

UACES 42nd Annual Conference

Passau, 3-5 September 2012

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

Matching Content with Context:

Effects of European Policy Transfer on ASEAN Patent Cooperation

Paper written for the

UACES Conference “Exchanging Ideas on Europe 2012 – Old Borders – New Frontiers”

3-5 September, Passau

Abstract

The promotion of regional integration constitutes a central element in the European Union (EU)'s foreign policy. Thereby, it has been identified as projecting internal solutions onto other parts of the world. The paper investigates the use of European policy models in a region which has traditionally emphasized its distinctiveness from other regional organizations, particularly the EU. The members of the Association of Southeast Asian Nations (ASEAN) have always avoided constraining their national sovereignties by the establishment of central institutions endowed with substantive competencies. However, in the course of the Asian financial crisis they agreed to enhance their regional integration and to establish a single market and production base – a goal which rather reminds of the European Way of regional integration than the ASEAN Way.

The paper traces the use of the European Patent Office (EPO) model along the ASEAN patent cooperation process. I examine dynamics of adoption, adaptation and resistance along the policy-making process and argue that in order to observe sustainable policy transfer the policy content needs to resonate with the preferences and normative dispositions constitutive of the policy-making context.

Imke Pente

Berlin Graduate School for Transnational Studies (BTS)

KFG „Transformative Power of Europe“

pente@transnationalstudies.eu

Introduction

Scholars of European Foreign Policy have found the European Union (EU) to globally promote regional integration (Alecú de Flers & Regelsberger, 2005). It uses internal solutions externally in order to address similar challenges, despite different political cultures (Farrell, 2007, 2009; Lavenex, 2004). As a uniquely European foreign political tool, Schimmelfennig identifies the EU to “propose regional economic and market integration and the establishment of supranational organizations as pathways to peace and welfare in other parts of the world” (Schimmelfennig, 2009: 10).

The Association of Southeast Asian Nations (ASEAN)¹ and the EU traditionally follow diametrically opposed regional integration models (Yeo, 2010). Whereas the European integration process has been supported by the member states’ willingness to delegate competencies to Brussels, ASEAN cooperation has been led by intergovernmental cooperation. Furthermore, in contrast to the internally-driven character of the European integration process, the ASEAN cooperation has been driven by external developments. ASEAN was supposed to maintain the region’s and member states’ resilience. Thereby, the focus was put on the political and security dimension while the European integration policies were largely driven by economic considerations. Rhetorically, these extreme opposites seem to have converged during the recent decade. ASEAN has committed itself to the establishment of a Single Market and Single Production Base which immediately raises connotations with the European way of regional integration. The ASEAN Charter (ASEAN, 2007) seemed to confirm this trend in setting a more institutionalized and rules-based path forward (Jetschke & Murray, 2012). Whether the opposite ways of regional integration equally converge in practical terms will be subject to the analysis in this paper.

The paper seeks to investigate the process of economic integration at the example of cooperation in patents. In 1995, ASEAN decided to “explore the possibility of setting up an ASEAN patent system, including an ASEAN Patent Office” (ASEAN, 1995, Article 1, 4). The declaration contradicted the previous course of regional cooperation which resisted the intervention into the national political sphere. Over time, however, the ASEAN member states departed from this ambitious policy goal. In their ASEAN Intellectual Property Rights Action Plan 2011-2015, the member states explicitly reject “[formulating] a single set of laws and designing a harmonized regional system in [Intellectual Property]” (ASEAN, 2011) and adopt a loose cooperation policy. Although this step is compatible with the ASEAN Way, the “double paradigm shift” still surprises observers of ASEAN.

¹ ASEAN was founded in 1976 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand and was later extended by Brunei (1986), Vietnam (1995), Laos, Myanmar (both 1997) and Cambodia (1999).

Against this background, the paper seeks to shed light on the question *to what extent ASEAN drew on European policy ideas in order to design its own policies*. In order to do so, the public policy literature is combined with a policy transfer approach. The paper traces the use of a European policy model along the ASEAN policy making process. Importantly, ASEAN is not depicted as mere recipient of a policy from abroad, but rather constitutes the central actor. The degrees of policy transfer are distinguished between adoption, adaptation and resistance and thus provide for a stronger differentiation of the policy transfer outcome. The analysis is especially based on semi-structured expert and elite interviews conducted with ASEAN Secretariat staff members, consultants, national delegations and IP experts in March/April 2012 in Southeast Asia. This set of data is complemented by documents of ASEAN and the member states, the EU, and further foreign governments.

The paper is structured in three parts. The following section sets the analytical framework which is later applied to the empirical case study. I outline the context in which the government actors make policy choices which are oftentimes influenced by policy ideas from abroad. I argue that the content, i.e. the policy model, needs to resonate with the context variables in order to be adopted. Practically, I will trace this causal relationship in the case of patent cooperation in ASEAN. The conclusion summarizes the findings and outlines the desiderata for further research.

Combining Public Policy and Policy Transfer Research

Combining public policy and policy transfer research provides the opportunity to match two sides of the policy making process. While the public policy literature provides for insights about the context of policy-making, the policy transfer approach helps to illustrate the constitutive content of the policy-making process. Both elements are depicted separately before they are combined and hypotheses are derived.

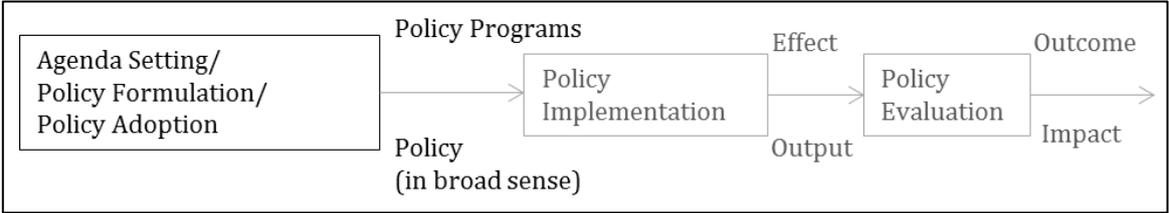
The Context: The Policy-Making Process

According to Fritz Scharpf, policy-making may be defined as process in which problems which ought to be solved are articulated, political goals are formulated, alternative courses of actions are developed and finally adopted (Scharpf 1973: 15). Therefore, the policy-making process may be conceived as problem processing (“Problemverarbeitung”) (Jann and Wegrich 2003: 71). Subdividing the process of policy-making into the phases of “agenda setting”, “policy formulation”, “adoption”, “implementation” and “evaluation” has become the standard definition in the public policy literature (Jann & Wegrich, 2003: 75).² Due to the gaping shortage in

² This phase model is based on an ideal understanding of rational planning and decision making and tends to simplify the oftentimes non-linear process of policy-making.

information on the ASEAN policy-making and its very policies, the analysis is constrained to the first three phases and neglects the actual implementation and evaluation.

