

Technology Transfer, Investment And Indonesian Patent Law

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Abstract

In 2020, Indonesia has just revised the local working provision contained in Article 20 of Law no. 13 of 2016 concerning Patents through the ratification of Law no. 11 of 2020 concerning Job Creation. According to the Government of Indonesia in the Academic Paper of the Draft Law on Amendments to Law Number 13 of 2016 concerning Patents, the main reason for the revision of this article is because it will hinder foreign investment from entering Indonesia and also violates Article 27 (1) TRIPs which contains the prohibition on foreign investment. discrimination. This article will try to argue that the imposition of local working in Article 20 of the 2016 Patent Law obligations does not violate TRIPs and the local working provisions in the Patent Law must be maintained.

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ABSTRACT

Pada tahun 2020, Indonesia baru saja merevisi ketentuan local working yang tertera pada Pasal 20 UU No. 13 tahun 2016 tentang Paten melalui pengesahan Undang-undang No. 11 Tahun 2020 tentang Cipta Kerja. Menurut Pemerintah Indonesia dalam Naskah Akademik Rancangan Undang-Undang tentang Perubahan atas Undang-undang Nomor 13 tahun 2016 tentang Paten, alasan utama pasal ini direvisi adalah karena akan menghambat investasi asing masuk ke Indonesia dan juga melanggar Pasal 27 (1) TRIPs yang berisi tentang larangan diskriminasi. Artikel ini akan mencoba mengargumentasikan bahwa pemberlakuan kewajiban local working pada pasal 20 UU Paten 2016 sesungguhnya tidak melanggar TRIPs dan ketentuan local working dalam Undang-undang Paten harus dipertahankan.

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1. INTRODUCTION

Since its issuance in 2016, Article 20 of Law Number 13 of 2016 on Patents (“2016 Patent Law”) has raised objections from several foreign patent holder companies. This provision requires patent holders to manufacture products and use processes in Indonesia to support technology transfer, absorption of investment, and employment. The strongest objections came from foreign businessmen, who considered this provision as impractical for business. In addition, this provision is also considered to be contrary to Article 27 paragraph (1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”), relating to international patents and the mechanisms on applying for patent applications that apply internationally.

Article 20 of the 2016 Patent Law is an article related to the principle of local working. According to Professor Agus Sardjono of the Faculty of law of the University of Indonesia, “*the principle of local working is the compensation requested by the state to the patent recipient to*

carry out his invention in the country that grants the patent.” This principle is applied in many countries including the United States. Indonesia itself has implemented this principle from the first Patent Law in 1989, the Patent Law in 2001, to the Patent Law in 2016. The difference in the application of this principle existed in 2016 where there was a sanction if the patent owner did not comply with article 20, then the patent could be revoked. However, in 2020, Indonesia issued a new law namely Law Number 11 of 2020 on Job Creation (“Omnibus Law”), which in article 107 (2) states that revising article 20 from the 2016 Patent Law.

The reason is that the obligation to transfer technology by requiring foreign companies to make products in Indonesia impede foreign investment. The government of Indonesia claimed that they received complaints from other countries, especially developed countries regarding patent obligations in Indonesia. Referring to the Academic Text of the Job Creation Bill, the government also stated that Article 20 of the 2016 Patent Law violates the TRIPs Agreement. This article will focus on discussing patent regulations in Indonesia, whether article 20 violates article 27 of the TRIPs and why a firm technology transfer regulation is needed.

2. HISTORY OF PATENT

2.1. International History of Patent

Historically, Filippo Brunelleschi, an architect and engineer from Florence, Italy, was listed as the first recipient of patent for a barge with lifting equipment used to transport marble in 1421. Brunelleschi was granted a three-year monopoly over the creation of his invention. It seems that giving exclusive rights to inventors spread from Italy to other European countries over the next two centuries. Legal mechanisms and regulation of monopoly rights, and the legitimacy of intellectual property rights, particularly patents, were adopted by the British Empire in the 1500s. At that time the first patent law in Britain was born, namely the Statute of Monopolies issued in 1623. The British move was followed by France, which established their well-developed patent system in 1791. In 1873, the government of the Austrian-Hungarian Empire invited other countries to participate in an international discovery exhibition held in Vienna. However, at that time there were concerns from various circles about the absence of adequate legal protection. After all, this exhibition was seen as not providing adequate legal protection to the inventions on display.

