-EFTA BFTA: INDONESIA'S CONCERNS IN THE AREA OF INTELLECTUAL PROPERTY RIGHTS

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The proposed BFTA between Indonesia and the member countries of the European Free Trade Association (EFTA) began to emerge sometimes on April 2005 when the Swiss (EFTA) trade delegation visited the Southeast Asian region. At the time, the Indonesian Trade Minister, Dr. Mari Pangestu, responded well to this initiative. However, there are some real concerns amongst the Indonesian civil society groups that the proposed BFTA between Indonesia and EFTA will be imbalance in the latter's favour, particularly in relation to the issue of intellectual property rights (IPR). The same also applies with the proposed BFTAs that will be conducted between Indonesia and other developed countries. BFTAs that include IPR chapter often force the participating countries to implement higher IPR standards that those agreed at the World Trade Organisation (WTO).

Indonesia has been implemented the WTO's Trade-Related Intellectual Property Rights (TRIPs) since 1997. Since then, Indonesia had amended three existing laws on patent, copyrights, and trademark, and established four new laws on IPR in 2001 on industrial design, integrated circuit, plant variety protection, and trade secret. TRIPs is, of course, a minimum standard IP protection for all members of the WTO, and encompasses broad scope of rights. However, instead of promoting the development and innovation, which is one of the main objectives of the TRIPs, the IP harmonisation process hinders developing countries' access to technology. In 1994, for example, there were 2,302 total patent applicants, with 7,5 percent local patent applicants in Indonesia. Nearly a decade later, or in 2003, the total number of patent applicants rose to 2,911, but with only 77 of them, or 2.3 percent, were local patent applicants.[1] As the huge disparities between local and foreign patent holders remain, the question, then, arises as to whether IP harmonisation benefits developing countries. In order to benefit the developing country partners, it is imperative that the larger trade partner should encourage the transfer of their technology to the former. In the absence of this condition, it is likely that the imbalances of flows of royalties from the developing country partner would be a permanent feature of this trade agreement. As a result, IPR would merely serve the interest of the patent holders at the expense of the consumers and general public at large. IPR should, therefore, not be an end in itself, but it should also be approached in the context of social and developmental interests as stipulated in the Article VII of the TRIPs Agreement.

Moreover, one should also bear in mind that TRIPs-plus, which is a common feature in many BFTAs today, requires an extension of patent protection beyond twenty

[1] As reported in the *Bisnis Indonesia,* 15 June 2004.

years period required under the TRIPs. This is done through the extension of monopoly period to the patent holders (beyond 20 years) in order to compensate the titleholder for unjustified delays resulted from the process of the granting of the patent or the lengthy marketing approval. This extension has the potential to delay the introduction of low cost products and technologies, such as generic medicines, into the market (see, for example, the IPR chapter on BFTA between EFTA and Chile), and it has the potential the livelihood of patients with severe diseases in Indonesia.

Another related concern about the TRIPs-plus agreement is the nature of the exclusivity of test data, limitations on exports of drugs made under compulsory license, limitations on parallel imports of patented drugs, and marketing authorisation rules. The IPR chapter in the EFTA-Chile BFTA, for instance, stipulates the undisclosed information concerning the safety and efficacy of a pharmaceutical or agricultural chemical product (also known as regulated products). This prohibition would normally last for a period of at least five years from the date of approval for a pharmaceutical product, and ten years from the date of approval for an agricultural chemical product. This sort of regulation also limits developing countries' ability to introduce new medicines to the market.

In addition, Article 27.3(b) of TRIPs provides options to protect plant varieties through patents, an effective suis generic system, or both. This Article is still under review by the TRIPs Council at the WTO. Patent protection, however, is inappropriate for developing countries, primarily due to its long and complex legal requirements (i.e. novelty, inventive steps, industrial application, and a sufficient written disclosure). Plants are vitally important for the agricultural sector, food industry, and to people's livelihood. The absolute monopoly rights given to the patent holders is potentially limiting a developing country's ability to produce food crops and undermine farmers' initiatives to save, use, and exchange over the seeds. Indonesia is rich with biodiversity and traditional knowledge. The so-called life industries, such as agri-food, chemical, biotech, and drug multinationals, have searched for new products from genetic materials, traditional remedies, plant, animal, and micro-organism species. These multinational biotech corporations often use IPR to protect and control innovations resulting from some discoveries that were carried out without any prior inform consent and share of the benefit with the local population in which such discoveries were originated.

The proposed BFTA between Indonesian and EFTA should, therefore, pays attention to all of the aforementioned concerns. It is in the interest of the Indonesian people at large that the proposed BFTA between the EFTA and Indonesia should pay into account the development level of the latter.

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