



Position Paper

Cross-sectoral Working Group on Legal & Regulatory

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1. Executive Summary

Business relations between Europe and Indonesia are highly complementary. This is due to the fact that Indonesia is a prospective and potential market for business with its huge population and growing economy. Not only in the sense as potential markets for consumer, but also as a capital since it can be highly utilized as so-called efficient labors in various industries. In these current years, capital inflows from European countries to Indonesia are increasing significantly. This fact occurs due to the recent financial crisis that significantly hit Europe, causing the European investors to shift their investment to emerging markets. With the huge capital inflows coming to Indonesia, a question that needs to be answered is how to manage such capital inflows and improve the business and investment climate for European investors. The chances to enhance the potentials lie in many business sectors and of course by providing solution for some issues that had become a challenge for both the government and foreign investors.

One of the solutions is by providing a good IPR protection to the investors. Nowadays, Indonesia is trying to improve the enforcement of IPR to protect the interest of foreign investors. Significant approaches have been done to solve the issues related with the lack of knowledge from the people that co-exist with poverty, black market and smuggling involvement, as well as problems with the law enforcers. Some examples can be seen by the enactment of numerous IPR-related regulations adopting the WTO international standards. More to this point, recent development of IPR protection shows that there is a growing local movement among the people and as well as the business actors to enhance IPR protection.

From the Indonesia's Investment Law point of view, Indonesia shows more lenient approaches by improving the negative list of investment to accommodate the interest of foreign investors to invest in Indonesia. The examples of such improvements could be seen by the increase of minimum foreign capital participation in certain sectors, such as construction businesses, health, energy and mining, education, and other relevant sectors.

The involvement of international organizations such as IFCCI, INA, EKONID, BritCham, EuroCham, etc. also play their roles in order to establish constructive relationship and nurture business relationship on trade and investment issues in Indonesia. The organizations have developed dialogue and maintain contact with high-ranking Indonesian officials,

promoting foreign investor business in Indonesia, and providing members with recent development on business in Indonesia by organizing events and seminars.

However, we could not neglect that some issues are of course still exist in Indonesia, starting from tough bureaucracy mechanism to the lack of infrastructures required to support the business of foreign investors. However, sets of regulations have been prepared by the government and waiting to be enacted to mitigate and solve these issues. Inter-departments coordination amongst the ministries has also been improved to expedite the process in obtaining licenses required to invest in Indonesia. With all of the efforts conducted by the governments and the support from local business doers, it is foreseeable that the prospect of investing in Indonesia will be more lucrative for European investors in the years to come.

2. General Overview

Indonesia as a nation with growing economy and a potential market for business will of course attract investors from various sectors to conduct their business in this country. Indonesia's population (to be read as human resources and customers) can be seen as one of the main attractions for the investors, not only in the sense as potential markets for consumer, but also as a capital since it can be highly utilized as so-called efficient labors in various industries.

However, many foreign investors will carefully consider the risk of doing business in Indonesia, especially for foreign companies which have established their position in the global market. The fear could come from the potential itself, since Indonesia is a country with growing economy, there are opportunities also for the distribution of counterfeit products. The distribution or even the production of the counterfeit products could come from the weakness in the legal enforcement and the low awareness of the public of so called Intellectual Property Rights.

In relation to the business sectors for the foreign investors, the government has provided wide-range of opportunities for them to enter into Indonesian market and conducting its business here with the return of job opportunities and transfer of knowledge for Indonesian business practitioners. Even though there are many sectors are made available for the foreign investor even with 100% involvement of foreign capital, of course some sectors are closed or at least limited for foreign investors, in order to protect Indonesia's national interest. Knowing the fact of the above, it is crucial to manage the interest of investors and our national interest. Thus, this position paper will elaborate more on details of those sectors as well as their problems and solution in the practical level.

3. Economic Relations

3.1 Europe-Indonesia Investment Relations

Indonesia and many European countries have enjoyed a mutual long-standing relationship for years. The cooperation between Indonesia and European countries is enshrined in its bilateral trading volume between them. As an illustration, in 2007 Indonesia's export volume in sum is US\$ 17.528,2 million while European countries' export volume to Indo-

nesia is US\$ 7.275,5 million. The former figure had been increased in 2008 whereas Indonesia export in total of US\$ 19.831,2 million and European countries' export increased to US\$ 8.561,7 million.

