org/10.1355/9789812308849-004.

Kelsall, Michelle Staggs. "The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?" *East-West Center*, Analysis from the East-West Center, no. 90 (September 2009): 1–8.

Kimura, Fukunari. "Reconstructing the Concept of 'Single Market and Production Base' for ASEAN beyond 2015," ERIA Discussion Paper Series, October 2013, 27.

Kivimäki, Timo. "East Asian Relative Peace and the ASEAN Way." *International Relations of the Asia-Pacific* 11, no. 1 (January 1, 2011): 57–85. https://doi.org/10.1093/irap/lcq016.

Klabbers. "Institutional Ambivalence by Design: Soft Organizations in International Law." *Nordic Journal of International Law* 70, no. 3 (January 1, 2001): 403–21. https://doi.org/10.1163/15718100120296647.

Klučka, Ján, and L'udmila Elbert. *Regionalism and Its Contribution to General International Law*. 1st ed. Košice: Pavol Jozef Šafárik University in Košice, 2015.

Knowledge Ecology International. "2015 Oct 15 Version: RCEP IP Chapter," 2016. https://www.keionline.org/node/2472.

Koh, Tommy, Walter Woon, Andrew Tan, and Chan Sze-Wei. "Charter Makes ASEAN Stronger, More United and Effective." *The Straits Times*, August 8, 2007.

Komada, Yasuto. "Applicable Law When an Act Implemented in Japan Allegedly Infringed a U.S. Patent Right." In *Annotated Leading Patent Cases in Major Asian Jurisdictions*, edited by Kung-Chung Liu, 392–407. ARCIALA Asian IP Law Series. Hong Kong: City University of Hong Kong Press, 2017.

Kono, Toshiyuki, and Paulius Jurcys. "General Report." In *Intellectual Property and Private International Law: Comparative Perspectives*, edited by Toshiyuki Kono, 1–216. United Kingdom: Hart Publishing, 2012.

Koopmann, Georg. "Regionalism Going Global." *Intereconomics* 38, no. 1 (February 2003): 2–3.

Koremenos, Barbara, Charles Lipson, and Duncan Snidal. "The Rational Design of International Institutions." *International Organization* 55, no. 4 (2001): 761–99.

Krasner, Stephen D. "Organized Hypocrisy in Nineteenth-century East Asia." *International Relations of the Asia-Pacific* 1, no. 2 (August 1, 2001): 173–97. https://doi.org/10.1093/irap/1.2.173.

———. “Structural Causes and Regime Consequences: Regimes as Intervening Variables.” *International Organization* 36, no. 2 (1982): 185–205.

Kuanpoth, Jakkrit. “Patents and the Emerging Markets of Asia: ASEAN and Thailand.” In *Emerging Markets and the World Patent Order*, edited by Frederick M. Abbott, Carlos M. Correa, and Peter Drahos, 305–26. United Kingdom: Edward Elgar Publishing, 2013.

Kur, Annette, and Ulf Maunsbach. “Choice of Law and Intellectual Property Rights.” *Oslo Law Review* 6, no. 1 (May 14, 2019): 43–61. https://doi.org/10.18261/issn.2387-3299-2019-01-07.

Kurus, Bilson. “Understanding ASEAN: Benefits and Raison d’Etre.” *Asian Survey* 33, no. 8 (1993): 819–31. https://doi.org/10.2307/2645090.

Ladas, Stephen Pericles. *Patents, Trademarks, and Related Rights: National and International Protection*. Harvard University Press, 1975.

Lall, Ashish, and R. Ian McEwin. “Competition and Intellectual Property Laws in the ASEAN ‘Single Market.’” In *The ASEAN Economic Community: A Work in Progress*, edited by Sanchita Basu Das, Jayant Menon, Rodolfo C. Severino, and Omkar Lal Shrestha, 207–78. Institute of Southeast Asian Studies, 2013.

Landolt, Phillip, and Alejandro García. “Commentary on WIPO Arbitration Rules.” *WIPO Arbitration and Mediation Center*, 2017.

Langinier, Corinne, and GianCarlo Moschini. “The Economics of Patents.” In *Intellectual Property Rights in Animal Breeding and Genetics*, edited by Max Frederick Rothschild and Scott Newman. New York, United States of America: CABI Publishing, 2002.

Lazewski, Marek. “Whatever Happened to Polish Support for Unified Patent Package.” AIPPI e-News, 2013. https://www.aippi.org/enews/2013/edition30/Marek_Lazewski.html.

Lee, Nari. *Exclusion and Coordination of Fragmentation: Five Essays toward a Pluralistic Theory of Patent Right*. Publications of the University of Eastern Finland. Dissertations in Social Sciences and Business Studies. Joensuu: University of Eastern Finland, 2010.

Leifer, Michael. *ASEAN and the Security of South-East Asia*. Routledge, 1989.

Lenz, Tobias, and Gary Marks. “Regional Institutional Design: Pooling and Delegation.” In *The Oxford Handbook of Comparative Regionalism*, edited by Tanja A. Börzel and Thomas Risse, 513–37. Oxford, United Kingdom: Oxford University Press, 2016. https://doi.org/10.1093/oxfordhb/9780199682300.013.1.

Lim, Mark, Sok Yee See Tho, and Diyanah Binte Baharudin. “Singapore’s Intellectual Property Dispute Resolution Experience.” In *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, edited by Elizabeth Siew-Kuan Ng and Graeme W. Austin, 82–102. United Kingdom: Cambridge University Press, 2017.