This ultimately led to two major developments in Austria: first, a special Austrian law guarantees temporary protection for all foreigners participating in exhibitions for the invention of their trademarks and industry. And second, the Vienna Congress for Patent Reform was held in 1873. These two issues then gave birth to some basic principles and gave rise to the discourse that patent rights must be regulated in an effective system. After the Vienna Congress, a final draft proposing an "international" union for the protection of industrial assets was prepared in France and sent by the French government to other countries along with an invitation to attend the 1880 International Conference in Paris. The conference adopted a draft convention contained in the essence of today's substantive provisions which are still the main features of the Paris Convention.

The Paris Convention was formulated and ratified as the Paris Convention for the Protection of Industrial Property. Commonly known as The Paris Union or Paris Convention (Paris Convention), this convention was held on March 20, 1883, in Paris (France). Initially, this convention was signed by 11 countries, namely Belgium, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain, and Switzerland. Over time and the map of world developments, the Paris convention also underwent several revisions including in Brussels, Belgium on December 14, 1900, in Washington, United States on June 2, 1911, in The Hague, Netherlands on November 6, 1925, in London, England on 2 June 1934, in Lisbon, Portugal on 31 October 1958, and in Stockholm, Sweden on 14 July 1967, and as amended on 28 September 1979.

The provisions of the Paris Convention can be divided into four main categories: First, they contain substantive legal rules that guarantee basic rights known as rights of equal status

in each member state; Second, determining other basic rights known as priority rights; Third, defining a number of general rules in the field of substantive law, either the rules stipulating the rights and obligations of individuals and legal entities or regulations that require or allow member states to enact laws and regulations; Fourth, there is an administrative framework that has been established to implement the Convention, and includes the Convention's final clause.

However, in the Paris Convention itself, there is no regulation regarding formality requirements, language, or fees. In addition, the previous international patent system was considered to be a hassle for applicants and national patent offices, because patent registration applications were filed in several countries for the same invention, but were handled separately. For this reason, the United States initiated a motion to the Executive Committee of the Paris Convention, which led to the establishment of an international treaty that could fill the void. The Patent Cooperation Treaty (PCT) was formed on June 19, 1970, in Washington, United States, and entered into force on January 24, 1978. This agreement was initially followed by 18 countries. The first international application was submitted on June 1, 1978. The treaty was subsequently amended in 1979, and modified in 1984 and 2001. As of 2021, the PCT's membership consists of 153 States Parties, with Samoa only joining in October 2019.

The PCT provides a unified procedure for filing patent applications to protect inventions in each of its contracting countries. A patent application filed under the PCT is called an international application, or PCT application. Through PCT, patent protection applicants can apply for a patent for an invention simultaneously in a number of countries by submitting only one "international" patent application. However, the PCT Application itself does not result in granting a patent, as there is no patent applicable internationally, and granting a patent remains the prerogative of each national or regional authority. In other words, the PCT application, which establishes filing dates in all states, must be followed up with a step into the national or regional phase of proceeding to grant one or more patents. The PCT procedure essentially leads to standardized national or regional patent applications, which can be granted or denied under applicable law, in each jurisdiction where a patent is sought.

On April, 1994, nearly 2 decades since the formation of the PCT, 123 countries signed the Marrakesh Agreement, an international agreement that became the basis for the formation of the World Trade Organization (WTO), the largest trade organization in the world. The Marrakesh Agreement itself contains approximately 60 agreements, annexes, decisions and understandings, one of which is TRIPs. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which became effective in 1995, establishes a permanent cooperative relationship between the World Intellectual Property Organization (WIPO) and the WTO as the administrator of the agreement. The TRIPs Agreement introduced intellectual property law into the multilateral trading system for the first time and remains the most comprehensive multilateral agreement on intellectual property to date.