Figure 1 Localizing Policy Adoption in the Policy-Making Process



Source: according to Jann/Wegrich 2003:79

While figure 1 illustrates the sequencing of policy-making, it does not reflect the factors influencing the course of policy-making. The policy-making takes place within the constraints of context variables which may be divided into agency- and structure-centered factors.

According to March and Olsen, the behavior of actors can be explained by two logics of behavior, namely the *logic of expected consequences* and the *logic of appropriateness* (March & Olsen, 1989, 1998). The former assumes the respective actor as benefit-maximizing individual which takes policy choices according to a cost-benefit-calculation. Policies may create opportunities which enable actors to realize their preferences. At the same time, they may cause opportunity costs. The ASEAN member states are endowed with limited resources which constrain them in their policy choices. Thus, by giving priority to one policy decision the actor might need to forgo to an alternative. In contrast to the rational choice approach, the logic of appropriateness predicts the adoption of a certain policy if it resonates with the respective actor’s norms. Relevant prior cognitive dispositions may be the decision maker’s attitudes towards regional integration and constraints to national sovereignty or towards the legitimacy of intellectual property protection (Loewen, 2008; Raustiala & Slaughter, 2008).

Besides the agency-centered factors, the decision-making rules must not be neglected as crucial factor affecting the adopted policy. The “ASEAN Way” builds on the principles of discussion and consultancy (musyawarah), consensus (mufakat), as well as the sense of community (gotong royong) (Dosch, 1997: 39). In keeping the member states’ sovereignty, the member states decide unanimously. Given the ASEAN member states’ heterogeneity and consequently their diverse interests, decisions are taken after oftentimes lengthy negotiation processes. Consequently, compromises are hard to be achieved and threaten to be very limited in their scope. While opportunities and attitudes may vary over time, the decision-making rules can be held constant in the analysis.

The Content: Policy Transfer

Diffusion scholars have taken the observations of global convergence in policies and institutions as starting point for their investigations (Braun, Gilardi, Füglistner, & Luyet, 2007; Elkins & Simmons, 2005; Simmons, Dobbin, & Garrett, 2006). Similarly, policy transfer research investigates the use of “knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) in [the] development of policies, administrative arrangements, institutions and ideas in another political setting” (Dolowitz & Marsh, 1996: 344). Whereas the former tends to overestimate the linear spread and adoption of policy models and to underestimate the politics at the receiving end (Acharya, 2004), the policy transfer perspective provides for a greater differentiation between objects of policy transfer, like policy goals, instruments, institutions, ideology, and negative lessons (Dolowitz & Marsh, 1996, 2000) and takes a more agency-centered approach (Marsh & Sharman, 2009).

Scholars have shown that policy-makers draw on foreign policy models in times of crises, dissatisfaction with policies in place and policy failure. Richard Rose notes that “every country has problems, and each thinks that its problems are unique [...] However, problems that are unique to one country [...] are abnormal [...] Confronted with a common problem, policy makers in cities, regional governments and nations can learn from how their counterparts elsewhere responded” (Rose, 1991: 3). While the search for policy models abroad has been depicted as “rational choice for policy makers” (Davies, Nuttley, & Smith, 2000; Pawson, 2002), the very policy choice however oftentimes follows normative considerations (Börzel & Risse, 2012a; Jetschke & Murray, 2012). “Organizations tend to model themselves after similar organizations in their field they perceive to be more legitimate or successful. The ubiquity of certain kinds of structural arrangements can more likely be credited to the universality of mimetic processes than to any concrete evidence that the adopted models enhance efficiency” (Casier, 2011: 47 citing DiMaggio & Powell, 1983: 152). Thus, according to Powell and DiMaggio “the motivation for isomorphism is legitimacy rather than efficiency” (Casier, 2011: 47 citing Verpoest, 2008: 35). While the meaning of legitimacy might be important, the spread of isomorphism is to be questioned.

The transfer of EU policies to member states, accession and neighborhood countries has been extensively investigated by the Europeanization literature (for an overview see Schimmelfennig, 2009). While substantive influence is attributed to the EU in the presence of hierarchy, rule transfer is at best selective where the EU does not provide for a credible membership perspective as in the European Neighborhood. An EU membership perspective does clearly not accrue to non-European regions, including Southeast Asia. However, scholars have still detected the use of European models in other parts of the world (Alter, 2012; Jetschke & Murray, 2012;

Lenz, 2012; Saldías, 2010). They conclude that political choices rather follow pull dynamics than push or imposed transfer logics (Börzel & Risse, 2012a).

Matching Context and Content: Policy Transfer as Part of Policy Making

Perceiving a policy model from abroad as input into the policy-making process, I integrate the public policy literature, which focuses on the policy making process delimited by agency- and structure-based context variables, with the policy transfer literature, which emphasizes the use of foreign policy ideas during policy-making.

In order to account for the politics at the receiving end and consequently for potential dynamics of contestation, I distinguish three different outcomes of policy transfer: adoption, adaptation and resistance. *Adoption* denominates the situation in which the European policy model is completely copied or is referred to as the policy goal. If the ASEAN member states *adapt* the European policy model, they make the foreign policy idea compatible with the regional conditions while retaining the underlying principles. *Resistance* can be observed if the ASEAN member states explicitly reject the European policy model and opt for an alternative policy. Policy transfer can be observed in its different values if the null-hypothesis, i.e. ignorance of a European policy model by the ASEAN actors during the policy making, is not fulfilled.

