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## **THE MONOPOLY PRACTICE AND UNFAIR BUSINESS COMPETITION IN THE TECHNOLOGY TRANSFER ACTIVITY THROUGH THE FOREIGN PATENT IN INDONESIA**

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### **ABSTRACT**

It is common knowledge that technology development will be in line with the development of a nation. This fact is raising the need of developing countries like Indonesia to maximize its potential in the field of technology. However, it is as not easy as it sounds. There are many obstacles for a country to develop its potential in technology, notably for the experts in the relevant country to master the necessary skills. Due to this limitation, many countries are beginning to fill-in the gap by registering the license of foreign patents. It is expected that the use of foreign patents will replace the higher cost and the longer time needed to develop local technology in the developing countries.

Unfortunately, the use of foreign patent licenses does not itself automatically enhance one's ability to master the necessary skills. There are many cases where developing countries were deceived by the 'grant-back' clause attached to the foreign patent license. The licensee's position is consequently considered lower than that of the licensor, which, in its turn, may give rise to monopoly practice and unfair business competition. This study was conducted with the purpose to formulate an effective technology transfer through the licensing of foreign patents that can refrain from the repetition of monopoly practice and unfair business competition, according to the TRIPs signed by WTO and the positive law in Indonesia. This study used the juridical-normative approach as the methodology of research. It also used the analytical approach through Law Number 13 of 2016 concerning patents; Law Number 5 of 1999 concerning the prohibition of the monopoly practice and unfair business competition as well as the Agreement on trade-related aspects of Intellectual Property Rights signed by the World Trade Organization, with respect to the license agreement of the foreign patent. Based on the issue, as established previously in this journal, the expected outcome of increased information dissemination to countries using patent licensing agreements in technology and information development related to any matter in intellectual property specifically in licensing agreement, has a higher possibility for monopoly practices and unfair business competition. Therefore, it shows that, in principle, in order to prevent the licensing of foreign patents that lead to monopoly practice and unfair business competition, a country must establish a controlling entity to supervise the execution of the foreign patents and at the same time, enact harmonious rules and regulations with such supervision.

**Keywords:** Technology transfer, license of foreign patent, monopoly practice, unfair business competition.

## INTRODUCTION

Indonesia's objective, as a state, is regulated by the Preamble of the 1945 Constitution of the Republic of Indonesia. It is said that Indonesia must protect all its people, its independence and its land,

which was acquired by its founding fathers through brave fights. Such purposes are considered as the vision and mission of the state, hence, it is also elaborated under the National Long-Term Development Plan ('RPJP') along with other objectives such as educating people to improve public welfare, as well as participating in the establishment of the world's order for freedom, perpetual peace and social justice. Enhancing public welfare also means enhancing social welfare. The present Regulation of the Republic of Indonesia Number 2 of 2015 concerning the National Middle-Term Development Plan ('RPJMN') of 2015-2019, states that this shall be made through forging people's ability in the field of science and technology.

The authors agree that the progress of technology development is capable of creating economic benefits. No wonder developed countries are competing against each other to explore their respective potential to the fullest in the field of technology. Nonetheless, this raises a problem, particularly in terms of the efforts required to master the necessary skills to develop the relevant technology. A country will need various supporting facilities to expedite, move and control its activities in developing the industrial technology.

Since Indonesia has been paying lesser attention to science and technology research than to the other fields, it, as one of the developing countries, has a comparably slower growth than the other countries in chasing technology development. As a result, Indonesia has lesser technology transfer from other industrial countries. Indonesia is often called a pseudo-industrial country since it still needs to pursue so much in terms of mastering the necessary skills for industrial technology development (Mulya, 1992a). This condition is different from Japan, Korea, Taiwan, China, Thailand, Malaysia and the Philippines, where technology plays the role of the spine of the industrialization strategy to develop their nations. They have sufficient resources for the necessary skills to master the technology to support industrial growth (Rahardjo, 2002).