TRIPs requires WTO members to provide copyright protection, including creators and other copyright holders, as well as related rights holders; geographical indication; industrial design; layout-design of integrated circuit; patent; new plant varieties; trademark; trade names and undisclosed or confidential information. TRIPs also establishes enforcement (Part III), remediation and dispute resolution procedures (Part V). The protection and enforcement of all intellectual property rights must meet the objectives of contributing to the promotion of technological innovation and the transfer and dissemination of technology, for the mutual benefit of producers and users of technological knowledge and in a manner conducive to social and economic well-being, and a balance of rights and obligations.

In international law concerning patents, Indonesia has ratified three international conventions in the field of patents, namely:

- a. Paris Convention for the Protection of Industrial Property and Convention Establishing the World Intellectual Property Organizations by Presidential Decree Number 24 of 1979

- b. Patent Cooperation Treaty (PCT) and Regulation Under the PCT with Presidential Decree No. 16/1997
- c. WPO Copyrights Treaty (WTC) with Presidential Decree No. 19 of 1997.

In 1983 Indonesia became a member of the "Paris Convention". In 1989 the House of Representatives of the Republic of Indonesia passed Law No. 1989 on Patents. Then it was changed to Law No. 13 of 1997. In 2001 the government updated the Patent Law to Law No. 14 of 2001, and finally the government changed it back in 2016 to Law No. 13 of 2016 concerning Patents. This change was made because Indonesia had to adapt to the protection of intellectual property rights with international standards, namely TRIPS.

2.2.Indonesia's regulation on patent.

Historically, laws and regulations in the field of intellectual property in Indonesia have existed since the Dutch Colonial Government introduced the first Patent Law, called *Octrooiwet* Law in 1910. After Indonesia's independence, the *Octrooiwet* Law was not followed up with the establishment of a Patent Law which as a replacement. In order to accommodate requests for domestic patents, the Minister of Justice of the Republic of Indonesia issued an announcement dated August 12, 1953 No. J.S 5/41/4 B.N 55, which is to provide a temporary measure. Furthermore, to accommodate foreign patent requests, the Minister of Justice also issued an announcement dated October 29, 1953, No. J.G 1/2/17 B.N 53-91.

So far, the patent law in Indonesia has been amended several times as follows:

1. Law Number 6 of 1989 concerning Patents (Patent Law 1989)
According to Article 9 of the 1989 Patent Law, the period of protection for patents is usually 14 years, whereas according to Article 10 the term of protection for simple patents is only 5 years. Both periods are calculated from the filing date of the patent application. The term of protection for ordinary patents can be extended for 2 years, while for simple patents it cannot be extended. One of the obligations of the patent holder contained in Article 18 of the 1989 Patent Law is "to exercise his patent in the territory of the Republic of Indonesia".
2. Law Number 13 of 1997 concerning Amendments to Law Number 6 of 1989
Law Number 13 of 1997 concerning Amendments to Law Number 6 of 1989 concerning Patents (State Gazette of 1997 Number 30; Supplement to State Gazette Number 3680) is a law made because of the encouragement of the enactment of Law Number 7 of 1994 dated November 2, 1994, concerning the Ratification of the Agreement on Establishing the World Trade Organization (Agreement on the Establishment of the World Trade Organization). It is because Article 1 paragraph (1) states that countries that have signed TRIPS (WTO member countries) are required to implement TRIPS. Thus, the arrangements contained in the TRIPS mechanism become the minimum reference for the management of property rights in every WTO country, including Indonesia in providing protection and dispute resolution mechanisms.
With the entry of Indonesia into the WTO agreement, Indonesia has officially become a member of the World Trade Organization (WTO) and all agreements contained in it have legally become part of the National Legislation. Being a member of the WTO means being bound by rights and obligations, Annex 1C is an Annex on the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods. As a consequence of all of that, the implementation, among others, must immediately adjust all regulations regarding Intellectual Property Rights, namely the way it must adopt aspects in the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights.
3. Law Number 14 of 2001 concerning Patents
Considering that there are still several aspects of the Agreement on Trade Related Aspects of Intellectual Property Rights that have not been accommodated in Law Number 13 of 1997 concerning Amendments to Law Number 6 of 1989 concerning Patents, it was

amended again through Law Number 14 of 2001 about patents. Law Number 14 of 2001 concerning Patents is comprehensively compiled in a single text in lieu of Law Number 13 of 1997 concerning Amendments to Law Number 6 of 1989 concerning Patents, meaning that as a substitute the substance is not changed, but is rewritten. in Law Number 14 of 2001 concerning Patents. In general, the changes made to Law Number 6 of 1989 concerning Patents and the amendments to the Act include improvements, additions, and deletions of several articles that are deemed no longer appropriate.

