

Part I

Research Setting

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Part I
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CHAPTER 1

Purpose of the Study and Research Method

1. Background of the Study

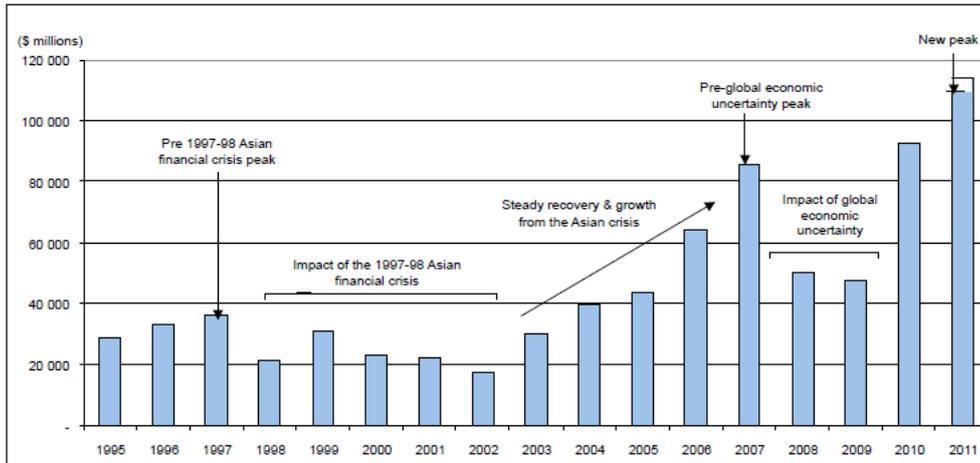
The Association of Southeast Asian Nations, or ASEAN, was established on 8 August 1967. One of the goals of ASEAN is to accelerate regional economic growth. For that purpose, ASEAN member states are to promote collaboration on matters of common interest in the economic, social, cultural, technical, scientific, and administrative fields. At the Ninth ASEAN Summit held in 2003, ASEAN leaders agreed to establish an ASEAN community. Four years later they signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.

The reason the realisation of the goal of the establishment of an ASEAN community was reinforced may be related to the rapid growth of the ASEAN economy. On 24 January 2014, OECD Secretary-General Angel Gurría delivered a speech entitled ‘Countdown 2015: Towards Inclusive and Sustainable Growth in the Association of Southeast Asian Nations (ASEAN) Economic Community’ at Davos, Switzerland. In his speech, he pointed out the following:

The ASEAN Economic Community has achieved impressive economic growth over the past several years. Southeast Asia has been one of the most dynamic and fastest-growing regions in the world, with GDP growth rates projected to average 5.4 percent per annum between 2014 and 2018.

This paper does not offer an explanation of the so-called ‘the East Asian Miracle’. But as can be seen in Figure 1-1 below, foreign direct investment (FDI) in ASEAN showed a significant increasing trend from 2003, which was in accordance with rapid economic growth in ASEAN.

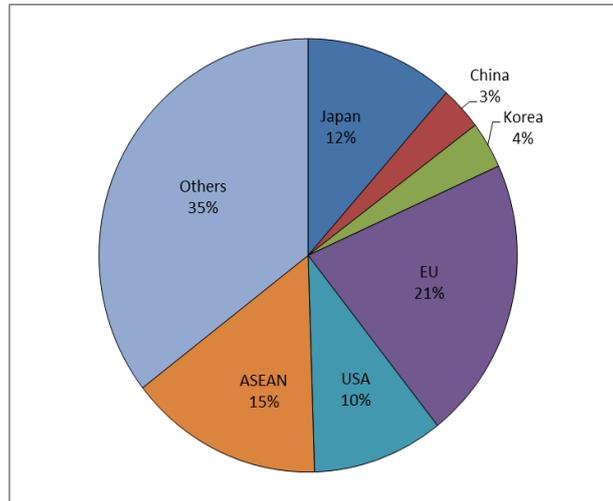
Figure 1.1: Net Foreign Direct Investment Inflows in ASEAN



Source: Reproduced from *ASEAN Investment Report 2012*, The ASEAN Secretariat.