Insufficient infrastructures (1992b), facilities, funding, and quality of human resources are impeding the development effort to enhance the capacity of technology in Indonesia, particularly in the assimilation of foreign and local technology. In order to resolve this problem, the

submission of foreign patent license may be the choice of mechanism to help Indonesia to obtain better transfer of the knowledge of proper skills of human resources for the relevant technology.

A license agreement is a mechanism of knowledge transfer on certain technology with the permission to enjoy economic benefits of an object protected under Intellectual Property rights (a patent in this regard, particularly the foreign patent) for a certain duration of time. A licensee shall be obligated to pay a certain amount of royalty in a certain duration of time as a consideration for the grant of such license. There are many different kinds of license agreements, considering that each exclusive right has its own type of economic rights attached, for instance, some licenses grant full enjoyment of exclusive rights, while some others only grant partial benefits such as in the product or sale license agreement.

It may be hard for a state to have simultaneous enhancements to its infrastructures, facilities, funding and quality of human resources at a time. Therefore, it would be more effective for a state to focus on the effective method to increase its technology capacity and development instead. The submission of a foreign patent license might work as a solution. It transfers knowledge on technology used in foreign countries for domestic use (Frame & Compare, 1984). In Indonesia, the regulation on the foreign patent is stipulated under Law Number 13 of 2016 concerning patent and in the TRIPs issued by the WTO. It is elaborated that to master a technology, one must undergo a continuous process, have balanced progress, and be sufficiently ready; in short, it is not an automatic process. A higher rate of readiness from the receiving country would cause less dependency on the sending country therefrom.

Problems in foreign patent licensing usually occur when there are provisions unilaterally pre-determined by the sending country in the relevant template license agreement. An example of this problem may be seen in the enactment of the Grant-back Clause, which obligates the licensee to hand over all information and the resulting technology development to the licensor, despite the fact that the agreement was said to be signed in equality between the parties (Widjaja, 2001). The enactment of such a provision raises the potential of monopoly

practice and unfair business competition. On that note, the author conducted this study with the purpose of answering the question on how technology transfer through foreign patents as the effort to develop national technology pursuant to the TRIPs signed by WTO and the positive law in Indonesia may be conducted effectively without raising the potential of monopoly practice and unfair business competition.

## **METHODHOLOGY**

This study used the juridical-normative approach as the research method (Soerjono, 1985), while the analysis was made by using the primary source of law such as the positive rules and regulations in Indonesia, namely Law Number 13 of 2016 concerning patent, and Law Number 5 of 1999 concerning the prohibition of the practice of monopoly and unfair business competition as well as international agreements such as TRIPs signed by the WTO with respect to the transfer of technology through the licensing of foreign patents. This study also specifically used the descriptive-analytic method to analyze the portrayal of the transfer of technology through foreign patents as the effort to develop national technology in relation to the monopoly practice and unfair business competition.

## **RESULTS AND FINDING**

### **The Implementation of the Transfer of Technology through the License of Foreign Patents in the Effort to Develop National Technology**

In practice, many people consider that technology development and enhancement through the use of license agreement of patents is more effective. This use of the existing patent created by others is reducing the time and cost originally necessary for self-improvement. Examples are commonly found in developing countries such as Indonesia. In the effort as a nation to create successful development, Indonesia is not finding or inventing new technology. It applies to license agreement for foreign patents from other countries instead.

Indonesia usually uses several methods in technology transfer made through the license agreement of foreign patents. It depends on the necessity of the project, namely:

a. Employment of individual experts.

This method gives technical and processing know-how, notably for the manufacturing field. With this scheme, a country does not need to apply for any patent license in order to upgrade its technology, which is why it is only suitable for small and middle range industries .

b. Supply of machines and other equipment that can be made in separate contracts.

This entails the granting of license for technology from an agreement with the owner, whereby each person/entity signified in the agreement shall hold the right to implement the relevant technology. This scheme can ease the technology procurement process.