4. Law Number 13 of 2016 concerning Patents

The current patent law in Indonesia is Law No. 13 of 2016 concerning Patents (“2016 Patent Law”). According to Article 1 (1) of the 2016 Patent Law, a patent is an exclusive right granted by the state to an inventor for his invention in the field of technology for a certain period of time to carry out the invention himself or to give approval to another party to implement it. Patents are divided into two, patents and simple patents. The difference lies in, for patents granted to new inventions, which contain inventive steps and can be applied in industry, while simple patents are granted for new inventions, developments of existing products or processes, and can be applied in industry. A patent holder may grant a patent license, which is a license granted by a patent holder, both exclusive and non-exclusive, to a licensee based on a written agreement to use a patent that is still protected for a certain period of time and under certain conditions. From this, an invention can become a source of material wealth for the inventor and patent holder in the form of royalty compensation given by the licensee. Meanwhile, for patent license holders, inventions are a source of economic benefit because they participate in producing and/or marketing products to consumers.

It should be emphasized that an inventor who is granted a patent can only monopolize his findings for commercial purposes for a certain period of time and cannot be extended. This is so that these technological findings can be utilized by the community and mass-produced. Here we see the uniqueness of patents that differentiate it from other intellectual property rights.

2.3. Investment and Transfer of Technology

Investment in this era of globalization is increasingly being carried out by developed countries. Several considerations are related to the availability of raw materials, cheap labor and in the context of market expansion. The existence of foreign investment for developing countries is divided into 2 theories, namely classical theory and dependency theory. According to the classical theory, the existence of this investment provides benefits for developing countries because through investment these countries can carry out infrastructure development, reduce unemployment by absorbing large numbers of workers, and the most important thing here is the transfer of technology. from expert workers working in Indonesia to national workers. Meanwhile, according to dependency theory, the existence of investment only brings consumptive and dependent nature to developing countries. This is of course very contrary to the noble ideals of our founding fathers who want sovereignty and independence in all aspects of national life, including here in the economic aspect.

The existence of foreign investment has the following characteristics and advantages:

1. It is permanent or long term;
2. Contribute to technology transfer;
3. Contribute to the transfer of skills;
4. Open new job opportunities.

The obligation to transfer technology is part of the principles and objectives of investment as stated in Article 3 of Law No. 25 of 2007 concerning Investment. However, the purpose of foreign investment related to the transfer of technology has not been seen in real terms in the development of national human resource capabilities. In a separate regulation, the transfer of technology is also regulated in several laws and regulations, such as Law Number 18 of 2002

concerning the National System of Research, Development, and Application of Science and Technology. In Article 1 number 11 it is stated that:

"Technology transfer is the transfer of the ability to utilize and master science and technology between institutions, agencies, or people, both within the domestic environment and those from abroad to within the country and vice versa".

Meanwhile, according to Transnational Corporations and Technology Transfer: Effects and Policy Issues, the complete definition of technology transfer is:

"The word "technology" itself is used in at least two senses. In the first, it means technical knowledge related or know-how-that is, knowledge, the methods and techniques of production of goods and services. In the sense it may include the human skills required for the application of techniques, since it is difficult to separate such application from a knowledge of the techniques themselves. In the second, broader sense, "technology" also implies capital for themselves the embodiment of technical knowledge. In some instance, the term "embodied technology" is used to distinguish capital goods from technical knowledge proper"

The methods of transfer technology are described as follows:

1. Foreign direct investment

Foreign direct investment is a form of technology transfer mechanism as previously described that with foreign direct investment there will be market expansion. This market expansion through the formation of foreign investment companies in Indonesia has brought in foreign technology. Foreign investment companies enter into contracts and it is through these contracts that technology enters Indonesia as well as through the purchase of machinery and various workshops.