Table 1 Values of the Dependent Variable

<i>Value</i>	<i>Indicator</i>
<i>Adoption</i>	The European policy model is completely adopted or is referred to as policy goal.
<i>Adaptation</i>	The European policy model is adjusted to the regional conditions, yet retained in its principles.
<i>Resistance</i>	The European policy model and the principles are rejected.

By analyzing the transmission of policy ideas into the policy-making process, scholars have identified norm entrepreneurs³ to play a central role (Hall, 1993; Rose, 1991). Particularly, epistemic communities have been attributed prominence as norm agents with the potential to

³ The literature distinguishes between epistemic communities (Adler & Haas, 1992; Haas, 1992; Rose, 1991; Stone, 2004), advocacy coalitions (Sabatier, 1993) and issue networks (Sikkink, 1993) which are bound by shared belief systems as well as instrumental networks (Kleinfeld, Willems, & Zimmer, 2007; Winter, 2004) which are rather driven by economic considerations.

bring new ideas into the policy making process (Adler & Haas, 1992; Haas, 1992; Rose, 1991; Stone, 2004). Despite their expertise and experience in the respective policy field, their success in channeling in a certain policy norm yet depends on the fit with the preferences or norms in the target region. In order to be received by the regional actors, policy models need to resonate with prior preferences and norms (Telò, 2007).

In accordance with the abovementioned logics of behavior, I derive two research hypotheses which will be assessed in the following case study with regard to their relevance.

On a rational choice account, actors tend to support the adoption of a certain policy if it helps to realize their respective interests. In order to define the preferences of the actors, I follow the rational-choice assumption that all actors seek to maximize their wealth and that political actors seek to maintain power. I will calculate the costs and benefits for relevant actors that would result from the adoption of the European policy model and examine whether the adoption would fit the preferences of ASEAN actors.

H₁ [preferential fit]: If the European policy model features preferential fit with the national decision-makers, it is likely to be adopted or adapted. In case of preferential misfit, the ASEAN governments are likely to resist it.

The logic of appropriateness conceives actors as striving to behave appropriately, i.e. in compliance with their set of norms and with their sense of legitimacy.

H₂ [normative fit/misfit]: If the policy features normative fit with the national decision-makers, it is likely to be adopted or at least adapted. In case of normative misfit, the ASEAN member states are likely to resist it.

Case Study: ASEAN Patent Cooperation and the Use of European Policy Models

After the end of the Cold War, the regional organization of ASEAN faced an identity crisis. Having been founded as anti-communist bloc in Asia (Acharya, 1993), ASEAN threatened to lose its cause for existence. The capitalist regimes led by the United States emerged victorious and successively withdrew from the region. While having been a largely political-security institution, the ASEAN member states featured little economic interdependence when the idea of regional economic integration was raised during the early 1990s.⁴ All members depended on labor-intensive production and consequently did not complement each other. Galvanized by the 1994

⁴ The ASEAN members signed the ASEAN Free Trade Agreement (AFTA) in Singapore in 1992 and agreed to complete its implementation until 2008. The deadline was later pre-drawn to 2003. In 2010, the AFTA was replaced by the ASEAN Trade in Goods Agreement (ATIGA).

Foreign Affairs article by Paul Krugman (Krugman, 1994)⁵, the member states recognized their dependence on international technology transfer in order to sustain their economic growth. Being surrounded by high-potential countries which started attracting a large share of foreign direct investment (FDI), the ASEAN member states sought pathways to increase the attractiveness of their investment climate. The rising intellectual property discourse, spurred by the industrialized countries, clearly spelt out the demands of developed countries to potential investment sites in the developing world, namely credible protection of intellectual property rights. The protection of IPR is not rooted in the Asian cultures [sic!]. Instead, the copying of famous artists is rather perceived as act of recognition (Antons, 2004: 32f.). Moreover, developing countries, among them many of the ASEAN member states, reproached the industrialized countries for using intellectual property rights as neo-colonial tool to retain the developing world's dependence on them (Asia-Europe Foundation, 2006). Yet, due to their dependence on technology transfer and the binding IP protection rules inscribed into the international trade regime by the trade-related aspects of intellectual property rights (TRIPS) agreement in 1994, the ASEAN members⁶ did not have a choice but to accept the need to enhance their IPR regimes.

ASEAN's identity crisis, the countries' dependence on technology transfer and the tightening international discourse created a window of opportunity in ASEAN which regional and international norm entrepreneurs seized to shape ASEAN's policy portfolio. On behalf of the European Commission, the European Patent Office (EPO) had implemented the first EC-ASEAN Intellectual Property Rights Co-operation Programme (ECAP I) which supported the ASEAN member states in building capacities in industrial property rights. At the same time, the EPO held workshops at the regional level which were supposed to facilitate regional dialogue and socialization. At this occasion ASEAN member states IP officials were familiarized with the European Patent system.

The European Patent system is based on the European Patent Convention (EPC)⁷ and came into force in 1977. It established the European Patent Organization, which consists of the European Patent Office (EPO) and a managing body called the Administrative Council. Applicants may file

⁵ In his article 'The Myth of Asia's Miracle', Paul Krugman demystifies the significant growth rates in Asia by a simple equation. He explains the increases in output by mere increases in inputs and declassifies them as unsustainable. In order to ensure welfare growth beyond labor resources, countries would need to increase their efficiency through technological progress.

⁶ All ASEAN member states, except for Vietnam, were members of the WTO in 1995. Laos which joined ASEAN in 1997 has not become member of the WTO yet. Cambodia acceded to ASEAN in 1999 and joined the WTO in 2004. Vietnam acceded to the WTO and thus to the TRIPS agreement in 2007.