Moreover, some other countries are implementing at least five other different methods in order to face the same issues of technology transfer (Yelpaala, 1999):

- i. Importing capital goods.
- ii. Franchising and distribution of programs (distributorship).
- iii. Management agreement and consultation agreement.
- iv. Turn-key projects.

Any form of cooperation in the manufacturing field will involve large amounts of capital investment. Its success will depend on the source of technology.

c. Joint venture agreement.

In the consultation agreement, developing countries must actively obtain the access to the optimum technology necessary. Meanwhile, in turn-key projects, this active role is transferred to the technology owner. The joint venture agreement is expected to become the combination of the two, to produce optimum technology know-how from the owner.

The technology development progress is undeniably giving economic benefits. As a new dimension in the international competition of growth for Indonesia, technology is closely related to the faster speed and sharper industrial development. One evidence that technology development is made to support the transformation of the national economy into a competitive market is that the government is supporting policy-making for the execution of the foreign patent licensing agreement. In this regard, the Indonesian government intends to direct both the development and enhancement of the national technology to national development, with the hope that the growth of science and technology will raise the sense of competitiveness among Indonesian citizens to produce more goods and services from local resources. It is expected that this condition will eventually increase the prosperity and welfare of the public in a real and sustainable manner.

Bearing the elaboration above in mind, the author is certain that the foreign patent license agreement serves as an important aspect in the effort to develop national technology. It must surely comply with Law Number 13 of 2016 concerning the patent and the TRIPs signed by WTO as the regulating provision and one of the international agreements ratified by Indonesia in this case. Compliance with the relevant regulations will minimize the possibility of monopoly practice and unfair business competition. It will restrict some of the exclusive rights of the patent owner or the principal in the execution of the foreign patent license agreement in the enforcement of technology progress in Indonesia. A good patent license agreement must be clear, regulating both the necessary freedom and boundaries for the parties, as well as elaborating the permissible and non-permissible acts.

Below are some of the regulations in Indonesia which regulate the Foreign Patent License Agreement. They describe the effort to develop national technology through the foreign patents.

### **Transfer of Technology through the Foreign Patent License Agreement Pursuant to Law Number 13 of 2016 concerning Patent**

The underlying provision for the foreign patent license agreement made in the effort to develop national technology in Indonesia is

regulated under the dictum of the consideration of its enactment in Law Number 13 of 2016 concerning patent:

*“whereas a patent is an intellectual property granted by the state to the inventor over his invention in the field of technology, that has strategic role in supporting the development of the nation and enhance the public welfare.”*

*“whereas the progress of technology in various fields has achieved in such a rapid manner; to the extent that it needs an enhancement of protection for the inventor and the patent holder.”*

Patent rights are very important for both the inventor and the patent holder. Thus, it is necessary to protect them under certain registrations. The elaboration above portrays the notion that the higher patent protection will result in better support for national technology development, since it is claimed that this may motivate the inventor to work better, either quantitatively or qualitatively. It is also claimed that this will consequently support the welfare of both the nation and the state, as well as create a healthy business environment.

As such, it is safe to conclude that the commentary on the consideration of the enactment of Law Number 13 of 2016 concerning patent is made to execute the effort in developing national technology from the start, one of which is through the foreign patent license agreement.

### **Transfer of Technology through the Foreign Patent License Agreement Pursuant to the TRIPs Signed by WTO**

Transfer of technology becomes the main attention in the TRIPs-WTO, as referred to in Articles 7 and 8 of the Convention.

#### *Article 7 Objectives*

*“The protection and enforcement of Intellectual Property Rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producer and*



*users of technological knowledge in a conductive manner to the social and economic welfare and to balance the rights and obligation.”*

Pursuant to the article above, it is clear that the protection and the enforcement of the intellectual property also include the transfer of benefits of the technology between the receiving and sending parties. This will, of course, be followed by their rights and obligations to direct the purpose of either the economy or social welfare according to the balance principle. It applies to all state parties to the TRIPs-WTO.