The above increase of export volume between European countries and Indonesia is also supported by the increase of capital inflows to Indonesia. This fact occurs due to the recent financial crisis that significantly hit Europe, causing the European investors to shift their investment to emerging markets. From the above explanation, we could conclude that the economic relations between Indonesia and European countries are growing positively. This precedence would off course signify potentials for further investment between Europe and Indonesia.

3.2 Indonesia's Participation in WTO

The World Trade Organization ("WTO") is a legal skeletal framework derived from international covenant and serves as a reference in any performance of business actors and government policies related to IPR protection and foreign direct investment as well as other matters relating to international trade transactions. As Indonesia has ratified the agreement establishing WTO by Law Number 7 Year 1994, Indonesia has to adjust its regulation under WTO frameworks particularly with those prescribed in the WTO where provision concerning IPR is included.

One of WTO instruments related to IPR protection in trade aspect is an agreement named Trade Related Aspects of Intellectual Property Rights ("TRIPs"). TRIPs is one of agreements from Final Act Embodying The Uruguay Round of Multilateral Trade Negotiation signed in Marakesh, dated April 1994 by 124 countries and 1 proxy from European Economic Community. TRIPs agreement itself in its several clauses contained therein is pointed the enactment of various international conventions relating to IPR protection, such as Paris Convention, Bern Convention, Rome Convention, etc. Indonesia itself is signatory to Paris Convention for Protection of Industrial Property.

4. Potentials for Enhanced Cooperation

4.1 Potentials of IPR Protection to Attract Foreign Investors to Invest in Indonesia

An appropriate use of intellectual property system is a powerful tool for competition, sta-

bility and mitigation on risks on capital investments. Without the strength of the intellectual property and its protection, there will be lesser chance of any investments would be made by the investors in the relevant country, as intellectual property generates capital and is impacted by capital and, in turn, impacts the availability of capital itself. Even though the regulations for the protection of IPR in Indonesia are available, the enforcement of IPR in Indonesia shall continue to be an area of concern for the foreign investors.

4.1.1. Availability of IPR-Related Regulations in Indonesia

Indonesia compliance to TRIPs measure has been considered since Indonesia has already promulgated several regulations concerning IPR protection that refer to TRIPs agreement. Laws and regulation governing IPR in Indonesia are, as follows:

1. Law Number 19 Year 2002 concerning Copyrights;
2. Law Number 14 Year 2001 concerning Patents;
3. Law Number 15 Year 2001 concerning Marks;
4. Law Number 31 Year 2000 concerning Industrial Design;
5. Law Number 32 Year 2000 concerning Layout Designs of Integrated Circuits;
6. Law Number 30 Year 2000 concerning Trade Secrets; and
7. Law Number 29 Year 2000 concerning Protection of New Plant Varieties.

From the above explanation, a brief explanation on types of IPR could be elaborated, as follows:

- (a) Copyrights;

Copyrights are exclusive rights for the creator or the recipient of the right to announce or its creation or give permission for it, without prejudice to the restrictions under laws in force (Article 1 paragraph 1 Law Number 19 Year 2002 concerning Copyright).
- (b) Industrial Property Rights

Industrial Property Rights consist of the followings:

 - (i) Patents

Patents are exclusive rights granted by the state to the inventor of the invention in the field of technology, which for a

given period is conducting his own invention or to give consent to another party to implement it (Article 1 paragraph 1 Law Number 14 Year 2001 concerning Patents).

(ii) Marks

Marks is a sign in the form of a picture, name, word, letters, figures, composition of colors, or a combination of said elements, having distinguishing features and used in the activities of trade in goods and services (Article 1 paragraph 1 Law Number 15 Year 2001 concerning Marks).

(iii) Industrial Design

Industrial Design is a creation on the shape, configuration, or composition of lines or colors, or a combination thereof in the form of three-dimensional or two-dimensions gives aesthetic impression and can be manifested in a pattern of three-dimensional or two-dimensional and can be used to generate a product, goods, industrial commodities, or handicrafts (Article 1 paragraph 1 Law Number 31 Year 2000 concerning Industrial Design).

(iv) Integrated Circuit

Integrated Circuit is a product in the form of finished or semi-finished, in which there are many elements and at least one of these elements are active elements, which partially or completely intertwined and formed an integrated manner in a semiconductor material that is intended to generate functions electronics (Article 1 paragraph 1 Law Number 32 Year 2000 concerning the Layout Designs of Integrated Circuits).