⁷ The EPC is legally based on the Convention on the Unification of Certain Points of Substantive Law on Patents for Invention (Strasbourg Convention). The Strasbourg Convention was already signed in 1963 by member states of the Council of Europe but only went into force in 1980. The ratification of the convention led to significant harmonization of patent laws across Europe.

their applications centrally at the EPO and may select the designated countries where the European patent should have effect. After the examination and acknowledgement of patentability, the European patent comes into existence as a group of national patents in the designated contracting states. While the patent applications may be filed in any official language of an EPC contracting state⁸, the applications are prosecuted in the three official languages of the EPO, i.e. English, French, German. (Gutterman & Anderson, 1997: 186f.) Thus, the European Patent system addressed two challenges which companies faced, namely the high transaction costs for patent applications in individual countries which followed distinct procedures and the need for translations into the respective official languages of the countries where to file the application. It is necessary to emphasize that the European Patent is not based on EU law. In contrast to the Community Trademark and the Community Design, the Community Patent with unitary character throughout the European Community has not come into existence yet.⁹

Although ASEAN featured a lower degree of mutual interdependence in patents, the EPO model was singled out as way forward. In contrast to Europe, where the founding members had featured significant mutual patent filings, the number of intra-ASEAN patent registrations was nil during the early 1990s (World Intellectual Property Organization, 2012). Consequently, the policy model would have rather served the interests of non-resident patent holders than the member states themselves (World Intellectual Property Organization, 2012).¹⁰ Yet, the EPO model resonated with the integration idea of a leading Thai government official. Don Weerawit Weeraworawit, Thai foreign service official delegated to the ASEAN Secretariat during the early 1990s, had studied in Europe where he had been socialized with the European integration idea (Interview No. 22, 2012). Evidence suggests that the normative fit of his attitude towards regional integration with the European policy model rendered him a gatekeeper in IP cooperation in ASEAN. He assumed the role of the regional norm entrepreneur and advocate. Although some of the ASEAN member states' representatives were initially hesitant to spell out the ambitious policy goal, they were convinced that the declaration of the political goal served their interests and *adopted* the policy idea. They were aware that the commitment would attract

⁸ The EPC went into force in 1977 for Belgium, West Germany, France, Luxembourg, Netherlands, Switzerland, and the United Kingdom. In the meantime the group of members accounts for 38 states, including the 27 EU member states.

⁹ Despite a long period of attempts to establish a Community Patent dating back to the 1970s the EU member states could not agree to a common regulation. The most crucial stumbling blocks constituted the language question and the location of the patent court. Particularly Spain and Italy were reluctant to accept EPO's three working languages for the community patent filing scheme. This deadlock was recently surmounted by the use of enhanced cooperation, i.e. the pursuit of the community patent without the participation of Italy and Spain (EurActiv, 2011). The agreement by the heads of states in June 2012 to split the EU patent court between London, Paris and Munich constituted a further step towards the introduction of the European Unitary Patent (Science Business, 2012).

¹⁰ The vast majority of patent applications in the ASEAN member states originated and still originate in the United States, Japan and Germany (World Intellectual Property Organization, 2012).

attention of governments and private companies. Beyond that, they knew that the European Union would extend the capacity-building provisions if they follow European ideas. Thus it was rather the preferential than the normative fit that induced the ASEAN member states to the political commitment.

In the aftermath of the decision to explore the possibility of establishing an ASEAN Patent Office, the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC)¹¹ issued a concept paper which examined three proposals for an ASEAN patent system, including a common form of domestic application, a regional filing system combined with a common patent fund, and thirdly an ASEAN Patent Office including the harmonization of patent law (Weeraworawit, 2004: 211f.). Remaining committed to the original goal of a centralized patent system, the member states opted for the second proposal and thus *adapted* the European policy model to the ASEAN conditions as interim solution. Although the regional patent office remained the member states' overall goal, they were not yet willing to immediately harmonize their legislations and establish a regional patent office. Instead, by harmonizing the procedures, the legal basis was supposed to converge over time (Weeraworawit, 2004: 211f.).

Turning of the tide: from Adaptation to Resistance

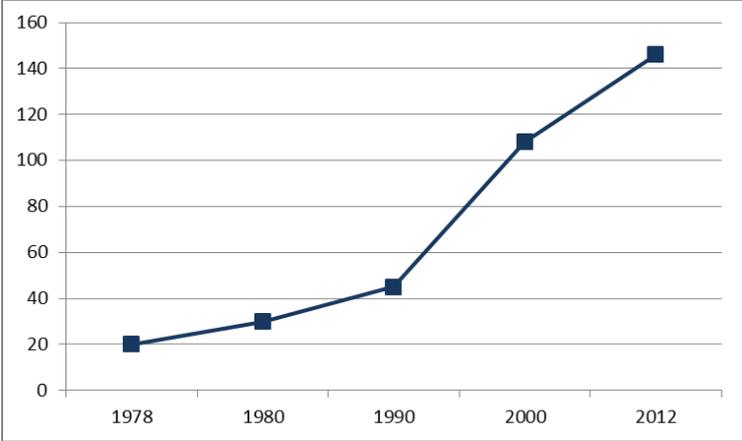
Although the Asian financial crisis during the late 1990s stimulated the ASEAN member states to enhance their regional integration particularly in the economics realm and even induced them to announce the establishment of a "Single Market and Production Base" (ASEAN, 2003), the member states increasingly departed from their original goal of an ASEAN patent system according to the EPO model. Given their persistent dependence on investments and technology transfer from abroad, the ASEAN member states were responsive to developments in the international IP regime.

In the field of patents one of the most crucial developments was the rise of the Patent Cooperation Treaty (PCT). Although already concluded in 1970, the PCT gained particular prominence only from 2000 when the number of member states had mounted from 45 in 1990 to 108 (see figure 2) (World Intellectual Property Organization, 2012). In the face of the increasing number of patent applications, particularly in the developed countries, the PCT constituted a good alternative to regular national or regional patent applications. Parties willing to file their invention in multiple countries may submit a PCT application which is subsequently

¹¹ The AWGIPC was established in 1996 and comprises the national delegates responsible for intellectual property rights. The body functions as architect of the ASEAN IP policy.

examined by an International Searching Authority¹². If the invention is found to be patentable, the international application enters the national or regional level where the patent is further proceeded to be eventually granted or refused.