Lipson, Charles. “Why Are Some International Agreements Informal?” *International Organization* 45, no. 4 (1991): 495–538.

Lorenzen, Ernest. “Huber’s de Conflictu Legum.” *Ill. L. Rev.* 13 (1918): 199–242.

Loughlin, Martin. “The Erosion of Sovereignty.” *Netherlands Journal of Legal Philosophy* 45, no. 2 (December 2016): 57–81. https://doi.org/10.5553/NJLP/.000048.

Luginbuehl, Stefan. “An Institutional Perspective I: The Role of the EPO in the Unitary (EU) Patent System.” In *The Unitary EU Patent System*, edited by Justine Pila and Christopher Wadlow, 45–56. United Kingdom: Hart Publishing, 2014.

Machlup, Fritz. *A History of Thought on Economic Integration*. London: The Macmillan Press Ltd, 1977.

Mahne, Kevin P. “A Unitary Patent and Unified Patent Court for the European Union: An Analysis of Europe’s Long Standing Attempt to Create a Supranational Patent System.” *Journal of the Patent and Trademark Society* 94, no. 2 (2012): 162–91.

Makman, David A. “Cross Border Patent Disputes.” *Hastings Bus. L. J.* 15, no. 2 (2019): 383–92.

Mansfield, Edward D., and Eric Reinhardt. “Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements.” *International Organization* 57, no. 4 (2003): 829–62.

Mantāphọn, Withit. *The Challenge of Law: Legal Cooperation among ASEAN Countries*. Bangkok: Institute of Security and International Studies, Chulalongkorn University, 1987.

Mantra, Dodi. *Hegemoni Dan Diskursus Neoliberalisme: Menelusuri Langkah Indonesia Menuju Masyarakat Ekonomi ASEAN 2015*. Jawa Barat: Manta Press, 2011.

Marsoof, Althaf. “Intersections Between Intellectual Property and Dispute Resolution.” In *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives*, edited by Irene Calboli and Maria Lillà Montagnani, 221–44. United States of America: Oxford University Press, 2021. https://doi.org/10.1093/oso/9780198826743.003.0015.

Maskus, Keith E. “Parallel Imports in Pharmaceuticals: Implications for Competition and Prices in Developing Countries,” 2001. https://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf.

Matsuo, Hiroshi. “The Rule of Law and Economic Development: A Cause or a Result?” In *The Role of Law in Development: Past, Present and Future*, edited by Yoshiharu Matsuura, 59–70. Nagoya: Center for Asian Legal Exchange, Graduate School of Law, Nagoya University, 2005. https://cale.law.nagoya-u.ac.jp/wp/wp-content/uploads/2021/09/CALE-Books2.pdf.

Matthews, Duncan. “WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?” *Journal of International Economic Law* 7, no. 1 (March 2004): 73–107. https://doi.org/10.1093/jiel/7.1.73.

Mattoo, Aaditya, and Michele Ruta. “Regional Trade Agreements.” Text/HTML. World Bank, 2018. https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements.

Matulionyte, Rita. *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals*. Edward Elgar Publishing, 2011.

Mavroidis, Petros C. *Trade in Goods*. United States: Oxford University Press, 2007.

Menon, Jayant, Laurence Todd, Azam Wan Hashim, and Aiman Wan Alias. “ASEAN Integration Report 2019.” API Report No. 3. Institute for Democracy and Economic Affairs, Friedrich Naumann Foundation, September 2019. http://www.ideas.org.my/wp-content/uploads/2019/09/Asean_Integration_2019_V4.pdf.

Mercurio, Bryan, ed. “Patent Linkage.” In *Drugs, Patents and Policy: A Contextual Study of Hong Kong*, 183–209. Cambridge: Cambridge University Press, 2018. https://doi.org/10.1017/9781108615235.008.

Mestral, Armand de. “Economic Integration, Comparative Analysis.” In *The Max Planck Encyclopedia of Public International Law: Print Edition*, edited by Rüdiger Wolfrum, 302–10. Oxford, New York: Oxford University Press, 2013.

Michaels, Ralf. “The Functional Method of Comparative Law.” In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 339–82. Oxford: Oxford University Press, 2006.

Mills, Alex. “Rethinking Jurisdiction in International Law.” *The British Yearbook of International Law* 84, no. 1 (2014): 187–239.

Mills, John Gladstone III. “A Transnational Patent Convention for the Acquisition and Enforcement of International Patent Rights.” *Journal of the Patent and Trademark Office Society* 88 (2006): 958–1016.

Milne, R. S. “Malaysia: A New Federation in the Making.” *Asian Survey* 3, no. 2 (1963): 76–82. https://doi.org/10.2307/3023678.

Ministry of Law Singapore. “Public Consultation on Intellectual Property (‘IP’) Dispute Resolution Reforms,” October 2018. https://www.mlaw.gov.sg/news/public-consultations/public-consultation-IP-dispute-resolution-reforms/.

Minow, Martha. “Archetypal Legal Scholarship: A Field Guide.” *Journal of Legal Education* 63, no. 1 (August 1, 2013): 65–69.