(v) Layout Design

Layout Design is the creation of groundbreaking three-dimensional design of various elements, at least one of these elements are active elements, as well as some or all the interconnections in an Integrated Circuit and the positions of the three dimensions were intended for the preparation of an Integrated Circuit (Article 1 paragraph 2 Law Number 32 Year

2000 concerning the Layout Designs of Integrated Circuits).

(vi) Trade Secret

Trade Secret is information not generally known in the field of technology and/or business, has economic value because it is useful in business activities, and kept secret by the owner of Trade Secret (Article 1 paragraph 1 Law Number 30 Year 2000 concerning Trade Secrets).

(vi) Protection of New Plant Varieties

Protection of New Plant Varieties is specific protection given by the state, which in this case represented by the government and its implementation carried out Protection of New Plant Varieties office, on plant varieties produced by the breeders of plant through plant breeding activities (Article 1 paragraph 1 Law No. 29 Year 2000 concerning Protection of New Plant Varieties).

Other regulations relevant for the protection of IPR have also been enacted by different Ministry/Department, such as regulations on franchising, information technology and electronic transaction, as well as drugs registration. From the above explanation, we could conclude that knowledge and awareness to protect IPR in various sectors have been introduced and accommodated by the Indonesian government.

4.1.2. Other Law References of IPR

Apart from the above regulations, court decision commonly referred to as precedents can be used by judges as considerations in deciding a case in addition to aforementioned statutory regulations made by the legislature. However in Indonesia, precedents do not have a binding power other than for the persons or parties being subjected to the decision, as Indonesia is a civil law country which ascribed to European continental legal system does not adopt *stare decisis* principle. *Stare decisis* principle is a principle that the precedent decision is to be followed by the courts. Nevertheless, some jurists concluded that the decision of the Supreme Judges in the Supreme Court of the Republic of Indonesia which have already

permanent legal force contains the rule which applies to examine and decide the case within the scope of criminal justice, civil, administrative state, religion and commerce are qualified. In addition to the above, the decision shall be used several times as a reference for the judges to decide a similar case in order to become a source of law which has binding force of a relative basis.

The examples on IPR cases that had been examined and decided by Supreme Court are case of POLO and case of Dunhill. Those two cases were occurred on the basis of similarity in principle or in its entirety with well-known mark that shall be deemed as trademark infringement act. Case of POLO Lauren Company, AS v. Ngo Jan Sin, Jakarta were examined until the cassation stages in the Supreme Court and eventually received the Indonesian Supreme Court Decision No. 638K/Pdt/1993 jo. No. 54/Pdt/G/1992 PN. Jak Pus. The case of Richard DUNHILL and John Wood v. Lilian Sutan and the government were examined until the request civil stages in the Supreme Court and received the Indonesian Supreme Court Decision No. 411PK/Pdt/1998 jo. No. 605/Pdt.G/1991 PN. Jak Pus. Therefore, the Supreme Court decisions for both cases can be used as precedents in any other IPR cases with similar basis.

4.1.3 The Exemption of IPR Infringement Act

Utilization of technological knowledge by third parties shall not directly be deemed as intellectual property infringement since not every use of technical knowledge by a third party constitutes an intellectual property infringement. It is important to distinguish between these following:

- (a) Knowledge that can be protected through the use of intellectual property law instruments on the one hand and knowledge that cannot be protected because it does not fulfill the criteria for IPR protection. (e.g. patent protection can only be obtained if an inventions is truly new) on the other hand;
- (b) Knowledge that is in theory 'protectable', but it is not protected in practice (e.g. because the creator is not aware of the possibilities of protection, or because the creator deliberately chooses not to protect its knowledge given the costs of registration, expected enforce-

ability problems, etc.).

From a case law, we could analyze that Intellectual property litigation in, for instance - a shipbuilding industry, is not always successful, because the owner/ plaintiff has not protected its intellectual property adequately and has to (try to) resort to unregistered copyright or design law or the law of unfair competition. Although such claims can be successful, the plaintiff would sometimes have been better off with a registered IPR.

It is very difficult to provide general rules as to which innovation can or should be protected by what type of IPR instrument. For instance, one cannot say that manuals are, as general rule, protected by copyright. The extent to which a product is protectable depends very much on whether the content of the manual has an own character and a personal mark of the creator, which can only be established on a case-by-case basis.

4.1.4 Effectiveness of IPR Protection

Several actions have been and will be conducted by Indonesia in order to provide protection of IPR not only for foreign investors in Indonesia, but also for Indonesian investors in order for them to penetrate European market.