Meanwhile, Article 8 emphasizes the necessity of protection for the health and the nutrition of the public, and to encourage the development of the vital sectors for public interest. It must be executed with the purpose to develop technology and the socio-economic field of the state parties to the TRIPs-WTO.

#### *Article 8 Principles*

*“Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and promote public interest in sectors of vital importance in their social, economic and technological development, provided that such measures are consistent with the provision of this agreement.*

*“Appropriate measures, provided that they are consistent with the provision of this agreement, may be needed to prevent the abuse of intellectual property rights by the rights holders or the resort of practices, with unreasonable restrain on trade or adversely affect the international transfer of technology.”*

The next article elaborates that it is better that the state parties to the TRIPs-WTO formulate the protection of public health and nutrition as well as encourage the development of the vital sectors meant for public interest in their respective positive laws, in order to develop the technology and socio-economic fields, and to support technology

development in their respective nations. Each state is granted the right to take the necessary steps to a certain degree to support technology transfer according to their needs, circumstances and conditions as the state party to the TRIPs-WTO.

Basically, the development of national technology through technology transfer has also been explained in the purposes and principles of the establishment of the WTO TRIPs agreement, namely (Adolf, 2005):

The purposes of the TRIPs-WTO Agreement (TRIPS WTO 1995, 2006):

1. Reduce irregularities and obstacles to the international trade.
2. Ensure that actions and procedures in enforcing Intellectual Property are not hampering any legitimate trade. Support the innovation and technology transfer for the mutual benefit of both the producers and the users of the technological knowledge, in a conducive manner for the social and economic welfare of the public, based on the balance principle between the rights and obligations (Siti Zulaekhah, 2008).

The principles of the TRIPs Agreement (Li Xuan, 2010) are:

1. In the creation or amendment of the national laws and regulations, member states can establish the necessary effort to protect the health and nutrition of the public, and to advance the society's interests in important sectors for socio-economy and technology development, as long as the process is in accordance with the provisions of this Agreement;
2. To the extent that it still is consistent with the provisions in this Agreement, appropriate measures can be taken to prevent the abuse of intellectual property rights that improperly inhibit certain trade or negatively affect the transfer of international technology transfer by the holder of the rights or practices.

Based on these purposes and principles, it is clear that the rules and regulations applicable in most states, either in the developed or developing countries such as Indonesia, which are applicable through ratification, are in favor of technology transfer as a method to develop national technology.

## DISCUSSION

### **Relationship between Technology Transfer through the Foreign Patent License and the Monopoly Practices and Unfair Business Competition**

Grant of foreign patent license as a method of technology transfer basically aims to generate more input rather than find the latest individual innovation. In fact, should this input result in an innovation, it may produce multiplied outputs, as in Japan and China. In this regard, Japan was executing its strategy in technology development by importing foreign technology to encourage new discoveries, while China was prioritizing the research necessary for new technology production (Mochtar, 2011). Apparently these facts show that the implementation of certain strategies in technology development may result in good outputs, whereas at the end of the day, this signifies the competitive advantage and status of Japan and China as complete industrial countries. National technology development is in line with the strategy used to implement new technology. Both the act of import in Japan and the prioritization of research in China, lead to new innovations that can be registered under new patents.

Indonesia, as a developing country, has also been putting its best endeavor to create a good strategy to develop its national technology. Foreign patent licensing is the most common measure of strategy executed so far; however, to succeed, it needs to be supported by three factors. *First*, is the proper technology capacity at the national level, mainly in the inadequacy of technical skills among human resources and the limited amount of capital. *Second*, is the incentive structure, which is determined by the product market structure and the production factors. This indicates hope lingering in the society in the novelty aspect to further develop certain technology. *Third*, is the science and technology capacity, and the relevant institution's performance. In this factor, the relevant institution can be considered as delivering its function properly if it is already encouraging companies to master a certain technology. Effectiveness, however, can only be achieved through better coordination.