Mistry, Percy S. “New Regionalism and Economic Development.” In *Theories of New Regionalism: A Palgrave Reader*, edited by Fredrik Söderbaum and Timothy M. Shaw, 117–39. International Political Economy Series. London: Palgrave Macmillan UK, 2003. https://doi.org/10.1057/9781403938794_7.

Mogens, Peter Carl. “Evaluating the TRIPS Negotiations: A Plea for a Substantive Review of the Agreement.” In *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, edited by Jayashree Watal and Antony Taubman, 99–122. Geneva, Switzerland: World Trade Organization, 2015.

Narine, Shaun. *Explaining ASEAN: Regionalism in Southeast Asia*. Lynne Rienner Publishers, 2002.

———. "Institutional Theory and Southeast Asia: The Case of ASEAN." *World Affairs* 161, no. 1 (1998): 33–47.
———. "State Sovereignty and Regional Institutionalism in the Asia Pacific." *Working Paper*, Working Paper Series, March 2005. https://pdfs.semanticscholar.org/39db/5a60a50ad898c94cf1a95e2fff9a37f2a3aa.pdf.
National Archives of Singapore. "Speech by Prime Minister Lee Kuan Yew at the Opening of the 15th ASEAN Ministerial Meeting on 14 June 1982 at DBS Auditorium," June 14, 1982. https://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19820614.pdf.
Naya, Seiji F., and Michael G. Plummer. "Economic Co-Operation after 30 Years of ASEAN." *ASEAN Economic Bulletin* 14, no. 2 (1997): 117–26.
Needham, Kirsty. "No Consensus yet on China Joining Regional Trade Pact - Singapore PM." *Reuters*. October 18, 2022. https://www.reuters.com/world/asia-pacific/no-consensus-yet-china-joining-regional-trade-pact-singapore-pm-2022-10-18/.
New York Arbitration Convention. "Contracting States." Accessed January 28, 2023. https://www.newyorkconvention.org/countries.
New Zealand Foreign Affairs & Trade. "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Accessions." Accessed November 14, 2022. https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Consultation-Outcome-Summary-Final.pdf.
———. "New Zealand – Brunei: ISDS." Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources, March 8, 2018. https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/New-Zealand-Brunei-ISDS.pdf.
———. "New Zealand – Malaysia: ISDS." Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources, March 8, 2018. https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/New-Zealand-Malaysia-ISDS.pdf.
———. "New Zealand – Viet Nam: ISDS." Comprehensive and Progressive Agreement for Trans-Pacific Partnership text and resources, March 8, 2018. https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/New-Zealand-Viet-Nam-ISDS.pdf.
Ng, Elizabeth Siew-Kuan. "ASEAN IP Harmonization: Striking the Delicate Balance." *Pace International Law Review* 25, no. 129 (2013).
———. "Intellectual Property Interoperability in ASEAN and Beyond: An Integration Model." In *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, edited by Elizabeth Siew-Kuan Ng and Graeme W. Austin, 3–23. United Kingdom: Cambridge University Press, 2017.
Ng, Elizabeth Siew-Kuan, and Graeme W. Austin, eds. *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*. Cambridge, United Kingdom: Cambridge University Press, 2017.
Nguyen, Minh Hue, Deborah Elms, and N Lavanya. "The ASEAN Trade in Goods Agreement: Evolution and Regional Implications." In *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*, edited by Bryan Mercurio and Pasha L. Hsieh, 22–45. Cambridge: Cambridge University Press, 2019. https://doi.org/10.1017/9781108563208.003.
Nottage, Hunter. "Developing Countries in the WTO Dispute Settlement System." *GEG Working Paper, No. 2009/47, University of Oxford, Global Economy Governance Programme (GEG)*, 2009, 29.
Nye, Joseph S. *International Regionalism: Readings*. Boston, MA: Little Brown, 1968.
OECD-UNIDO. "Integrating Southeast Asian SMEs in Global Value Chains: Enabling Linkages with Foreign Investors." Paris, 2019. https://www.oecd.org/investment/Integrating-Southeast-Asian-SMEs-in-global-value-chains.pdf.
Office of the United States Trade Representative. "The United States Officially Withdraws from the Trans-Pacific Partnership." United States Trade Representative, January 2017. http://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP.
Oppenheim, Lassa. *International Law (Review Citation)*. 1st ed. Longmans Greed & Co 1905, n.d.
Ordover, Janusz A. "A Patent System for Both Diffusion and Exclusion." *Journal of Economic Perspectives* 5, no. 1 (February 1, 1991): 43–60. https://doi.org/10.1257/jep.5.1.43.

Otten, Adrian. "The TRIPS Negotiations: An Overview." In *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, edited by Jayashree Watal and Antony Taubman, 55–78. Geneva, Switzerland: World Trade Organization, 2015.

Panagariya, Arvind. "The Regionalism Debate: An Overview." *The World Economy* 22, no. 4 (1999): 455–76. https://doi.org/10.1111/1467-9701.00214.

Park, Sang Chul, Chul Ju Kim, Farhad Taghizadeh-Hesary, and Pitchaya Sirivunnabood, eds. *Economic Integration in Asia and Europe: Lessons and Policies*. Japan: Asian Development Bank Institute, 2021. https://www.adb.org/publications/economic-integration-asia-europe-lessons-policies.

"PCT-Patent Prosecution Highway Program (PCT-PPH and Global PPH)." Accessed November 17, 2022. https://www.wipo.int/pct/en/filing/pct_pph.html.