In 2015, Indonesia will be involved in Madrid Protocol in order to provide adequate measure of trademark protection and make trademark protection becomes effectively apply worldwide. The existence of the Madrid Protocol made international trademark protection possible. Any party who wants protection of their trademark in different countries could obtain protection for their mark in any member states of the Madrid Protocol, by only filing a single application at a national or regional trademark office and the IPR register will be applied internationally as well. Therefore, by Indonesia's plan to participate in this protocol, the cost for international trademark registration shall be dramatically reduced and the [Indonesia's] trademark owner will obtain protection of their mark in the relevant country(-ies).

A local movement for introducing the awareness and the importance of IPR in the society have also been conducted. One of which can be seen by the establishment of Indonesian Anti-Counterfeiting Society (*Masyarakat Indonesia Anti Pemalsuan - "MIAP"*) that aims to reduce the negative impact of counterfeiting practice in Indonesia through cooperation with relevant authorities, and to increase public awareness, consumer protection, and law enforcement. MIAP has been established to educate, influence and make direct actions that are beneficial to authentication products users alike. Establishment of MIAP is dedicated to reduce counterfeit products in Indonesia through education, awareness and collaboration so that negative perception of the investors that their IPR will not be protected in Indonesia is expectantly to be vanished. Other organizations have also actively supported the development of IPR protection in Indonesia such as Indonesian Intellectual Property Society (IIPS) and Association of Indonesian Intellectual Property Attorney (AKHKI).

4.2 Potentials in Investing in Indonesia

4.2.1 The Investment Regulations

In respect of further enhanced investment in Indonesia, Indonesia has promulgated Law No. 25 year 2007 concerning Investment ("**Investment Law**") and Presidential Regulation of the Republic of Indonesia No. 36 Year 2010 regarding List of Business Fields Closed to Investment and Business Fields Open, With Conditions, to Investment other Related Laws concerning Specific Fields of Business (**Negative Investment List - "NIL"**). The purpose of having said laws are to boosts Indonesia's investment climate by giving simplification, certainty and subsequently accelerate the development of the national economy, even though on the other hands, NIL is sometimes regarded as a major obstacle by foreign investors, as it will reduce the possibility of foreign investors to gain full ownership in a company engaging business in certain sectors.

The provisions under NIL do not applicable for indirect investment or whose portfolio transaction is carried out through a local capital market. However, if the additional investment resulted in the foreign capital ownership become over the limit as outlined in the agreement letter of the company, then within 2 years, it has to be adjusted as to the maximum limit in the agreement letter by selling the excess of

the foreign capital to the local investors, to the local capital market; or the company buys the excess of the foreign capital and treat it as treasury stocks. In addition, in the event the investment had been conducted prior to the enactment of NIL, the NIL shall not be applicable.

4.2.2. Privilege and Opportunities in Investing in Indonesia

Notwithstanding to the reserved portion of capital for the domestic investor due to the Negative Investment List, the opportunities to obtain profits in investing in Indonesia remains high. One of the reasons for it is the inability of the local investor to meet the market demand. For example, provider, management (operation and renting) and construction service provider for telecommunication tower is one of business fields that is closed to foreign investor. However, until now the number of existing telecommunication tower had not yet sufficient to meet the market requirement while there is capital handicap from domestic capital of doing so. Having noted on the above facts, we may see that there is a chance for Indonesia to open such business field for foreign investment and at the end, provide new opportunities for European investors to fill in the gap.

5. SUCCESS STORIES

5.1 Success stories in IPR

In the practical level in Indonesia, counterfeit products are somehow easily traded in the market and represent an astonishing number of total world trades. The problem implies substantial financial losses for legal manufacturers and undoubtedly enables to harm their brand image and create consumer trust issues which can damage their sales as well.

Therefore, many trademark owners strive for the most appropriate anti-counterfeiting solution to protect their trademark. Below are examples of success measures conduct by the manufacturers in protecting their trademark from trademark infringement act.

a. Microsoft Story

Microsoft fights against the infringement of its infamous Microsoft Windows (“**Windows**”) intellectual property right has always been one of the success stories in IPR area. Microsoft owns and holds the copyrights of Windows and copyright ownership of said software can be either fully or in part

transferred to other parties by means of license. By means of license, Microsoft gives a legitimate right over a person who buys Windows to use said software. Microsoft also made a sort of source code within Windows for supporting copyright protection. Such source code is used to identify which user is using the genuine Windows in their computer and which ones are not when they access certain websites affiliated to Microsoft. If a computer is detected using counterfeit Windows then they may not continue their access upon the website for good and other several disadvantages.

b. The Schneider’s Hologram Product

The usage of hologram can help manufacturers combat all forms of illicit trade, from counterfeiting product or substitution to parallel trade of authentic goods. The hologram can propose attractive images that enhance the brand image incorporated with optical security elements either visible or hidden that are very difficult to be imitated. The technology of hologram as an optical security effects regularly to further harden the resistance of products from being copied or imitated.