The research conducted by the experts and the ASEAN secretariat in relation to AFTA shows that Indonesia, as a developing country,

has difficulties in mastering and developing technology, notably in the industrial field. It is deemed that this is due to the shortages in the ability to analyze the capacity level of the existing technology to develop business, minimum network, insufficient basic knowledge in negotiation, inconsistent government policies such as in the localization program as well as unclear direction and target of determination for the desired outcome from technology development.

Another related factor is the late adherence to technology development, since Indonesia was not keen on arranging strategies for technology development. It has missed many chances to focus on research in the field of science and technology. This leads to the absence of technology mastership at the time of technology transfer. In the grant of foreign patent license from industrialized countries, Indonesia was not equipped with proper readiness, hence, the title of pseudo-industrial country emerges.

The use of foreign patent license agreement to transfer technology in Indonesia, as a part of the intellectual property legal regime, is expected to create genuine national technology. This aims to manifest public welfare as explained in the objective of the state in the 1945 Constitution of the Republic of Indonesia. The intellectual property regime is granting legal basis for the patent holder to exercise exclusive rights through the foreign patent license agreement. He may fully exploit the patent while prohibiting any other party to do the same. The term 'exploit' is deliberately used in this regard to emphasize that one patent has different exclusive rights with another. The context of exclusive rights above, is the right to perform activities comprising of the process to make, to use, to sell, to import, to rent, to hand-over, to supply for sale, and others.

Some people often argue that the exclusive rights mentioned will be interpreted as the form of right to monopoly. In the law of business competition, monopoly means the excessive control over production and/or marketing of goods and/or the use of certain services provided by a business-person or a group of business- people. Logically, technology transfer through the foreign patent license agreement in the regime of intellectual property is surely connected with the monopoly practice, since the license agreement is usually derived

from developed countries with higher rates of technology production than in Indonesia.

This argument is supported by the most common problem occurring in the effort of national technology development in Indonesia through the foreign patent license agreement, where there is an imbalanced distribution of rights and obligations between the parties. Developing countries such as Indonesia usually hold position as the awardee/agent while the principal usually comes from developed countries. As the developed countries typically produce greater kind of technology, the awardee/agent mostly has less privileges than the principal. In a sense, this is understandable since the regime of patent regulates that the exclusive rights shall only be granted to the patent owner. It is indeed that the patent owner has the right to freely use the intellectual property, either for his own use or to give to other people. He also has the right to receive economic benefits therefrom, for example through the license agreement. On the other hand, this sounds unfair to the receiving country, since the execution of the foreign patent license agreement should have complied with the balance principles. This contradictory preposition may consequently result in monopoly practice and unfair business competition.

In case this condition is confirmed as the occurrence of monopoly practice and unfair business competition during the implementation of the foreign patent license agreement, then the Indonesian government is in the state of failure to develop its national technology; not to mention that there is disharmony between the existing regulation and the practice of the foreign patent license agreement at hand (Mufidi, 2013).

One example of such disharmony is the exception against the implementation of the foreign patent license agreement in the regime of intellectual property, in Article 50 b Law Number 5 of 1999 concerning the prohibition of the practice of monopoly and unfair business competition which stipulates: *“The provision within this law puts exception to the agreements related to the Intellectual Property Rights such as Patent License, Trademark, Copyright, Industrial design, Integrated Electronic Circuit, and Trade Secret, as well as agreements in connection with franchise.”*

If such provision is associated with the technology transfer methods referred to in the WIPO, then the exception will only be excluding the assignment, sale and import of capital goods, turn-key projects and joint venture arrangements, provided that there is always no license involved. Meanwhile, the nature of the said provision elaborates that the exception basically applies automatically to the agreement for know-how methods, franchising and arrangement for consultancy since they are already included in the license agreement. To that end, it is clear that there is no restriction in executing license agreement for the transfer of technology that is protected under the law of intellectual property despite it might be of detrimental nature. This may justify the act of monopoly and unfair business competition conducted by the developed countries or the licensee's principal up to this day.