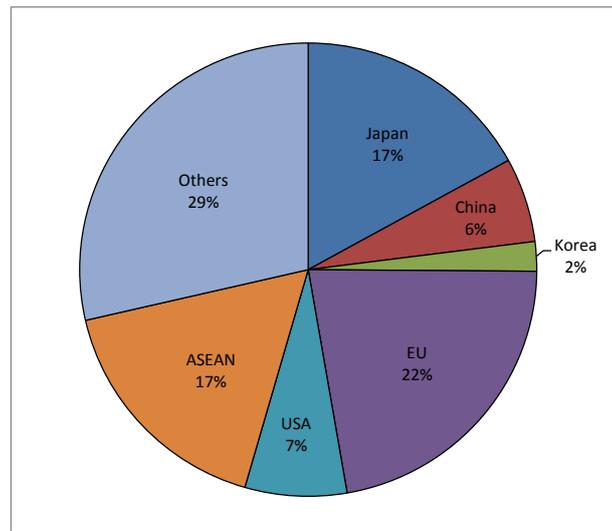
The share of Japan, China, and Korea increased from 19 percent in 2007–2009 to 25 percent in 2011–2013. Hence, Japan, China, and Korea accounted for a quarter of total FDI in ASEAN in 2011–2013, making it easier to conclude that Northeast Asian countries (Japan, China, and Korea) will influence more FDI net inflows in ASEAN. Adding the share of the EU and the US amounts to an increase from 50 percent to 54 percent, accounting for over a half of total FDI in ASEAN.

Figure 1.2: Share of FDI Net Inflows in ASEAN (2007–2009)



Source: ASEAN Statistics.

Figure 1.3: Share of FDI Net Inflows in ASEAN (2011–2013)



Source: ASEAN Statistics.

The protection of intellectual property rights (IPR) has been a critical element of the business strategies of multinational companies. Studies that examined the relationship between FDI and the intellectual property (IP) system (or protection of IP) did not reach clear conclusions. Some studies found that the likelihood of the most advanced technologies being transferred rises with the development of stronger protection of IPR (Maskus, 1997).

Nicholson (2003) analysed the effects of IPR protection by studying US companies engaged in FDI or licensing. It showed that weak IPR protection lets foreign companies internalise the production process of a particular country.

Maskus (1998) argued that the lack of clear findings could be due to only rough measures of IPR protection being available. Not only IPR protection, but FDI too is influenced by various factors. According to the early studies of Mansfield (1994, 1995), concerns about the IPR system also depended on the purpose of an investment project. Concerns would be stronger in cases of establishing an R&D base than in cases of establishing a sales or distribution base. Despite the complexity of the relationship between IPR systems and FDI, it is worthwhile and necessary for policymakers, domestic companies, and multinational corporations (MNCs) to explore the current state of the relationship in a certain area.

2. Purpose of the Study

The purpose of this study is to establish the present situation regarding IP systems and to derive political recommendations for their renewal with a view to promoting foreign direct investment (FDI) in ASEAN countries by MNCs.

ASEAN countries are very attractive markets for MNCs because of the former's potential economic growth, while ASEAN countries are keen to promote the growth of investment by MNCs. But MNCs are concerned about the IP environment in ASEAN countries, such as the slow examination process, different design and trademark systems in every country of the region, and weak border measures. Reducing intra-regional disparities among ASEAN countries and enhancing the predictability of IP systems would result in FDI growth and sustainable economic growth of the ASEAN region. Therefore, to develop and refine IP systems in ASEAN is greatly important to both ASEAN countries and MNCs.