However, the problem with other success stories other than the most successful ones is no wide publications that will encourage other investors and even customers to understand the importance of IPR. Some say that protection can only be given only to such big companies, e.g. Microsoft. Strong intellectual protection shall not only encourage innovation, but it will also provide the level of confidence in an economy needed to attract foreign investment and spur technology transfer. When counterfeiters illegally use intellectual property and deceive consumers with their deceive goods then they inflict serious harm on legitimate IPR owner and it may harm the society in general. Infringement of IPR will reduce the incentives to innovate new products (which could also create job opportunities and enhancing revenues), and it may reduce total social welfare in the society.

As regard to the successful solutions, there has been an effort put by IPR consultants based in Surabaya to in order to educate the people. The consultant educates the public

by socializing the need to protect and respect IPR. The socialization took place in the Surabaya industrial district. Their main goal is to prevent the industrial society there to accept an order for IPR counterfeiting product. Seeing this example we may conclude that there is an active participation from the private sector to uphold the IPR protection and that the process of educating the people is still in progress. Moreover, by doing so, it is expected that the Indonesian industrial society may give contribution by at least not accepting any order to produce counterfeit products and subsequently eliminating national production on counterfeit products.

5.2 Success Stories in Investment Sectors

Indonesia had concluded bilateral investment treaties with many countries which include prevention on double taxation of income tax. Moreover, the government also provides tax and fiscal incentives to investors which investing on certain business fields. The said privilege to the investors is supported by the issuance of one door investment policy applied by the Indonesian Capital Investment Coordinating Board (“**BKPM**”), centralizing the investment coordination under one roof. This one door policy will ease the process to obtain certain licenses for foreign investors in order for them to invest in Indonesia. As an authorized institution, BKPM is authorized to coordinate the implementation of investment policies except for banking and financial institutions. Prior to the application of this one-door policy, foreign investors sometimes faced difficulties in obtaining licenses in Indonesia, and therefore this could be deemed as one of success stories in the investment sector that becomes an effective solution for the flow of investment transaction.

International organizations such as IFCCI, INA, EKONID, BRITCHAM, EUROCHAM, etc. also play their roles in order to establish constructive relationship and nurture business relationship on trade and investment issues in Indonesia. The organizations have developed dialogue and maintain contact with high-ranking Indonesian officials, promoting foreign investor business in Indonesia, and providing members with recent development on business in Indonesia by organizing events and seminars.

From the above actions, improvement of NIL provisions that ease restriction on foreign investment in several sectors could now be seen. The examples of such improvements are, as follows:

- a. Cyclamate and saccharin industry that previously closed for investment is now open with conditions for investment;
- b. Foreign investors can own 67% of construction businesses, up from 55% previously;
- c. Foreign investor can own up to 49% in film-related businesses;
- d. Hospital ownership by foreign investors is raised from 65% to 67%;
- e. Foreign investors can now own up to 95% of power plant businesses;
- f. Basic, elementary, secondary and high-school now requires special licensing;
- g. Postal service is reduced to 49% of foreign ownership; and
- h. Foreign investment in nursery service is now 49% nationwide.

6. ISSUES AND CHALLENGES

6.1 Problems and Proposed Solutions for IPR Issues

The issues in respect of IPR enforcement in Indonesia are inter-related with each other, whereas each issue may become the cause and the effect at the same time to the other issues. One of the most fundamental problems in establishing a strong IPR protection in Indonesia is inadequate education of the people. An inadequate education would implicate in people's inability to understand that they have to honor a person's intellectual property rights, other than that, an inadequate education is also resulted in poverty. As a consequence, poverty would create a low purchasing power from the people.

This situation becomes a business opportunity for the IPR counterfeiters to sell their counterfeit product with cheaper price but with appearance that almost similar with the genuine products. In the middle of the economic crisis and considering people's low recognition for IPR due to their education, having a counterfeit product would seem to be more realistic than having the genuine one. In order to respond to this situation, an education for the people is essential in order to create an anti-counterfeit society, and especially to protect the consumers from buying a false counterfeit product.