Figure 2 Membership in the Patent Cooperation Treaty



Source: based on WIPO data

Also the ASEAN member states decided to become members of the PCT – although for different reasons. Although a growing number of ASEAN companies, especially from Malaysia and Singapore, filed patents abroad, the decision to sign the treaty by the countries was probably mostly driven by the dependence on international technology transfer. Vietnam (1993), Singapore (1995), Indonesia (1997) and the Philippines (2001)¹³ had already acceded to the treaty so that the remaining ASEAN states were probably encouraged by the example of the ASEAN fellows.¹⁴ Particularly for developing countries, the treaty offered a promising opportunity to integrate into the international IP system (Smith, 2004: 228).

Besides the rising attractiveness of the PCT membership, some of the ASEAN member states continued being under bilateral pressure from the United States to comply with the TRIPS provisions. Particularly Indonesia, the Philippines, and Thailand ranked prominently on the 301 (Priority) Watch Lists¹⁵ during the 2000s which made them turn inwards (e.g. United States

¹² International Search Authorities are national or regional patent offices which have concluded a respective agreement with the World Intellectual Property Organization. For now, 15 patent offices have accepted the PCT examinations.

¹³ The Philippines had already signed the PCT when it came into existence in 1970. The ratification was however delayed by 31 years.

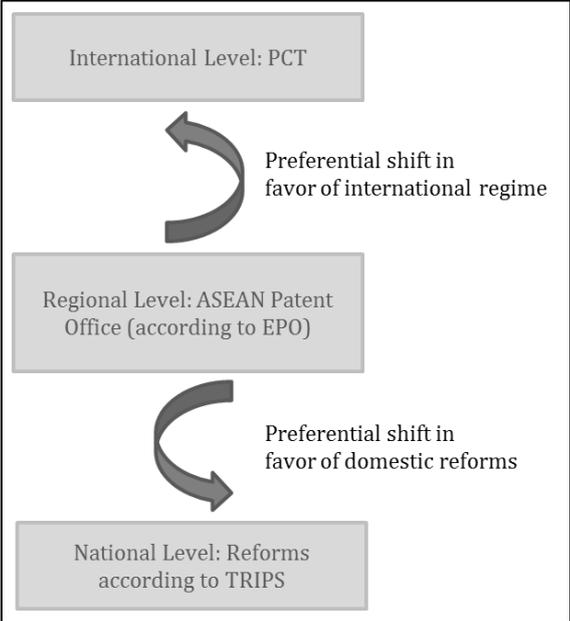
¹⁴ Laos and Malaysia subscribed to the PCT in 2006, Thailand did so in 2009.

¹⁵ The Special 301 Report has been annually prepared by the Office of the United States Trade Representative (USTR) since 1989. Based on Section 301 as amended of the Trade Act of 1974, it identifies barriers to trade to US companies and products due to intellectual property laws in other countries. The countries assessed as violating WTO or other trade agreements are classified in the statutory category “Priority Foreign Countries”, or the non-statutory categories “Priority Watch List”- and “Watch List”-countries. While priority foreign countries are subject to assessments and potentially retaliation, countries set on the (priority) watch lists are subject to investigations. Although the latter countries do

Trade Representative, 2001, 2002, 2003, 2004, 2005). Instead of developing a deeply-integrated patent system, the member states gave priority to domestic reforms in order to escape from trade sanctions.

As a first finding, it can be concluded that the ASEAN member states had a general preference for international IP regimes which were considered to constitute a trade-off to a profound regional patent architecture. The ASEAN member states featured weak intra-ASEAN interdependence indicated by the universally low degree of innovation in the member states (with the exception of Singapore and to a lesser extent Malaysia) and the low number of intra-ASEAN patent registrations. In contrast, all members featured marked dependence on international technology transfer. This condition rendered them particularly responsive to changes in the international IP regime and vulnerable to pressure from significant investment and trading partners like the United States. Consequently, the ASEAN member states turned inwards and gave priority to domestic reforms. Resources were diverted from the regional to the national level and rendered a deeply-integrated regional patent regime unfeasible.

Figure 3 Preferential Shifts at the Expense of a Regional Regime



Source: own illustration

Besides the international pull and US push towards domestic reforms, the ASEAN member states equally encountered divergent interests which additionally prevented them from agreeing to a deeply integrated policy model after the EPO. When the member states started discussing the ASEAN patent system the decision where to locate the ASEAN patent office awakened

not face direct sanctions, they are under marked reform pressure. The US private sector is alienated by potential future sanctions and may thus be hesitant to invest or to extend its business activities in the respective country (Uphoff, 1990: 48).

desirousness among them. The establishment of a central patent office would have caused significant redistributions of economic gains among the members. Illustrated by EPO and OHIM, the relocation of patent advisors and law firms would have brought significant economic benefits to the respective city while the other member states would have been deprived of this income source. (Interview No. 31, 2012) At the same time, the centralization of patent application and filing procedures would have also withheld the application and filing fees from the states. Malaysia, the Philippines, Singapore and Thailand laid their claims on the patent office's sight and raised a distributional conflict which could not be settled (Interview No. 43, 2012). The initiative of establishing central structures also caused resistance among ASEAN patent attorneys as they feared their work to become redundant (Interview No. 23, 2012; Interview No. 31, 2012).

In addition to the centralization of the office, the ASEAN member states increasingly questioned the meaningfulness of harmonizing the patent law in the face of their heterogeneity (ASEAN, 2011). According to their different levels of development, the ASEAN member states considered different degrees of IP protection appropriate (see Commission on Intellectual Property Rights, 2002: 61). In the meantime, the group of members had been extended by three least developed countries (LDCs), namely Cambodia, Lao PDR and Myanmar, which had the right to waive some of the TRIPS provisions.¹⁶ Beyond that, the member states faced different challenges concerning intellectual property rights according to their distinct levels of development. While the more developed countries faced system stress caused by the growing volume of patent applications, the less developed countries were concerned with the impact of patents on health and food security (Blakeney, 2007). Moreover, the striking difference in patent applications in the advanced countries raised commanded higher administrative standards than in the LDCs which registered only very few applications (Leesti & Pengelly, 2007). Consequently, the scope of a potential policy solution was significantly narrowed to the mutual relief of work load without “[formulating] a single set of laws and designing a harmonized system in [patents]” (ASEAN, 2011). The EPO model was explicitly *resisted* due to the “different perspectives among countries and regions” which precluded the development of an ASEAN IP Office (see also Interview No.26, 2012; The Philippine Star, 2007).