2. Joint ventures

A Joint venture is a form that has long grown quite rapidly and widely. A joint venture contract or joint venture contract is an attempt of commercial activity (with risk) by two or more parties (acting) through an institution or organization formed to carry out a common goal.

Technology transfer can be done through licensing and franchising. Licensing is a license granted by the licensor to the licensee to carry out an activity or a protected right. With this license, the second party to enjoy the use of an intellectual property right in the industrial sector. With this usage permit, the first party gets paid. Meanwhile, franchising according to the Regulation of the Minister of Trade No. 12/M-Dag/Per/3/2006 concerning Provisions and Procedures for Issuing Franchise Business Registration Certificates, are:

"A franchise is an agreement between a franchisor and a franchisee in which the franchisee is given the right to run a business by utilizing and/or using intellectual property rights or inventions or business characteristics owned by the franchisor in exchange for the terms stipulated by the franchisor with a number of obligations to provide ongoing operational consulting support by the franchisor to the franchisee"

Some of the above technology transfer mechanisms are well-known types of activities, while there are several other technology transfer mechanisms, such as Management contracts, Marketing contracts, Technical Service contracts, Turnkey contracts, International sub-contracting.

2.4. Article 20 of the 2016 Patent Law vs TRIPs

Article 20 of the 2016 Patent Law requires patent holders to produce or use a production process in Indonesia, which is also commonly referred to as local working. It is clearly stated that local working must support technology transfer, investment absorption and the creation of new jobs. The local working provisions in patents are not new in patent regulation in Indonesia. In previous patent laws, similar provisions have existed, such as in Article 18 of the 1989 Patent Law and Article 17 (1) of the 2001 Patent Law. Thus, local working is not a new provision in Indonesia, even in the world.

Article 20 of the 2016 Patent Law was strengthened by Article 132 (1) e of the same law which allows for legal remedies to revoke patents that do not implement the provisions of Article 20 of the Patent Law. Indeed, the issue of the objection of this Article was heard even before the 2016 Patent Law was officially enacted. When discussing the material on the Patent Bill at the House of Representatives of the Republic of Indonesia in 2016, The United States Chamber of Commerce was also present and expressed its rejection of Article 20. The United States Chamber of Commerce assessed that the obligations for companies as referred to in Article 20 would raise serious concerns for foreign companies holding patents in Indonesia.

Then in 2018, Indonesia issued Minister of Law and Human Rights Regulation number 15 of 2018 concerning the Implementation of Patents by Patent Holders to provide a legal basis for delaying the application of the policies of Article 20 and Article 132 (1) e of the 2016 Patent Law. In fact, in the 2016 Academic Paper on the Draft Law on Amendment to the Patent Law, the mandatory provision as referred to in Article 20 is an act that imposes a burden on the patent applicant to produce/use the process in Indonesia, so that this provision will prevent the entry of a patent application and its protection in Indonesia. According to the text, Article 20 is also considered contrary to the provisions of TRIPs.

As mentioned above, in November 2020, Law no. 11 of 2020 concerning Job Creation (Omnibus Law) which changes a number of laws at once. One of the changes affected is Article 20 of the 2016 Patent Law, which previously reads as follows:

- “(1) Patent holders are required to manufacture products or use processes in Indonesia.
(2) Making a product or using a process as referred to in paragraph (1) must support technology transfer, absorption of investment and/or provision of employment.”*

Based on Article 107 (2) of the Omnibus Law, Article 20 of the 2016 Patent Law has now been revised, which in full reads as follows:

“2. The provisions of Article 20 amended, so that it reads as follows:

Article 20

- 1) Patents must be enforced in Indonesia.*
- 2) The implementation of the Patent as referred to in paragraph (1) is as follows:*
 - a. implementation of a product Patent which includes making, importing, or licensing a product for which a Patent is granted;*
 - b. implementation of a Patent-process which includes making, licensing, or importing products resulting from the process for which the Patent is granted; or*
 - c. implementation of Patents-methods, systems, and uses which include making, importing, or licensing products resulting from system methods, and uses for which the Patent is granted.”*