Actually, Indonesia already has all the tools needed to ensure IPR protection and its enforcement in Indonesia. It already has *inter alia* the laws which also regulate procedural matters on the IPR enforcement, an independent IPR consultant, specialized IPR court, and the law enforcer whereas its authority is vested upon the police. However, notwithstand-

ing to the existing tools and regulation to provide a better protection on IPR, the progress of implementation to reach said objectives are still growing slowly.

Indonesia, like other developing countries, used to experience an unabated influx of counterfeit goods from neighboring Asian sources which arise certain issues such as smuggling and the black market involvement which detrimental to the IPR owner. In addition to pursuing a criminal and civil action, In order to mitigate these problems, the law no.15 of 2001 concerning trademark for example, allows the IPR owner to take precaution measures such as temporary court stipulation which will allow the customs to detain and stop the entering of counterfeit goods.

However since it is often difficult for an IPR owner to provide specific details about the suspected shipment or the name of the importer or exporter of the counterfeit goods, a cross-border, cross-government, and cross-sectoral cooperation would be needed. Moreover, the government is required to commit in respecting and enforcing IPR laws. It will also require the government, especially the court, to exercise the judicial power independently, without any interference by any organs, public organization or even an individual.

Furthermore, as a result of weak protection and slow progress on the IPR laws enforcement, most of the "well-known" IPR holder company, for example CHANEL, refused to open its store in Jakarta based on the impression that Indonesian IPR law is not yet implemented. They expect that IPR law in Indonesia should be implemented like in their country which offers adequate protection to the IPR holder. More on the issues there have been raising worries from the IPR holders that they may face a legal claim due to counterfeit product using their IPR product's name.

One of the proposed solutions is to having laws which would allow sanction not only for the manufacturer, supplier, distributor and the seller for the counterfeit products, but also to buyers or users. For example, the authority may conduct a raid on laptop of air transportation passenger, whereas the airport personnel will check the originality of the operating system and software. If it used the pirated/counterfeited program, then the laptop may be taken as a proof. In addition to said solution, a positive progress has been shown

by Indonesian Council of Religious Scholars (*Majelis Ulama Indonesia* - "MUI") to reinforce the IPR protection. Based on MUI instructions (*fatwa*) no.1/MUNAS/VII/MUI/15/2005 dated 29 July 2005, it is vindicated that every violation to a person's IPR including providing, producing, using, selling and even using counterfeit goods is forbidden and against the Islamic law. As one of the countries which has the largest Muslim society in the world, this instruction surely will bring a good impact upon the IPR protection in Indonesia.

6.2. Issues on Limitations, Restrictions and Problems of Foreign Direct Investment and Legal Certainties

Apart from the NIL promulgation which may be deemed as a major obstacle by foreign investors, there are also limitations, restrictive measures and legal certainty occur to give additional problems for them in investing in Indonesia.

Under Investment Law there are a number of main issues that have been identified as a barrier for Indonesia to attract foreign investment in larger quantities and to achieve expectantly growth of foreign investment. Several barriers concerning such matter, among others, are as follows:

- a. Tough bureaucracy mechanism whether in central or regional governments, which delays the issuance of licenses and other approvals;
- b. Slow progress in achieving law and judicial reform to eradicate corruption and provide legal certainty within the framework of law and regulations;
- c. The lack of and deteriorated infrastructures specifically roads and ports, and the issues of electricity may cause the increase of costs and obstruct the future growth of investment.

In addition, some examples of issues in certain economic sectors that need to be taken into account by foreign investors who are about to carry out their business in relevant sectors, as follows:

(i) Infrastructure Sector

Indonesia's infrastructure businesses are growing rapidly. The Economic development of Indonesia requires it to build its infrastructure in order to meet market's demand. One of the highly noted investments in infrastruc-

ture is investment on toll roads. The toll road business offers a great investment profit due to the rising transportation flux from one region to another. Based on Negative Investment List, it allows for foreign investors to invest in the toll road concession up to 95 %. This opportunity should be supported with a good investment scheme as well as to the law enforcement to protect the investors.

However, notwithstanding to the high opportunity for investment in toll road business, the investors (both local and foreign) as expressed by numerous media, the investors still have some doubts in investing in this sector. In order to analyze and provide solution to this problem then it is essential for us to see from every possible aspect of the issues.