Particularly Singapore, however, had a strong interest in establishing a system that reduced the transaction costs for regional patent filings. The country accounted for around 40 or half of the

¹⁶ The exempted protection of pharmaceuticals, the right to parallel imports and compulsory licensing constitute three of the most important measures to expand the LDCs' scope. (Leesti & Pengelly, 2007)

regional patent cross-filings¹⁷ (Interview No. 64, 2012). The country was eager to come to terms with a regional filing system and proposed the so-called Patent Prosecution Highway (PPH) as a model. This policy had been initiated on a pilot basis by the Canadian Intellectual Property Office (CIPO) and the United States Patent and Trademark Office (USPTO) and spread particularly by the Japan Patent Office (JPO).¹⁸ If a patent applicant has been registered in the first PPH patent office, the related documents may be provided to the second PPH patent office and is prioritized against the open filing procedures.

The decision-makers in the AWGIPC could not find consensus on using the PPH in ASEAN. Only Malaysia also accounted for a marked number of about 20 ASEAN cross-filings while the remaining members did not see a substantive benefit in the policy model. Countries with significant capacity problems and hence a long turnaround time from patent application to eventual registration perceived the model as inappropriate. Granting patents to foreigners in an accelerated manner than to national applicants who had been waiting for several years would have been an unpopular decision. (Interview No. 64, 2012)

The subsequently adopted ASEAN Patent Examination Co-operation (ASPEC) thus constituted a compromise, yet at a very low scale. Based on the PPH model, ASPEC forgoes to the unpopular accelerated procedure. The ASEAN member states agreed to exchange examination reports – without being bound to the search results. This cooperation policy was sold as a breakthrough, but ironically constituted the status quo. The possibility of exchanging examination reports among IP institutions had already been rooted in the national laws of the ASEAN member states before (Interview No. 64, 2012). In a later reform, the member states agreed to solve the pending language question by selecting English as official working language. Thus, the status quo procedure was facilitated by allowing patent applicants to file their applications in English, instead of translating them into the official language of the respective target country.

Conclusion

The case study illustrates the need for a fit between external policy models and the preexisting cognitive dispositions of the member states as well as their preferences in order to see them travel abroad.

¹⁷ A person from country A who is member in the Paris Convention or the Patent Cooperation Treaty files his patent application in A and may use the priority rule based on the Paris Convention or the PCT to register his patent in countries B and C which are also members of the treaties.

¹⁸ In the meantime the so-called Patent Prosecution Highway (PPH) is being pursued on a pilot basis among 25 patent offices in the world. The Intellectual Property Office Singapore (IPOS) has concluded cooperation agreements with the Japan Patent Office (JPO) and USPTO. The Intellectual Property Office of the Philippines (IPOPIL) exchanges information bilaterally with JPO. (Japan Patent Office, 2012)

Table 2 The Values of the Variables in an Overview

	<i>H₁ (preferential fit)</i>	<i>H₂ (normative fit)</i>	<i>Dependent Variable</i>
1995	+	- (+ individual actor)	Adoption
Late 1990s	+	- (+ individual actor)	Adaptation
2009	-	-	Resistance

Table 2 juxtaposes the three phases with regard to the values of the dependent and independent variables. Given the finding that the normative misfit remained stable over time – except for Thai official’s individual normative fit which rendered him the gatekeeper in the policy-making process – the variation on the dependent variable may be explained by the transition from preferential fit to preferential misfit.

In contrast to the European Union, ASEAN has traditionally avoided the delegation of competencies to the regional level. Although the regional organization has recently taken a more rules-based path of regional cooperation than in the past, the centralization of institutions and the deprivation of national scope remain highly contested. It can be claimed that the normative attitude towards regional integration has remained stable over time. Except for individuals being convinced of deeper regional integration, like Weerawit Weeraworawit, a general shift in ASEAN in favor of harmonization and the delegation of competencies for normative considerations cannot be detected.

The early decision to follow the EPO model and thus the interims decision for a policy at odds with the ASEAN Way can rather be explained by rational considerations. The member states were induced to deal with intellectual property rights by the tightened international IP regime and their dependence on international technology transfer. The EPO model figured as well-reputed and obvious solution. At the same time, the EU was the major donor in the field of IP in the ASEAN region and clearly promoted a regional IP system. In the face of the ASEAN member states’ need for capacity building the adoption of the model constituted a welcome opportunity. Consequently, the preferential fit was more significant for the policy choice than the normative misfit.

However, their dependence on international technology transfer and the weak intra-ASEAN interdependence rendered the member states responsive to developments in the international IP regime. The growing attractiveness of the PCT and the increasing pressure by the industrialized countries, particularly the US, confronted the member states with a trade-off which they solved in favor of membership in the PCT and domestic reforms, at the expense of a

deeply-integrated regional IP regime. The only interests that were from then on to be addressed at a regional level were the mutual work sharing and the solution of the language question. In the face of different priorities, the only cooperation policy the member states were able to agree to was the status quo slightly amended by a simplified language rule.

The paper provides for valuable insights into ASEAN policy making and the reception of European policy models in the region. A further step to deepen the insights from the analysis would be the examination of diffusion mechanisms. The diffusion, Europeanization and policy transfer literature have identified different transfer mechanisms (for an overview see Börzel & Risse, 2012b). The case study hints to differentiated diffusion processes among the respective decision makers. Examining them on a cognitive level would provide the opportunity to convey a more differentiated picture of the ASEAN policy-making process. Alternatively, the mechanisms could also be tentatively derived according to scope conditions which have been identified in the state of the art literature. This approach would require a less profound set of information about the micro-level.