Further, the above-mentioned provision is not in line with Article 16 of Law Number 5 of 1999 which states that: "A business-person is prohibited from executing an agreement with other parties abroad which contains provisions that can result in the monopoly practice and/or unfair business competition." This provision has a very broad interpretation; if the prohibition does not specify the type of restricted agreement, then it may lead to an assumption that it basically prohibits execution of any kind of agreement with other parties abroad (including the patent license). This is inconsistent with Article 50 b; despite they being from the same law.

The author views that Article 50b should have exempted its enactment on the agreement in the field of industrial property (including patents) despite the regulation on the patent license being very important to anticipate the emergence of unfair business practices. On the contrary, Article 16, Law Number 5 of 1999 should not have provided any exception to the agreement on the transfer of commercial technology. In this regard, both articles signify the necessity to regulate business practices related to technology transfer.

Another inconsistency of regulations can also be seen between Article 50b of Law Number 5 of 1999 and Law Number 13 of 2016 concerning patent, derived from the International Agreement of TRIPs-WTO, as the profound rules deliberating technology transfer through the foreign patent license. The contradiction reflects

Indonesia's real effort in developing its national technology. Article 78 of Law Number 13 of 2016 concerning patent deliberates that: "License Agreement is prohibited from stipulating provisions that can detriment the national interest of Indonesia or stipulating restrictions that can hamper the ability of Indonesia as a nation to transfer, master and develop technology."

TRIPs-WTO deliberates that:

1. *Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.*
2. *Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include, for example exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.*

The two provisions above emphasize that in each grant of patent license, there is a possibility of monopoly practice and unfair business competition, particularly in case of the foreign patent. However, in this case, there is an obligation for a license agreement executed in Indonesia to contain prohibitions or mandatory restrictions against the misuse of intellectual property for mitigation purposes. Hence, there is no foreign patent license agreement that can hamper the parties to the agreement to prevent monopoly practice and unfair business competition. In other words, misuse of intellectual property through the license of foreign patent will be prohibited, since it will cause loss to each party and will affect national technology development.

Rules and regulations function as the basis of control for the creation of foreign patent license. Unharmonious conditions among them will

open greater possibilities for them to use their privileges for monopoly practice and unfair business competition against the awardee/agent. Some already admit that the monopoly practice is usually claimed from the excessive implementation of exclusive rights derived from the Intellectual Property Rights ('IPR').

In fact, the regime of the Intellectual Property explains that the protection of intellectual rights is meant to work as incentives and rewards for the creator to ignite creativity and innovation in developing art, science, technology and trade; it is initially expected to improve the quality of civilization in the society. This arrangement provides an opportunity for creators and /or the holders of intellectual rights to obtain returns of their investment or to even take advantage over their intellectual property for a certain period of time. Thus, we can say that the legal regime on intellectual property is in favor of healthy business competition. The regime of law on business competition discusses the protection of fair competition as an environment to open economic and business opportunities, as well as innovation, for all stakeholders. In principle, this law gives business certainty for all through the free market with the aim to achieve efficiency and fair competition. It can provide consumers with the best alternative of choices in the market.

From here onwards, the discussion will focus on the elaboration of the legal issue of the descriptions above. The author finds it necessary to answer whether or not the Intellectual Property Rights license agreement (in this case, for foreign patent), which tends to implement the monopoly practice, should be exempted from the provisions in the law of business competition. To answer this, one must create an adjustable interpretation of the exceptions stipulated in Article 50b. It must be read in harmony with the provisions of Articles 2 and 3 of the Law of Business Competition concerning the principles and objectives of business activities. Likewise, the same applies in implementing the exception to the Intellectual Property Rights licenses.