Peers, Steve. "The Constitutional Implications of the EU Patent." *European Constitutional Law Review* 7, no. 2 (June 2011): 229–66. https://doi.org/10.1017/S1574019611200051.

Pelkmans, Jacques. *The ASEAN Economic Community: A Conceptual Approach*. Edited by J. H. H. Weiler and Tan Hsien-Li. Integration Through Law: The Role of Law and the Rule of Law in ASEAN Integration. United Kingdom: Cambridge University Press, 2016.

Penrose, Edith Tilton. *The Economics of the International Patent System*. Johns Hopkins Press, 1951.

Perkins, David, and Garry Mills. "Patent Infringement and Forum Shopping in the European Union." *Fordham International Law Journal* 20 (1997 1996): 549–602.

Peukert, Alexander. "Territoriality and Extraterritoriality in Intellectual Property Law." In *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, edited by Günther Handl, Joachim Zekoll, and Peer Zumbansen, 189–228. Queen Mary Studies in International Law. Leiden/Boston: Brill Academic Publishing, 2012. https://ssrn.com/abstract=1592263.

Peukert, Alexander, and Benedetta Ubertazzi. "International Law Association's Guidelines on Intellectual Property and Private International Law ('Kyoto Guidelines'): General Provisions." Edited by Toshiyuki Kono, Axel Metzger, and Pedro de Miguel Asensio. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 12, no. 1 (2021): 4–12.

Pila, Justine. "An Historical Perspective I: The Unitary Patent Package." In *The Unitary EU Patent System*, edited by Justine Pila and Christopher Wadlow, 9–32. United Kingdom: Hart Publishing, 2014.

———. "Constitutionalized Doctrine of Precedent and the Marleasing Principle." In *The Europeanization of Intellectual Property Law*, edited by Ansgar Ohly and Justine Pila, 227–53. United States of America: Oxford University Press, 2013.

———. "The European Patent: An Old and Vexing Problem." *International and Comparative Law Quarterly* 62, no. 4 (October 2013): 917–40. https://doi.org/10.1017/S0020589313000304.

Pila, Justine, and Paul Torremans. *European Intellectual Property Law*. United Kingdom: Oxford University Press, 2016.

Piris, Jean-Claude, and Walter Woon. *Towards a Rules-Based Community: An ASEAN Legal Service*. Cambridge University Press, 2015.

Plomer, Aurora. "A Unitary Patent for a (Dis)United Europe: The Long Shadow of History." *International Review of Intellectual Property and Competition Law* 46, no. 5 (2015): 508–33.

———. "The Unified Patent Court and the Transformation of the European Patent System." *IIC - International Review of Intellectual Property and Competition Law* 51, no. 7 (September 1, 2020): 791–96. https://doi.org/10.1007/s40319-020-00963-6.

Plummer, Michael. *The ASEAN Economic Community and the European Experience*. Manila, the Philippines: Asian Development Bank, 2006. https://www.adb.org/publications/asean-economic-community-and-european-experience.

Pollard, Vincent K. "ASA and ASEAN, 1961-1967: Southeast Asian Regionalism." *Asian Survey* 10, no. 3 (1970): 244–55. https://doi.org/10.2307/2642577.

Pottelsberghe, Bruno Van. *Lost Property: The European Patent System and Why It Doesn't Work*. Vol. IX. Bruegel Blueprint Series. Belgium: Bruegel, 2009.

Rajec, Sarah R. Wasserman. "Free Trade in Patented Goods: International Exhaustion for Patents." *Berkeley Technology Law Journal* 29, no. 1 (2014): 317–76.

Ravenhill, John. "Economic Cooperation in Southeast Asia: Changing Incentives." *Asian Survey* 35, no. 9 (1995): 850–66. https://doi.org/10.2307/2645786.

Reichman, Jerome H., and Rochelle Cooper Dreyfuss. “Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty.” *Duke Law Journal* 57, no. 85 (2007): 85–130.

Association of Southeast Asian Nations. “Report of The Secretary-General of ASEAN to the 32nd ASEAN Ministerial Meeting Singapore, 22-24 July 1999,” 2012. https://asean.org/?static_post=report-of-the-secretary-general-of-asean-to-the-32nd-asean-ministerial-meeting-singapore-22-24-july-1999-2.

Reyes, Romeo A. “Part 1 of 2: ASEAN: A Single Market and Production Base.” *The Jakarta Post*. June 14, 2004. https://asean.org/?static_post=asean-a-single-market-production-base-by-romeo-a-reyes-the-jakarta-post.

Rillo, Aladdin D., Anna Maria Rosario D. Robeniol, and Salvador M. Buban. “The Story of RCEP: History, Negotiations, Structure, and Future Directions.” In *Regional Comprehensive Economic Partnership (RCEP): Implications, Challenges, and Future Growth of East Asia and ASEAN*, edited by Fukunari Kimura, Shandre Thangavelu, and Dionisius Narjoko, 2-0-2–23. Economic Research Institute for ASEAN and East Asia, 2022. https://www.eria.org/uploads/media/RCEP-Monograph-Launch-14-March-2022-FINAL.pdf.

Roin, Benjamin N. “Intellectual Property versus Prizes: Reframing the Debate.” *University of Chicago Law Review* 81, no. 3 (June 1, 2014): 999–1078.