With the enactment of these changes, we can see that the definition of the use of a Patent is fragmented. The new Article 20 divides the implementation of Patents into several activities, and uses the word "or" in its formulation, such as "covering the manufacture, importing, or licensing of products that are granted a Patent". Thus, by only doing one of these things, the obligation to apply a patent in Indonesia can already be fulfilled, so that the fulfillment of the provisions of Article 20 paragraph (1) becomes lighter.

The problem with this revision is that one of the activities covered by Article 20 paragraph (2) is "importing". This means that by only importing products for which a Patent is granted, the implementation of the Patent is deemed to have been carried out and the obligations under Article 20 paragraph (1) have been fulfilled. Thus, the Patent Holder is no longer required to manufacture products in Indonesia, nor build factories or offices in Indonesia. In other words, there is no transfer of technology and knowledge, nor employment. Whereas the objectives of technology and knowledge transfer, as well as the absorption of labor are the most important objectives contained in Article 20 of the Patent Law. With the formulation of the new Article 20, it is as if this objective has been removed from the Patent Law.

Technology transfer is considered an important component in TRIPs Agreement because technology is closely related to several intellectual property such as patents and trademarks.

In fact, TRIPs Agreement in several sections mentions the importance of technology transfer and dissemination. Provisions for technology transfer in TRIPs Agreement can be seen in the provisions of Article 7 and Article 8 of TRIPs. Article 7 explains that technology transfer is expressly stated as an important component in efforts to improve the socio-economic welfare of TRIPs participating countries. Then in Article 8 of the TRIPs Agreement, State Members are given space to take a necessary step, by formulating or amending their laws and regulations, to protect public health and nutrition (public health and nutrition), and it is also emphasized the need for the development of vital sectors for the public interest in the context of technological and socio-economic development of TRIPs participating countries.

Concerning its participation as a member of the WTO, Indonesia is bound by international agreements involving countries including the TRIPs Agreement. However, these international agreements are not always absolute by putting aside the national interests of a country, and this is justified by article 8 of the TRIPs Agreement as stated before. In this case, each country has the right to a certain degree to take the necessary steps to support the transfer of technology as expected. According to Khoirul Hidayah in her book, TRIPs Agreement, which have been ratified by Indonesia through WTO membership, must be understood in accordance with national interests. The implementation of TRIPs Agreement should not harm the national interest, in order to achieve a balance between international needs and national interests, lobbying in the form of diplomacy and good negotiations by developing and poor countries is needed against developed countries.

In relation to the local working provision in patent regulation, the debate on this matter has been going on for a long time, especially the debate about potential conflicts between obligations under Article 27 (1) of the TRIPs Agreement. The government of Indonesia said that Article 20 of the 2016 Patent Law is a form of discrimination and violates Article 27 (1) of TRIPs, which stipulates:

“(1) Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”

As already mentioned, Article 27 (1) of the TRIPs Agreement prohibits discrimination between imported and domestically produced products. At first glance, the TRIPs Agreement seems to prohibit the practice of local working which only protects domestically produced patents and negates the protection of patent products imported into the country. However, the reading of this article must be seen in conjunction with Article 30 and Article 31 of TRIPs.

Article 30 of TRIPs allows for limited exceptions to the exclusive rights granted by granting patents. Meanwhile, Article 31 of the TRIPs Agreement allows for "other uses without permission from the right holder". Other uses referred to in the TRIPs Agreement refer to "uses other than those permitted under Article 30". While, Article 30 establishes the first level of exception for the eponymous patent referred to in Article 27(1), and Article 31 establishes the second level of exception called "other uses" Article 31 stipulates a second level of exemption which is more liberal referred to as other uses. In this interpretation the principle of *lex specialis derogate legi generali* applies, where if there are general legal provisions that contradict certain provisions, then special provisions apply. Where in the provisions of Article 27 of the TRIPs Agreement, it articulates the existence of general protection, but in Article 30 and 31 tend to provide special exceptions. Thus, based on the principle of *lex specialis derogate legi generali*, the exceptions to Articles 30 and 31 are higher than the rights in Article 27 of the TRIPs Agreement.