In this study, we explore the opportunities and challenges with regard to IP systems and policies in ASEAN countries through surveys of MNCs and a preliminary statistical analysis based on the survey results.

3. Research Method

We conducted two types of surveys—a questionnaire survey and an interview survey.

We prepared a questionnaire sheet, which included the following items:

- (1) The present state of and plans for direct investment in ASEAN countries;
- (2) Profile of subsidiary in ASEAN countries (operating country in ASEAN, year of establishment, type of activity, method of establishment, sales volume, number of employees, etc.);
- (3) Factors considered important when deciding on (or planning) direct investment in ASEAN countries;
- (4) Particulars of the above IP elements considered important when deciding on (or planning) direct investment in ASEAN countries;
- (5) Problems faced after expanding to ASEAN countries;
- (6) Involvement of IP divisions in decision-making regarding FDI;
- (7) Expectations and hopes for proper and satisfactory IP systems and policies in ASEAN countries.

To establish a new foreign subsidiary, MNCs would normally consider a variety of factors, for example, size and growth rate of GDP, labour cost, quality of human capital, completeness and reliability of infrastructure, corporate tax rate, and country risks (political, religious stability, disaster, etc.) of the host country. Stability and reliability of IP policies and systems can also be critical factors. To identify the relative importance of IP elements in determining (or planning) direct investment, we asked about the factors that were considered important in the decision-making process concerning the establishment of a new foreign subsidiary in ASEAN countries.

Regarding the particulars of IP elements, we chose detailed items based on the Park indices mainly on patent rights, such as the Ginarte-Park index (1997), Park-Wagh index (2002), and Park-Lippoldt index (2005). They included examination time and cost, term of rights, injunction and damage, and other issues related to patent, trademark, design, utility model, and copyrights, respectively. They also included IP-related issues as the invalidity of grant-back clauses, the invalidity of NAP clauses, transparent and predictable tax system concerning transfer pricing, import and export control on counterfeit goods, trade secret and technology know-how protection system, and the level of protection. We asked which items were important, how important, and why in considering the establishment of new subsidiaries in ASEAN countries.

In addition to the questions on the factors considered in the decision-making process on foreign expansion, we asked the companies about the actual problems they faced after expansion. By asking these questions, we tried to clarify the gap between the significance of the factors before expansion and that after expansion.

The definition and meaning of the detailed items are explained in Chapter 2. Appendix 1 contains the questionnaire we used in the survey and Appendix 2 describes the relationship with the Park indexes on which our questionnaire is based.

We sent the questionnaire to Japanese, Chinese, Korean, and western (US and European) MNCs that have already expanded into ASEAN countries. We assigned the manager of the IP division and, as necessary, the manager of the international business division and/or corporate planning division as the responding persons. We subsequently conducted an interview survey with the companies that responded to the questionnaire. In the interviews which lasted for about one-and-a-half to two hours in most cases, we asked them to provide more details about their answers to the questionnaire and any comments on the actual situations and the problems of IP systems in ASEAN countries.

Most of the interviewees were the managers of the IP-related division of the company. The surveys were conducted from March to June 2014.

4. Selection of the Target Companies

As for the targets of the survey, we selected Japanese, Chinese, Korean, and western (US and European) companies that have already established local subsidiaries in ASEAN countries. To better assess the potential impact on the future economic growth in ASEAN, we picked target companies active in four industries—electric devices, transportation machines, chemicals, and food.

As previously described, we built a working group consisting of core members from Japan, China, Korea, Singapore, Thailand, Indonesia, and Viet Nam and assistant research members who conducted the surveys in each country. In Japan, China, and Korea, the survey was conducted with Japanese, Chinese, and Korean companies, respectively, whereas in Singapore, Thailand, Indonesia, and Viet Nam, it was done with subsidiaries of US and European companies in each country.

CHAPTER 2

Overview of the Research Items Examined

In this chapter, we clarify the definition and/or meaning of the detailed items with regard to IP-related systems examined in the survey. As shown in Appendix 1, the questionnaire contains various items, some of which we selected and clarified.