Romandini, Roberto, and Alexander Klicznik. “The Territoriality Principle and Transnational Use of Patented Inventions – The Wider Reach of a Unitary Patent and the Role of the CJEU.” *International Review of Intellectual Property and Competition Law* 44, no. 5 (2013).

Rosenthal, David. “IP & IT Arbitration in Switzerland.” In *Arbitration in Switzerland: The Practitioner’s Guide*, edited by Manuel Arroyo, 1111–78. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2013. https://www.loc.gov/catdir/toc/fy14pdf04/2013404013.html.

Royal Customs Department Malaysia. “Intellectual Property.” Malaysia National Trade Repository, 2020. http://mytraderepository.customs.gov.my/en/ntm/Pages/int_pro.aspx.

Ruggie, John Gerard. “Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis.” In *Neorealism and Its Critics*, edited by Robert O. Keohane, 131–57. Political Economy of International Change. New York: Columbia University Press, 1986.

Ryngaert, Cedric. *Jurisdiction in International Law*. Second edition. Oxford Monographs in International Law. Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015.

Samuelson, Paul A. “The Transfer Problem and Transport Costs: The Terms of Trade When Impediments Are Absent.” *The Economic Journal* 62, no. 246 (1952): 278–304. https://doi.org/10.2307/2227005.

Santos-Paulino, Amelia U. “The Asian Economic Integration Cooperation Agreement: Lessons for Economic and Social Development.” UNCTAD Research Paper No. 3. United Nations, 2017. https://unctad.org/en/PublicationsLibrary/ser-rp-2017d3_en.pdf.

Schwab, Klaus, and Saadia Zahidi. *The Global Competitiveness Report Special Edition 2020*. Cologny/Geneva: World Economic Forum, 2020.

Schwab, Susan C. “After Doha: Why the Negotiations Are Doomed and What We Should Do About It.” *Foreign Affairs* 90, no. 3 (2011): 104–17.

Seah, Daniel. “The ASEAN Charter.” *The International and Comparative Law Quarterly* 58, no. 1 (2009): 197–212.

Severino, Rodolfo C. “No Alternative to Regionalism, by Rodolfo C. Severino, Jr.” ASEAN, August 1, 1999. https://asean.org/no-alternative-to-regionalism-by-rodolfo-c-severino-jr/.

———. *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*. Institute of Southeast Asian Studies, 2006.

———. “Sovereignty, Intervention and The ASEAN Way (3 July 2000).” ASEAN, July 3, 2000. https://asean.org/?static_post=sovereignty-intervention-and-the-asean-way-3-july-2000.

Severino, Rodolfo C., and Jayant Menon. “Overview.” In *The ASEAN Economic Community: A Work in Progress*, edited by Sanchita Basu Das, Jayant Menon, Rodolfo C. Severino, and Omkar Lal Shrestha. Singapore: ISEAS Publishing, 2013.

Shafie, Tan Sri Ghazali. “Politics in Command.” *Far Eastern Economic Review* 155, no. 42 (October 22, 1992): 30.

Shee, Poon-Kim. “A Decade of ASEAN, 1967-1977.” *Asian Survey* 17, no. 8 (1977): 753–70. https://doi.org/10.2307/2643336.

Shimizu, Kazushi. “The ASEAN Charter and the ASEAN Economic Community.” *Economic Journal of Hokkaido University* 40 (2011).

European Commission: Press Release. “Single Market Act II: Twelve Priority Actions for New Growth,” 2012. http://europa.eu/rapid/press-release_IP-12-1054_en.htm.

Smith, James. “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement.” *Review of International Political Economy* 11, no. 3 (2004): 542–73.

Smith, Matthew A., Marina Cousté, Temogen Hield, Richard Jarvis, Mrinalini Kochupillai, Barry Leon, Jacobus C. Rasser, Masamitsu Sakamoto, Andy Shaughnessy, and Jonathan Branch. “Arbitration of Patent Infringement and Validity Issues Worldwide.” *Harvard Journal of Law & Technology* 19, no. 2 (2006): 299–357.

Söderbaum, Fredrick. “Old, New, and Comparative Regionalism: The History and Scholarly Development of the Field.” In *The Oxford Handbook of Comparative Regionalism*, 16–39, 2016. https://doi.org/10.1093/oxfordhb/9780199682300.013.2.

Söderbaum, Fredrik. “Early, Old, New and Comparative Regionalism: The Scholarly Development of the Field.” *KFG Working Paper Series, Kolleg-Forschergruppe (KFG) “The Transformative Power of Europe“, Freie Universität Berlin.*, no. 64 (October 2015). https://refubium.fu-berlin.de/bitstream/handle/fub188/18003/WP-64-Soederbaum_WEB.pdf?sequence=1&isAllowed=y.

———. *Rethinking Regionalism*. Bloomsbury Publishing, 2017.

Soesastro, Hadi. “The ASEAN Free Trade Area: A Critical Assessment.” *The Journal of East Asian Affairs* 16, no. 1 (2002): 20–53.

Soesilowati, Sartika. “Sovereignty in ASEAN’s Regional Order-Building.” *Indonesian Journal of Social Sciences* 2, no. 2 (July 2010). http://journal.unair.ac.id/IJSS@sovereignty-in-asean%E2%80%99s-regional-order-building-article-4119-media-35-category-8.html.