Based on Article 4 of Ministry of Public Works Regulation No. 04/PRT/M/2007 concerning Procedure on Utilization of Fund by Public Service Agency - Toll Road Regulatory Body for Toll Road Land Acquisition, the land acquisition shall be conducted by the business entity. However, the land acquisition obligation performed by the business entity shall also include the cost of compensation of the land, the cost for having the Land Acquisition Committee, and the operational cost of Land Acquisition Committee (which shall be borne by the said business entity). Under Presidential Regulation No. 65 of 2006, the [land acquisition] committee may only be formed by the government, *inter alia* governor, regent, and the minister, whereas the member also consist of government authorities, yet the cost for having them was borne by the business entity/ investor. By these provisions, the investor may find difficulties in calculating the land acquisition costs for the project.

In addition, there are still many lands are scattered without certificate of ownership. In the absence of the certificate, it will be very difficult to compensate the land because in one hand the owner may claim the land as his own but on the other hand they do not have the relevant land certificate as

evidence of ownership. This situation would be detrimental, and economic and timely inefficient.

Moreover, Indonesian Agrarian Law still acknowledge *Ulayat* Rights upon land (a rights which owned by the customary community/tribes/traditional community over land). Customary require a general consensus from the customary society in order to approve the selling of *Ulayat* land. Taking into consideration that the land has a historical, psychological and physical value to the society, selling *Ulayat* Land would be very difficult. In view of the above, a risk of claim based on the above reason still exists.

Under Law no. 20 of 1961 concerning Revocation of Rights over Land and Other Objects Beneath It, it gives the government the right to revoke the right upon land for the public benefits, for example, in building a toll road. The revocation of rights over land for the building of toll roads are still acknowledged until 2005 based on Presidential Regulation 36 of 2005 concerning Land Acquisition for Development of Public Purposes. However, the said provision had been amended by article 2 of Presidential Regulation No. 65 of 2006. In the amended article, it removes the government ability to revoke the rights over land for the purpose of Land acquisition. The amended version stated that the Land acquisition for toll road building are only extent to discharge or transfer of rights which made by deliberation (*musyawarah*). Having the above said situation, then any party who wished to build a Toll Road, will be required to firstly conduct a diligent research to know the status of the land. The research will most probably take a long period. Not to mention that the deliberation (*musyawarah*) will surely creates a prolong process of land acquisition and subsequently causing bigger cost upon the investor.

In order to ensure the investor's interest in Indonesia particularly in toll road sector, the government and relevant authorities shall work together to create a friendly investment environment. Thus, some solutions could be proposed, among others by creating a clear land administration by registering

and producing a legitimate certificate of ownership by National Land Agency, at least on the area whereas a Toll Roads planned to be builds. By having so, it will ease the Land Acquisition Committee in documenting the proposed land to be dealt in the future and prevent unnecessary obstacle from the illegal owner of the land. Moreover, the Government could start to consider in enacting regulation concerning land acquisition for public purpose.

In respect of said proposed regulation, the regulation must contain as a minimum the authority of the government to start the toll roads construction even the land had not yet been settled. The procedure may take place by allocating the people to a new place, and a mandatory compensation which worth more than the Tax Object Sale Value (*Nilai Jual Objek Pajak*) for example, two times of Tax Object Sale Value.

The land acquisition must be obtained by the government prior to the tender to appoint business entity to run the toll roads. Perhaps part of the cost for having such acquisition may be borne by the appointed business entity, provided that the cost already been stipulated in the beginning of the tender. Hence, the investor may enjoy a friendly environment to invest in Indonesia's infrastructure.

(ii) **Medical or Pharmaceuticals Sector**

Ministry of Health Decree No. 1010/MENKES/PER/XI/2008 concerning Drug Registration ("**Drug Registration Regulation**") particularly affects foreign investors which do not manufacture drugs in Indonesia. For obtaining an approval in distributing and/or circulating drugs from the Indonesian Food and Drug Agency (BPOM), they are required to manufacture locally as registration of drugs is only allowed for companies that have manufacturing in Indonesia. The import of drugs itself are only allowed only if the imported drugs are needed for the national health program or if they are not manufactured locally. From such decree we could infer that Indonesia severely re-

stricts imports of pharmaceutical products and such measure risk to worsen the access to new and innovative medicines as well.

According to NIL, the pharmaceuticals industry is limited to a maximum of 75% and the distribution of pharmaceutical is entirely closed to foreign direct investment. It means that in order to invest in Indonesia, foreign entity shall seek local partner for holding partnership between them to put 25% of their fund as an investment. As a matter of fact, foreign entity may be difficult to seek suitable local partner and reluctant to share the full control of decision-making with local partners. Therefore, the government may consider to increase foreign participation in pharmaceutical industry and for the wholesale of pharmaceutical products.