Foreign patent license has the possibility to facilitate various methods of monopoly practice and unfair business competition. Monopoly practice might happen when there is centralization of economic power. Some of the examples are: *first*, sole operation of a kind of



business by the holder of the exclusive rights or the sole appointment of a certain company as the awardee/agent of the license by the holder of rights and *second*, solitary mastership of the production and/or marketing process of certain goods and/or services. On the other hand, unfair business competition occurs when the holder of rights and/or the awardee/agent of the license performs the business activity in a dishonest manner or against the law, impeding the fair act of business conduct. Meanwhile loss of public interest is when the business activity of the holder of rights and/or awardee/agent of the license is considered capable of causing injury to the interest of many people.

Other matters in the Intellectual Property Rights license agreement necessary to be analyzed due to the existence of an anti-competitive nature include the clause related to exclusive dealing. The guideline in the Intellectual Property Rights license agreement contains exclusive elements such as: (a) Pooling licensing and cross- licensing, (b) product binding (tying arrangement), (c) limitation of raw material,; (d) limitation in production and sales, (e) limitation in sales price and resale prices and (f) Grant-back license. The said exclusive elements are described below:

1. Pooling licensing and cross — licensing

Pooling licensing is an act of cooperation between the holder of the Intellectual Property Rights and his business partners to collect the relevant license of the Intellectual Property Rights for certain components of the main product. Meanwhile, cross-licensing entails mutual licensing of the Intellectual Property Rights between business partners. It is usually performed in the Research and Development (R & D) activities. The holder of the Intellectual Property Rights may reduce the transaction costs to obtain exclusive rights through pooling licensing and/or cross-licensing. This enables them to produce cheaper products in turn.

In order to analyze whether or not the two licensing schemes above are considered as anti-competitive, each party should view whether or not the licensor is executing the two to accelerate its operation in principle. However, if the two licensing schemes

cause the production or marketing process of a product to be predominantly controlled by certain businesses, and cause other businesses to have difficulties in competing effectively, then it is clear that the clause is anti-competitive.

2. Binding products (Tying arrangement)

In order to analyze whether or not the anti-competitive clause has a binding character on the products, each party should view in principle, whether or not the licensor trades the combination of two or more products protected by the Intellectual Property Rights in public, while still offering one type of the combined product to his customer. This entails the necessity of a clause to provide provision for the licensee to sell whole products to the customer upon the creation of a certain product. Hence, the customer can still buy all kinds of products; thus, it is anti-competitive.

3. Limitation for raw materials

In analyzing whether or not a certain clause on the limitation for raw materials is of anti-competitive nature, each party should view in principle, whether or not the licensor provides limitation to the quality of raw materials used by the licensee. This is deemed as necessary to maximize the function of technology, maintain safety and prevent the leak of secrets.

However, each party should also understand that limiting the provider the source of raw material may cause restriction for the licensee in choosing the range of quality and supplier for the raw materials. In turn, this can cause economic inefficiency in the execution of the license agreement. The restriction may be considered as offensive for some raw materials supplier companies since it may hinder their access to the market. In short, this clause is a provision in the license agreement obliging the licensee to use raw materials from the specific source appointed exclusively by the licensor, despite the fact that similar raw materials with convenient prices and same quality may already be abundantly available in the market.

In analyzing whether or not a certain clause on the restriction of production process is of anti-competitive nature, each party should consider in principle, whether or not the licensor restricts the licensee to produce or sell comparable products to those of the licensor's. In the event that such a restriction is intended to maintain the confidentiality of know-how, or to prevent unauthorized use of technology, it can be considered as non-interference in the licensor's market competition. Further, the restriction would hinder the licensee from using the technology freely. This will eliminate potential rivals for the licensor and increase its opportunity in the trade. This is the reason why clauses in license agreement contain restrictions for the licensee to produce or sell comparable products to the licensor. The clause prevents the licensee from using the technology effectively to create an anti-business competition environment.