South Centre. “The ASEAN Experience: Insights for Regional Political Cooperation.” Analytical Note. Geneva, Switzerland: South Centre, February 2007. https://www.southcentre.int/wp-content/uploads/2013/07/AN_REG1_The-ASEAN-Experience_EN.pdf.

Southern African Development Community. “SADC Needs to Improve and Enforce Intellectual Property Rights Frameworks and Regulations | SADC,” October 7, 2022. https://www.sadc.int/latest-news/sadc-needs-improve-and-enforce-intellectual-property-rights-frameworks-and-regulations.

Speeches. “Speech by Mr Daren Tang, IPOS Chief Executive, at the Thailand Department of IP Symposium, on ‘ASEAN POST-AEC on IPR: Turning Point For Entrepreneurs,’” March 2016. https://www.ipos.gov.sg/media-events/speeches.

Intellectual Property Office of Singapore. “Speech by Mr Tan Yih San, Chief Executive of IPOS at the NUS Centre for Business and Law,” 2014. https://www.ipos.gov.sg/MediaEvents/Readnews/tabid/873/articleid/290/category/Speeches/parentId/80/year/2014/Default.aspx.

Stewart, Terence P., ed. *The GATT Uruguay Round: A Negotiating History (1986-1992)*. Boston: Kluwer Law and Taxation, 1993.

Story, Joseph. *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*. Little, Brown, 1846.

Stubbs, Richard. “The ASEAN Alternative? Ideas, Institutions and the Challenge to ‘Global’ Governance.” *The Pacific Review* 21, no. 4 (August 28, 2008): 451–68. https://doi.org/10.1080/09512740802294713.

Sutherland, Claire. “Another Nation-Building Bloc? Integrating Nationalist Ideology into the EU and ASEAN.” *Asia Europe Journal* 3, no. 2 (July 1, 2005): 141–57. https://doi.org/10.1007/s10308-005-0141-0.

———. “Reconciling Nation and Region: Vietnamese Nation Building and ASEAN Regionalism.” *Political Studies* 57, no. 2 (2009): 316–36. https://doi.org/10.1111/j.1467-9248.2008.00736.x.

Suzuki, Masabumi. "国境をまたがる行為と特許権の間接侵害の成否." *パテント 2014* 67, no. 12 (2014): 116–30.
Tan, Eugene K. B. "The ASEAN Charter as Legs to Go Places: Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia." *Singapore Year Book of International Law* 12 (2008): 171–98.
Tan, Lay Hong. "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?" *International & Comparative Law Quarterly* 53, no. 4 (October 2004): 935–67. https://doi.org/10.1093/iclq/53.4.935.
Thambipillai, Pushpa. "Challenges to the ASEAN Way: Musyawarah and Non-Interference." *Kajian Malaysia* XVIII, no. 1 & 2 (2000): 157–70.
Thambipillai, Pushpa, and Jayaratnam Saravanamuttu. *ASEAN Negotiations: Two Insights*. Institute of Southeast Asian Studies, 1985.
Thanadsillapakul, Lawan. "Legal and Institutional Frameworks for Open Regionalism in Asia: A Case Study of ASEAN." In *The Dynamics of East Asian Regionalism in Comparative Perspective*, edited by Tamio Nakamura. ISS Research Series 24. Japan: Institute of Social Science, University of Tokyo, 2006.
Thao, Le Xuan. "Vietnam's Intellectual Property Law Amended to Comply with CPTPP." Asia IP, July 31, 2019. https://asiaiplaw.com/article/vietnams-intellectual-property-law-amended-to-comply-with-cptpp.
The ASEAN Secretariat. "A New ASEAN by ASEAN Secretariat." ASEAN, 2007. https://asean.org/?static_post=a-new-asean-by-asean-secretariat-3.
———. *ASEAN 2025: Forging Ahead Together*. Jakarta, Indonesia: The ASEAN Secretariat, 2015. https://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf.
———. "ASEAN Integration Report 2019." Jakarta, Indonesia, 2019. https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf.
———. "ASEAN Key Figures 2021." Jakarta, Indonesia: Association of Southeast Asian Nations, 2021. https://www.aseanstats.org/wp-content/uploads/2021/12/ASEAN-KEY-FIGURES-2021-FINAL-1.pdf.
———. *ASEAN Statistical Yearbook 2021*. Jakarta: ASEAN Secretariat, 2021. https://asean.org/wp-content/uploads/2021/12/ASYB_2021_All_Final.pdf.
———. "Consolidated Strategy on the Fourth Industrial Revolution for ASEAN." Jakarta, Indonesia: Association of Southeast Asian Nations, October 2021. https://asean.org/wp-content/uploads/2021/10/6.-Consolidated-Strategy-on-the-4IR-for-ASEAN.pdf.
The ASEAN Secretariat and United Nations Conference on Trade and Development. "ASEAN Investment Report 2017: Foreign Direct Investment and Economic Zones in ASEAN." Jakarta, Indonesia, October 2017.
———. *ASEAN Investment Report 2020-2021: Investing in Industry 4.0*. Jakarta, Indonesia: ASEAN Secretariat, 2021. https://asean.org/wp-content/uploads/2021/09/AIR-2020-2021.pdf.
Torremans, Paul. "An International Perspective II: A View from Private International Law." In *The Unitary EU Patent System*, edited by Justine Pila and Christopher Wadlow, 161–78. United Kingdom: Hart Publishing, 2014.
Trimble, Marketa. *Global Patents: Limits of Transnational Enforcement*. New York: Oxford University Press, 2012.
———. "The Territorial Discrepancy Between Intellectual Property Rights Infringement Claims and Remedies." *Lewis & Clark Law Review* 23, no. 2 (2019): 501–52.
Tumbridge, James. "Unified Patent Court: Harmonising Patent Law Throughout Europe." *Business Law International* 15, no. 1 (2014): 55–66.
Ubertazzi, Benedetta. "Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law." *Marquette Intellectual Property Law Review* 15, no. 2 (2011): 357–448.
United Nations. *International Trade Statistics Yearbook*. Vol. 1. New York: United Nations, 2021.
United Nations Conference on Trade and Development. *International Classification of Non-Tariff Measures 2019*. Geneva, Switzerland: United Nations Publication, 2019. https://doi.org/10.18356/33bf0bc6-en.