1. Intellectual Property Rights in General

Prosecution timeline	Prosecution timeline usually constitutes the term from the date of a submission of intellectual property rights (IPR) to registration of the IPR.
Co-ownership	(Licensing) Some laws and regulations prohibit the granting of a license under the IPR without the consent of co-owners. (Enforcement) Some laws and regulations prohibit legal action by a co-owned IPR without the consent of other co-owners.
Injunction	A court order requiring a person to carry out or halt a specific action. Court procedures to order an injunction vary by country. But mostly, it is an extraordinary remedy that courts use in special cases where preservation of the status quo or taking some specific action is required to prevent possible injustice.
Damage	A monetary compensation ordered by a court to offset losses caused by another's fault or negligence. Court procedures to order payment of damages vary by country.

2. Patent

Examination	IPR examination is a fundamental part of the IPR system. For better IPR examination, there are worldwide networks such as
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	<p>the ASEAN Patent Examination Co-operation (ASPEC) and Patent Prosecution Highway (PPH) on patent examination.</p> <p>The PPH is a programme that speeds up the examination process for corresponding applications filed in participating IP offices.</p> <p>ASPEC is the first regional patent work-sharing programme among some of the IP offices of ASEAN Member States (AMSs).</p>
Home country application system	Some countries require inventions conceived in a particular country to be filed in that country first.
Secret patent system	New technologies related to national defence and economic stability of a country will be examined using a special procedure.
Compulsory licensing right	Some laws or regulations permit a government to allow someone to produce the patented product or process without the consent of the patent owner.

3. Trademark

Registration of a trademark for multiple classes of goods and services with a single application	Some laws and regulations require the filing of an application for the trademark for each class. It would cause unreasonable costs to applicants and make management of the trademark more complicated.
Cancellation of registered trademark not in use	Some countries regulate that the burden of proof be imposed on the requester of the trial that concerns cancellation of a registered trademark not in use. In some situations, the trademark is registered for not in use, but for preparation of business. Under such circumstances, attempting to prove whether the trademark has been used places a great burden on the requester.

4. Design Patent

Partial design system	A system that provides protection for the features of a particular creation. Adoption of a partial design system is designed to prohibit people from imitating only the characteristic features of others' designs to create their own.
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5. Copyright

Employee works	According to the general rules of copyright law, the person who actually creates a work is the legally recognised author of that work. However, under certain conditions, the employers are recognised as the author legally. Software can be protected by copyright. Hence, how to establish the conditions for employee works is important in the software industry.
Scope of neighbouring rights protection	Neighbouring rights refer to the rights of the persons who do not create works, but play an important role in commercialising the works. Protection of neighbouring rights is important in the music and film industries.

6. Other IP-related Systems

Contract registration system	Some laws or regulations require the registration of a license agreement.
Rates control for license fee objects of license contracts	There are some laws or regulations on how to determine a royalty (such as an upper limit on the amount and rate) or on how to decide what the objects of a license contract are.
Invalidity of grant-back clauses (assignment-back, exclusive or non-exclusive grant-backs, reciprocity)	Some laws, regulations, or cases stipulate which party—the licensor or the licensee—owns the improved technologies. If they apply, it is not legally permitted to include any provisions for the licensee to assign back or grant back to the licensor the improved technologies.
Invalidity of NAP clauses	Some laws, regulations, or cases restrict contract parties to include certain kinds of clauses, such as:

	<p>(1) The licensee shall not contest the validity of the licensed IPR;</p> <p>(2) The licensee shall not assert any of the licensee's IP against the licensor.</p>
Licensor's warranty obligation	Some laws or regulations oblige the licensor to make a particular kind of warranty, such as a warranty with respect to the quality of the licensed IP, or a warranty for non-infringement of any third party's IPR.