#### 4. Limitation in the production and sales

In analyzing whether or not a certain clause on the restriction of sales is of anti-competitive nature, each party should consider in principle, whether or not the licensor sets a limitation to the plausibility of certain types or number of products manufactured by proprietary technology in order to go to the market. However, each party should also understand that in case of such a restriction, a licensee will not be able to make any technological innovation. It may cause inefficiency in product development. This clause is proven to contain restrictions on the possibility of certain types and number of products to go to the market. It is made with the intention of preventing the licensee producing technological innovations, and causing inefficient product development.

#### 5. Limitation in the sales' price and resales' price

In analyzing whether or not a certain clause on the restriction of the sales' price and the resales' price is of anti-competitive nature, each party should view whether or not the licensor has the capacity to determine the sufficient price level of

a certain product in order to make it suitable to go to the market, according to the investment rationality of the product concerned. However, each party should also understand that the price caps may lead to restriction on the competition between the licensee's and the distributor's business activities. It will reduce competition between the businesses and, in turn, may cause inefficient product development. Therefore, clauses, in the license agreement, containing restrictions on the selling or the resale prices through the lower price setting, is a clear sign of an anti-competitive nature.

#### 6. Grant-back clause

Grant-back is a provision in a license agreement requiring the licensee to be open at all times and to transfer all information regarding all improvements and developments made to the licensed product to the licensor, including the know-how related to its development.

In analyzing whether or not the clause on license to grant-back is of an anti-competitive nature, each party should consider that these measures preclude the licensee to have progress in mastering the technology and the provisions that seem to contain injustice elements since they grant the right to the licensor to obtain the right over the intellectual works produced by the other party. To that end, obligation to put clauses on grant-back in a license agreement is a clear sign of anti-competitiveness.

In order to prevent monopoly practice and unfair business competition that may occur in the abuse of the Intellectual Property Rights, the products and services sold under certain Intellectual Property Rights must not have any significant influence in market control. It is important to understand that Indonesia cannot rely on the international legal mechanism to legally protect its technology. Indonesia should make decisions on the transfer of technology through the foreign patent license and the harmonization of domestic laws against the principles formulated under the license agreement and other international agreements which are related to technology transfer. It is better

to particularly create provisions in favor of the parties; hence, the licensor and the licensee will both have balanced positions of rights and obligations (Djumhana, 1997). The realization of the above elaboration would reduce the hindrance to implement the main purpose of the law on the prohibition of the monopoly practice and unfair business competition as expressly stipulated in Article 3 of Law Number 5 of 1999:

- a. Keeping public interest and protecting customers;
- b. Growing a healthy business environment;
- c. Ensuring safe and equal business opportunities for everyone;
- d. Preventing monopoly practice and/or unfair business competition caused by the holder of the rights;
- e. Creating effective and efficient business activities in improving the efficiency of the national economy as one of the efforts to improve public welfare.

## **CONCLUSION**

In Law Number 13 of 2016 concerning patent technology transfer, the explanation of the consideration stipulates that in the effort for the development of national technology in Indonesia, one can use foreign patent license agreement. The purpose of the foreign patent in its initial invention or development may affect national development. It is also affirmed in the TRIPs-WTO, an international agreement, that the existence of exclusive rights owned by the principal, along with the inconsistency of the regulation as a tool of control for the foreign patent licensing in Indonesia, has raised the possibility for the monopoly practice and unfair business competition. This has prevented people from using the foreign patent license during the effort for technology development in Indonesia.

In the author's humble opinion, to make technology transfer through foreign patent license for the purpose of national technology development, Indonesia can either establish a governmental or private research agency as a controlling entity for the implementation of the license or the government must pay more attention to the

harmonization of rules and regulations in relation to the control of such foreign patent license. More inconsistent regulations will make it harder to realize the national technology development through the foreign patent license. Indonesia, as a developing country, has a lower position in the license agreement and has already put behind the monopoly practice and unfair business competition made intentionally with the principal as the holder of exclusive rights.

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