United Nations Economic Commission for Africa, African Development Bank, and African Union. *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About*. Addis Ababa, Ethiopia: Publications Section, Economic Commission for Africa, 2017. https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf.

United Nations Industrial Development Organization. "Economic Zones in the ASEAN: Industrial Parks, Special Economic Zones, Eco Industrial Parks, Innovation Districts as Strategies for Industrial Competitiveness." Viet Nam, August 2015. https://www.unido.org/sites/default/files/2015-08/UCO_Viet_Nam_Study_FINAL_0.pdf.

Vajda, Imre. "Integration, Economic Union and the National State." In *Foreign Trade in a Planned Economy*, edited by Imre Vajda and Mihaly Simai. London; New York: Cambridge University Press, 1971.

Valdés, Raymundo, and Maegan McCann. "Intellectual Property Provisions in Regional Trade Agreements: Revision and Update." *WTO Staff Working Paper*, no. No. ERSD-2014-14 (2014). https://www.econstor.eu/bitstream/10419/104752/1/797426418.pdf.

Vanoverbeke, Dimitri. "Are We Talking the Same Language?: The Sociohistorical Context of Global Constitutionalism in East Asia as Seen from Japan's Experiences." In *Global Constitutionalism from European and East Asian Perspectives*, edited by Anne Peters, Dimitri Vanoverbeke, Mattias Kumm, and Takao Suami, 203–24. Cambridge: Cambridge University Press, 2018. https://doi.org/10.1017/9781108264877.007.

Väyrynen, Raimo. "Regionalism: Old and New." *International Studies Review* 5, no. 1 (2003): 25–51.

Verico, Kiki. *The Future of the ASEAN Economic Integration*. United Kingdom: Palgrave Macmillan, 2017.

Villafuerte, James, Fahad Khan, Mara Claire Tayag, Thiam Hee Ng, Kwang Jo Jeong, and Dulce Zara. "Building Complementarity and Resilience in ASEAN amid Global Trade Uncertainty." 0 ed. ADB Briefs. Manila, Philippines: Asian Development Bank, October 2018. https://doi.org/10.22617/BRF189578-2.

Von Holstein, Per. "International Co-Operation in the Field of Patent Law with Special Reference to the Activities of the Council of Europe." *The International and Comparative Law Quarterly* 16, no. 1 (1967): 191–206.

Vu, Hien Thi Thu, and Mai Thi Le. "Pharmaceutical IP and Competition Law in Vietnam: Overview." Thomson Reuters Practical Law, December 1, 2020. http://uk.practicallaw.thomsonreuters.com/0-560-3825?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Wadlow, Christopher. "An Historical Perspective II: The Unified Patent Court." In *The Unitary EU Patent System*, edited by Justine Pila and Christopher Wadlow, 33–44. United Kingdom: Hart Publishing, 2014.

Wang, Jiangyu. "International Economic Law and Asia." In *Oxford Scholarly Authorities on International Law*, edited by Simon Chesterman, Hisashi Owada, and Ben Saul, September 2019. https://opil.ouplaw.com/view/10.1093/law/9780198793854.001.0001/law-9780198793854-chapter-10?prd=OPIL.

Wasescha, Thu-Lang Tran. "Negotiating for Switzerland." In *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, edited by Jayashree Watal and Antony Taubman, 159–84. Geneva, Switzerland: World Trade Organization, 2015.

Watts, Sean. "Low-Intensity Cyber Operations and the Principle of Non-Intervention." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, May 5, 2014. https://doi.org/10.2139/ssrn.2479609.

Weeraworawit, Weerawit. "The Harmonisation of Intellectual Property Rights in ASEAN." In *Intellectual Property Harmonisation Within ASEAN and APEC*, edited by Christoph Antons, Michael Blakeney, and Christopher Heath, 10:205–26. The Hague, Netherlands: Kluwer Law International, 2004.

Wheaton, Henry. *Elements of International Law*. Edited by James Brown Scott. The Classics of International Law. Washington: Carnegie Endowment for International Peace, Division of International Law, 1866.

WIPO Lex. "WIPO-Administered Treaties." WIPO IP Portal, July 6, 2022. https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=2.

Woetzel, Jonathan, Oliver Tonby, Fraser Thompson, Penny Burtt, and Gillian Lee. “Southeast Asia at the Crossroads: Three Paths to Prosperity.” McKinsey Global Institute, 2014. https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Asia%20Pacific/Three%20paths%20to%20sustained%20economic%20growth%20in%20Southeast%20Asia/Southeast_Asia_at_the_crossroads_Three_paths_to_prosperity_Full%20report.ashx.