Bibliography

- ASEAN. (1995). ASEAN Framework Agreement on Intellectual Property Cooperation. Bangkok. Retrieved from <http://www.asean.org/24526.htm>
- ASEAN. (2003). Declaration of ASEAN Concord II (Bali Concord II). Bali. Retrieved from <http://www.asean.org/15159.htm>
- ASEAN. (2007). The ASEAN Charter. Singapore. Retrieved from <http://www.aseansec.org/21069.pdf>
- ASEAN. (2011). ASEAN Intellectual Property Rights Action Plan 2011-2015. *Intellectual Property*. Jakarta.
- Acharya, A. (1993). A New Regional Order in Southeast Asia: ASEAN in the Post-Cold War Era. London.
- Acharya, A. (2004). How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism. *International Organization*, 58(2), 239-275.
- Adler, E., & Haas, P. M. (1992). Conclusion: epistemic communities, world order and the creation of a reflective research program. *International Organization*, 46(1), 367-390.
- Alecu de Flers, N., & Regelsberger, E. (2005). The EU and Inter-regional Cooperation. In C. Hill & M. Smith (Eds.), *International Relations and the European Union* (pp. 317-342). Oxford: Oxford University Press.
- Alter, K. J. (2012). The Global Spread of European Style International Courts. *West European Politics*, 35(1), 135-154.

- Antons, C. (2004). Legal Culture and Its Impact on Regional Harmonisation. In C. Antons, M. Blakeney, & C. Heath (Eds.), *Intellectual Property Harmonisation within ASEAN and APEC. Max Planck Series on Asian Intellectual Property Law* (pp. 29-36). The Hague: Kluwer Law.
- Asia-Europe Foundation. (2006). 8th Talks on the Hill - Re-righting Intellectual Property: Economic and Social policy challenges in Asia and Europe, 7-9 May 2006, Singapore. Singapore.
- Blakeney, M. (2007). Identifying Regional Capacities and Need for IP Education.
- Braun, D., Gilardi, F., Füglistner, K., & Luyet, S. (2007). Ex Pluribus Unum: Integrating the Different Strands of Policy Diffusion Theory. *Politische Vierteljahresschrift*, 38, 39-55.
- Börzel, T. A., & Risse, T. (2012a). When Europeanisation Meets Diffusion: Exploring New Territory. *West European Politics*, 35(1), 192-207.
- Börzel, T. A., & Risse, T. (2012b). From Europeanisation to Diffusion: Introduction. *West European Politics*, 35(1), 1-19.
- Casier, T. (2011). To Adopt or Not to Adopt: Explaining Selective Rule Transfer under the European Neighbourhood Policy. *Journal of European Integration*, 33(1), 37-53. doi:10.1080/07036337.2010.526709
- Commission on Intellectual Property Rights. (2002). Integrating Intellectual Property Rights and Development Policy. London. Retrieved from http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf
- Davies, H., Nuttley, S., & Smith, P. (Eds.). (2000). *What works? Evidence-based policy and practice in public service policy*. Bristol: Policy Press.
- DiMaggio, P., & Powell, W. (1983). The iron cage revisited: institutional isomorphism and collective rationality in organizational fields. *American Sociological Review*, 48(April), 147-160.
- Dolowitz, D. P., & Marsh, D. (1996). Who Learns What from Whom: a Review of the Policy Transfer Literature. *Political Studies*, 21, 343-351.
- Dolowitz, D. P., & Marsh, D. (2000). Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making. *Governance: An International Journal of Policy and Administration*, 13(1), 5-24.
- Dosch, J. (1997). *Die ASEAN: Bilanz eines Erfolges*. Hamburg: Abera Verlag Meyer & Co. KG.
- Elkins, Z., & Simmons, B. A. (2005). On Waves, Clusters, and Diffusion: A Conceptual Framework. *Annals of the American Academy of Political and Social Science*, 598, 33-51.
- EurActiv. (2011). 25 Countries give green light to European patent. Retrieved from <http://www.euractiv.com/innovation-enterprise/25-countries-give-green-light-eu-news-503000>
- Farrell, M. (2007). From EU Model to External Policy? Promoting Regional Integration in the Rest of the World. In S. Meunier & K. McNamara (Eds.), *Making History. European*

- Integration and Institutional Change at Fifty - The State of the European Union* (pp. 299-315). Oxford: Oxford University Press.
- Farrell, M. (2009). EU policy towards other regions: policy learning in the external promotion of regional integration. *Journal of European Public Policy*, 16(8), 1165-1184.
- Gutterman, A. S., & Anderson, B. J. (1997). *Intellectual Property in Global Markets. A Guide for Foreign Lawyers and Managers*. London, The Hague, Boston: Kluwer Law International.
- Haas, P. M. (1992). Introduction: Epistemic Communities and international policy coordination. *International Organization*, 46(1), 1-35.
- Hall, P. A. (1993). Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain. *Comparative Politics*, 25(3), 275-296.
- Interview No. 22. (2012). Telephone Interview with Official of the European Patent Office, 21.3.2012.
- Interview No. 23. (2012). Interview with member of ASEAN Intellectual Property Association, 22.3.2012, Singapore.
- Interview No. 26. (2012). Telephone Interview with former Official of European Patent Office, 26.3.2012.
- Interview No. 31. (2012). Interview with member of ASEAN Intellectual Property Association, 2.4.2012, Bangkok.
- Interview No. 43. (2012). Interview with Official from Department of Intellectual Property Rights of Indonesia, 12.4.2012, Tangerang.
- Interview No. 64. (2012). Telephone Interview with former Official of European Patent Office, 18.7.2012.
- Jann, W., & Wegrich, K. (2003). Phasenmodelle und Politikprozesse: Der Policy Cycle. In K. Schubert & N. C. Bandelow (Eds.), *Lehrbuch der Politikfeldanalyse* (pp. 71-104). München: Oldenbourg.
- Japan Patent Office. (2012). Patent Prosecution Highway (PPH). Retrieved July 10, 2012, from <http://www.jpo.go.jp/ppph-portal/index.htm>
- Jetschke, A., & Murray, P. (2012). Diffusing Regional Integration: The EU and Southeast Asia. *West European Politics*, 35(1), 174-191.
- Kleinfeld, R., Willems, U., & Zimmer, A. (2007). Lobbyismus und Verbändeforschung : Eine Einleitung. In R. Kleinfeld (Ed.), *Lobbying. Strukturen, Akteure und Strategien*. (pp. 7-35). Wiesbaden: VS Verlag.
- Krugman, P. (1994). The Myth of Asia's Miracle. *Foreign Affairs*, 73(6), 62-78.
- Lavenex, S. (2004). EU External Governance in Wider Europe. *Journal of European Public Policy*, 11(4), 680-700.