Article 31 of the TRIPs Agreement does justify local working laws. This is directly related to mandatory licenses, namely establishing procedures and conditions for issuing

mandatory licenses without permission from the patent holder. There are two sets of requirements for obtaining a compulsory license. For non-emergency circumstances, a mandatory license may be obtained if the "proposed user" attempts to obtain permission from the patent holder on "reasonable commercial terms and conditions" within a "reasonable period of time". Meanwhile, for emergencies, this requirement is waived. In a sense, all that is needed is notification from the patent holder. Based on the description above, in the case of Article 31 which replaces Article 27(1), there is no potential conflict between Articles 27 (1) and 2 (2), which explicitly gives the right to use local working requirements. Thus, the use of mandatory licenses if local working fails to do so is still permitted under the TRIPs Agreement.

Mercurio and Tyagi in their paper titled *Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements*, have taken a different approach to solve the issue of local working in regards with TRIPs. They use Article 2.2 of TRIPs and Article 5 A (2) of the Paris Convention as a means of justifying the application of local working provisions in TRIPs. As stated in Article 2.2 of TRIPs:

“Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”

Based on this article, we can draw the conclusion that the Paris Convention still applies to TRIPs Member States. Now, in Article 5 A (2) it is stated:

“Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”

It is clear that under this article, a failure to work the patent is deemed an abuse of the exclusive rights attached to the patent and allows the government of the patent granting country to issue a compulsory license for the patent to a local producer. In their paper, Mercurio and Tyagi conclude that:

“The obligation in Article 27 must be read in conjunction with Article 2.2 (incorporating Article 5(A)(2) of the Paris Convention) and the Doha Declaration. When viewed in totality, it appears the only way in which a complainant can meet its burden is by applying the term “discrimination” to a justifiable exercise of an incorporated right. Such an application would be nonsensical. Thus, “the one” remains—Article 2.2, in conjunction with Article 5(A)(2) of the Paris Convention, which now stands without a competing provision.”

The regulation of technology transfer is a strategic means in increasing the mastery and utilization of science and technology. The experience of developing countries which then leads to become developed countries that master advanced technology in line with countries that have already developed requires the existence of technology transfer rules. Without clear rules and legal coercion, foreign investment companies would be reluctant to transfer their technology to Indonesia through agreement instruments (licenses) and reasons for protecting Intellectual Property Rights.

It seems hard to ask foreign investment companies voluntarily to transfer technology, and with various efforts to prevent technology transfer from occurring. Therefore, the state must take a role through legal or policy instruments that can force technology transfer to occur for the welfare of the nation. Returning to the discussion on Article 20 of the 2016 Patent Law, it would be better if the government grouped which patents could be valid indefinitely without needing to be restricted and what types of patents needed restrictions. If a technology is useful for social purposes and the public benefit, then it can be required to transfer technology. However, for certain technologies that are not related to the general benefit, it can be considered that there is no need to require technology transfer.

3. CONCLUSION

For Indonesia, the regulation of technology transfer is an important matter. The existence of patent protection should be a motivation for the Indonesian people to conduct research so that they can produce a technology that is beneficial to humans and can export technology. For this reason, the provision of local working as a catalyst for technology transfer should be kept in existence. So, in order for Indonesia to have the power to force foreign investment companies to be willing to commit to technology transfer and implement it consistently, clear and firm rules regarding technology transfer must be made and implemented immediately.

The reason that Article 20 of the 2016 Patent Law contradicts Article 27 of TRIPs because it is considered discriminatory is something that is forced. Article 27 of TRIPs clearly cannot be read alone. It must be read in conjunction with the related article. TRIPs highly respect the rule of law and the national interests of participating countries. In addition, TRIPs still want monopoly rights to have a positive impact by preventing abuse of intellectual property rights by right holders in the form of blocking patents and failure to work as stipulated in Article 5A (2) of the Paris Convention.

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