Woon, Walter. *The ASEAN Charter: A Commentary*. Singapore: NUS Press, 2016.

World Intellectual Property Organization. “Alternatives in Patent Search and Examination,” 2014. https://www.wipo.int/publications/en/details.jsp?id=3921&plang=EN.

———. “Conference Documents of the ‘PLT/DC’ and ‘PLT/DC/INF’ Series.” In *Records of the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned: Volume I : First Part of the Diplomatic Conference, The Hague, 1991*, 1:55–175. First Part of the Diplomatic Conference. Geneva, Switzerland: World Intellectual Property Organization, 1991.

———. “Draft Reference Document on the Exception Regarding the Exhaustion of Patent Rights.” Geneva, Switzerland: WIPO Secretariat, 2022. https://www.wipo.int/edocs/mdocs/mdocs/en/scp_34/scp_34_3.pdf.

———. “Francis Gurry on the Challenges for Multilateralism in the Field of Intellectual Property.” *WIPO Magazine*, October 2016. https://www.wipo.int/wipo_magazine/en/2016/05/article_0001.html.

———. “ISA and IPEA Agreements.” Accessed November 14, 2022. https://www.wipo.int/pct/en/access/isa_ipea_agreements.html.

———. “Lao People’s Democratic Republic.” Statistical Country Profiles, December 2022. https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=LA.

———. “Myanmar.” Statistical Country Profiles, December 2022. https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=MM.

———. “PCT Fee Tables,” October 1, 2022. https://www.wipo.int/export/sites/www/pct/en/fees.pdf.

———. “Time Limits for Entering National/Regional Phase under PCT Chapters I and II,” June 7, 2022. https://www.wipo.int/pct/en/texts/time_limits.html.

———. *WIPO Intellectual Property Handbook: Policy, Law and Use*. Geneva, Switzerland, 2004.

———. “WIPO IP Statistics Data Center.” WIPO IP Portal, 2020. https://www3.wipo.int/ipstats/.

———. “WIPO IP Statistics Data Center.” WIPO IP Portal, November 2021. https://www3.wipo.int/ipstats/.

———. “WIPO Mediation, Arbitration, Expert Determination Cases and Good Offices Requests.” WIPO Caseload Summary, 2022. https://www.wipo.int/amc/en/center/caseload.html.

———. “WIPO-Administered Treaties.” WIPO IP Portal, 2022. https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=7.

World Justice Project. “Rule of Law Index 2022.” Washington, D.C., 2022. https://worldjusticeproject.org/rule-of-law-index/downloads/INDEX_2022-digital.pdf.

World Trade Organization. “Doha Work Programme.” Ministerial Conference, Sixth Session. Hong Kong, December 22, 2005. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=70196&CurrentCatalogueIdIndex=0.

———. “Least-Developed Countries.” Understanding the WTO: The Organization, 2023. https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

———. “RTAs Currently in Force (by Year of Entry into Force), 1948-2022.” Regional Trade Agreements Database, December 15, 2022. http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

———. “Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century.” World Trade Report 2012, 2012. https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2d_e.pdf.

———. “Transparency Mechanism for RTAs,” 2023. https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm.

———, ed. *Understanding the WTO*. 5th ed. Geneva, Switzerland: World Trade Organization, Information and External Relations Division, 2015. https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

———. “WTO Members Agree to Extend Drug Patent Exemption for Poorest Members,” November 6, 2015. https://www.wto.org/english/news_e/news15_e/trip_06nov15_e.htm.

———. “WTO Members Agree to Extend TRIPS Transition Period for LDCs until 1 July 2034,” June 29, 2021. https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm.

World Trade Organization and IDE-JETRO. “Trade Patterns and Global Value Chains in East Asia: From Trade in Goods to Trade in Tasks,” 2011. https://www.wto.org/english/res_e/booksp_e/stat_tradepat_globvalchains_e.pdf.

Yan, Ing Lili, Olivier Cadot, and Rully Prassetya. “Managing Non-Tariff Measures in ASEAN.” Edited by Ponciano Intal and Mari Pangestu. *Integrated and Connected Seamless ASEAN Economic Community*, May 2019, 34–49.

Yeo, Lay Hwee. “From AFTA to ASEAN Economic Community - Is ASEAN Moving Towards EU-Style Economic Integration?” In *Comparative Regional Integration: Europe and Beyond*, edited by Finn Laursen. Ashgate Publishing, Ltd., 2013.

Yu, Peter K. “Intellectual Property, Global Inequality and Subnational Policy Variations.” SSRN Scholarly Paper. Legal Studies Research Paper Series, Research Paper No. 21-04. Rochester, NY, January 5, 2021. https://papers.ssrn.com/abstract=3760413.

Yu, Peter K. “The RCEP and Intellectual Property Normsetting in the Asia-Pacific.” *Texas A&M Law Scholarship*, 2017, 89–107.

Yukawa, Taku. “Analyzing the Institutional and Normative Architecture of ASEAN: Reconsidering the Concept of the ‘ASEAN Way.’” 東洋文化研究所紀要, no. 162 (December 2012): 342–324. https://doi.org/10.15083/00026869.

———. “The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms.” *The Pacific Review* 31, no. 3 (2017): 1–17. https://doi.org/10.1080/09512748.2017.1371211.