As a member of WTO, Indonesia is required to implement adequate data exclusivity protection in accordance with Article 39 paragraph 3 of TRIPs agreement. Data exclusivity is a separate and independent concept from others rights of ownership. It is not same as well with trade secrets and patents. Data exclusivity is a term used in United States that refers to the intellectual property right outlined in Article 39 paragraph 3 of TRIPs agreement.

Article 39 paragraph 3 of TRIPs agreement states that "Members (of WTO), when it is necessary, as a requirement to obtain marketing authorization of pharmaceutical products or agricultural chemical products which used new chemical element, the test registration or data that is closed, shall protect such data from the use of unfair commercial nature. The members shall also maintain the confidentiality of such data, unless it is necessary for public purpose or if there are measures taken in order to ensure such data are protected from the use of commercial objectives.

In practice, data exclusivity is the act of the drug regulatory agency for a certain period that do not permit the result of clinical data to be used, which was previously proposed by the inventor as part of proving safety and efficiency of the drug requirement. Until now, Indonesia has not incor-

porated such provision in its patent legislation. The current process for determining and verifying the patent status of a product prior to obtain marketing authorization is insufficient to protect the intellectual property rights of the patent holder. Moreover, Indonesia's judiciary system does not facilitate effective measure for patent infringement act. There has not yet established a good cooperation between BPOM and patent office in order to avoid patent infringement act.

(iii) Other Relevant Sectors

In other sectors, bureaucracy and inefficient regulations seem to be the major obstacle in preventing investors in investing in Indonesia. In food and beverage sector for example, to obtain product registration from BPOM, the manufacturer shall also need to concern with *Halal* requirements issued by MUI. From the research, the process for registering products has become inefficient, burdensome, opaque, and costly to the manufacturer.

In textile, apparel and footwear sector, imports of certain textiles into Indonesia shall comply with some requirements, among others:

- (1) Importer classified as a Textile Producer – Importer;
- (2) Imported textiles are only use as raw, materials or auxiliary material for production and can thus not be traded, resold or handed over;
- (3) Importer needs to be secure three different licenses which are basic, special and textile importer licenses;
- (4) Limitation on ports of entry and pre-shipment inspections in the port of shipping that governed under Ministry of Trade Decree No. 56/M-DAG/PER/12/2008 concerning Import Provisions on Certain Products;
- (5) Importer needs to report on imports to the Ministry of Trade.

Such burdensome and complex import requirements set under such decrees results in costs and delays for importers.

Lastly in machinery and automotive sector, tax issues have also contributed in preventing the investor in investing in Indonesia. Based on the research, some automobiles manufac-

urers have complained about an increase of the Indonesian tax on motor vehicles. This considerably high vehicles-tax (comparing to other countries) causes a higher cost for the automotives industries and subsequently resulted in the decrease numbers of consumer's demand.

The above mentioned issues need to be solved promptly by the government. Again, the enactment of set of regulations shall be needed in order to solve the above issues. Yet, the support from local business doers in providing inputs to the government and relevant institutions shall be one of the key points for the issuance and implementation of regulations that will protect not only investors in Indonesia but also Indonesia's national interest. By having all of the tools with the support by the public, it is foreseeable that the prospect of investing in Indonesia will be more lucrative for European investors in the years to come.

7. CONCLUSION

With all of the abovementioned conditions surrounding Indonesian business climate, it can be concluded that there are of course opportunities for foreign investor in investing in Indonesia knowing the fact that Indonesia offers a prospective and potential market for business with its huge population and growing economy. The opportunities lie in many business sectors and of course there are issues to be addressed and become a challenge for both the government and foreign investors.

In relation with the IPR issues, the cooperation between the government, the investors and public shall be required in order to uphold IPR as it will enhance value to the society. A strict and reliable enforcement of IPR law and other laws that creates legal certainty both for the investors/producer and their consumers will support the above interest. Foreign investor should also proactively take their parts in increasing the awareness of public of their brand or products by continuously educate the people regarding their products.

In many of the business sectors made available for foreign investment, the issues needed to be addressed are the legal certainties and regulatory implementation by the government. This is where the necessity of an institution which could enter into the equation as a

link between the investors and the government to sound the concerns of both parties and make the business climate becomes more conducive for the benefit of both parties.