- Leesti, M., & Pengelly, T. (2007). Assessing Technical Assistance Needs for Implementing the TRIPS Agreement in LDCs. A Diagnostic Toolkit. Geneva, Switzerland. Retrieved from <http://www.iprsonline.org/ictsd/docs/LDCToolkit-final.pdf>
- Lenz, T. (2012). Spurred Emulation: The EU and Regional Integration in Mercosur and SADC. *West European Politics*, 35(1), 155-173.
- Loewen, H. (2008). Democracy and Human Rights in the European-Asian Dialogue: A Clash of Cooperation Cultures? *October*. Hamburg.
- March, J. G., & Olsen, J. P. (1989). *Rediscovering Institutions. The Organizational Baics of Politics*. New York, London: Free Press.
- March, J. G., & Olsen, J. P. (1998). The Institutional Dynamics of International Political Orders. *International Organization*, 52(4), 943-969.
- Marsh, D., & Sharman, J. C. (2009). Policy diffusion and policy transfer. *Policy Studies*, 30(3), 269-288. doi:10.1080/01442870902863851
- Pawson, R. (2002). Evidence and policy and baning and shaming. *Policy Studies*, 23, 211-230.
- Raustiala, K., & Slaughter, A.-M. (2008). International Law, International Relations and Compliance. In W. Carlsnaes, T. Risse, & B. A. Simmons (Eds.), *Handbook of Intenrational Relations* (pp. 538-558). London: Sage.
- Rose, R. (1991). What is lesson-drawing? *Journal of Public Policy*, 11, 3-30.
- Sabatier, P. A. (1993). Advocacy-Koalitionen, Policy-Wandel und Policy-Lernen: Eine Alternative zur Phasenheuristik. In A. Héritier (Ed.), *Policy-Analyse. Kritik und Neuorientierung*. (pp. 116-148). Opladen: Westdeutscher Verlag.
- Saldías, O. (2010). Networks, Courts and Regional Integration. Explaining the Establishment of the Andean Court of Justice. *KFG Working Papers*, (20). Berlin. Retrieved from http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/WP_20_Saldias1.pdf
- Scharpf, F. (1973). Verwaltungswissenschaft als Teil der Politikwissenschaft. In F. Scharpf (Ed.), *Planung als politischer Prozess: Aufsätze zur Theorie der planenden Demokratie* (pp. 9-32). Frankfurt a.M.: Suhrkamp.
- Schimmelfennig, F. (2009). Europeanization beyond Europe. *Living Reviews in European Governance*, 4(3), 1-28.
- Science Business. (2012). Deal reached: Unitary patent court to have three homes. *Science Business*. Retrieved from <http://bulletin.sciencebusiness.net/news/75784/Deal-reached-Unitary-patent-court-to-have-three-homes>
- Sikkink, K. (1993). Human rights, principled issue-networks, and sovereignty in Latin America. *International Organization*, 47(3), 411-441.
- Simmons, B. A., Dobbin, F., & Garrett, G. (2006). Introduction: The International Diffusion of Liberalism. *International Organization*, 60(4), 781-810.

- Smith, P. (2004). Harmonisation, Regional Collaboration and Small Patent Offices. In C. Antons, M. Blakeney, & C. Heath (Eds.), *Intellectual Property Harmonisation within ASEAN and APEC. Max Planck Series on Asian Intellectual Property Law* (pp. 227-243). The Hague: Kluwer Law.
- Stone, D. (2004). Transfer agents and global networks in the “transnationalization” of policy. *Journal of European Public Policy*, 11(3), 545-566. doi:10.1080/13501760410001694291
- Telò, M. (2007). *European Union and New Regionalism: Regional Actors and Global Governance in a Post-hegemonic Era*. Farnham: Ashgate.
- The Philippine Star. (2007, November 15). Formation of regional Intellectual Property Office urged. Manila.
- United States Trade Representative. (2001). 2001 Special 301 Report. Washington, D.C. Retrieved from <http://www.keionline.org/ustr/special301>
- United States Trade Representative. (2002). 2002 Special 301 Report. Washington, D.C. Retrieved from <http://www.keionline.org/ustr/special301>
- United States Trade Representative. (2003). 2003 Special 301 Report. Washington, D.C. Retrieved from <http://www.keionline.org/ustr/special301>
- United States Trade Representative. (2004). 2004 Special 301 Report. Washington, D.C. Retrieved from <http://www.keionline.org/ustr/special301>
- United States Trade Representative. (2005). 2005 Special 301 Report. Washington, D.C. Retrieved from <http://www.keionline.org/ustr/special301>
- Uphoff, E. (1990). *Intellectual Property and US Relations with Indonesia, Malaysia, Singapore, and Thailand*. Ithaca, NY: Cornell University Press.
- Verpoest, L. (2008). State isomorphism in the Slavic core of the CIS. A comparative study of postcommunist geopolitical pluralism in Russia, Ukraine and Belarus.
- Weeraworawit, W. (2004). The Harmonisation of Intellectual Property Rights in ASEAN. In C. Antons, M. Blakeney, & C. Heath (Eds.), *Intellectual Property Harmonisation within ASEAN and APEC. Max Planck Series on Asian Intellectual Property Law* (pp. 205-226). The Hague: Kluwer Law.
- Winter, T. von. (2004). Vom Korporatismus zum Lobbyismus. Paradigmenwechsel in Theorie und Analyse der Interessenvermittlung. *Zeitschrift für Parlamentsfragen*, 35(4), 761-776.
- World Intellectual Property Organization. (2012). Statistics on Patents. Retrieved July 11, 2012, from <http://www.wipo.int/ipstats/en/statistics/patents/>
- Yeo, L. H. (2010). Institutional regionalism versus networked regionalism: Europe and Asia compared. *International Politics*, 47(3/4), 324-337. Nature Publishing Group.