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UNIVERSITAS PELITA HARAPAN

CITI CENTER FOR INTERNATIONAL TRADE & INVESTMENT

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Can You Spot Pirated Local DVDs in Jakarta?

Michelle Limenta, Ph.D & Oscar Fernando*

In April 2016, the United States Trade Representative (USTR) released its annual review of the global state of IPR protection and enforcement, known as the 'Special 301' report. Indonesia have remained on the 'priority watch list' since 2001, except in the years 2007 and 2008 where Indonesia was instead listed on the 'watch list' category. The widespread availability of pirated and counterfeit products in Indonesia is one of many concerns pointed out by the USTR within its report.

Undeniably, pirated goods such as foreign movies and music in the form of DVDs can still be found in several (low-end) shopping centers in Jakarta. Interestingly, it appears that the numbers of in-shop vendors selling illegal DVDs have been declining in recent years. The city administration's threat to revoke licenses to repeated offender malls, alongside a more rampant use of the internet for online downloading and streaming, contributed to these declining numbers. Another interesting fact is that, of those selling pirated DVDs, rarely can we find a vendor who sells illegal local movies/music. Most of them sells original ones. In our view, there are at least three possible reasons for this practice.

Firstly, it is the 'supply and demand'. With a population of over 240 million people, the entertainment market in Indonesia is large. Foreign movies/songs, primarily the Hollywood films, served this demand well. There are also a number of local award-winning best-seller music and box office movies that have attracted a lot of audiences, such as '*Laskar Pelangi*' and '*Ada Apa Dengan Cinta?*'. However, the local production is far from capable of satisfying the demand. In 2011, the government's plan to increase the import tax on foreign movies, in order to encourage and boost local production, have led to controversies and oppositions. The Motion Picture Association decided to halt the import of foreign movies to Indonesia in mid-February 2011, which led to a public outcry from the Indonesian movie

* We would also like to thank Jhonny Antonio Pabón Cadavid for his comment within this article.

fans protesting that they are being deprived of watching high-end foreign films and being forced to watch mediocre local films. The halt of importing foreign movies was predicted to only benefit the piracy business even more without giving a positive impact to local production. The quantity and quality of local production may play a role in the demand and supply of illegal DVDs.

Secondly, it is the sense of nationalism/patriotism among Indonesians. ‘Nationalism/patriotism’ can be manifested in many ways, such as through the campaign of ‘buying local’ or ‘buying original products’. Generally, people tend to assume that they serve their patriotic duty and help their domestic industry by buying local original products. Government and stakeholders, in many events, call for public support to enhance and boost national industries by buying local original movies/music.



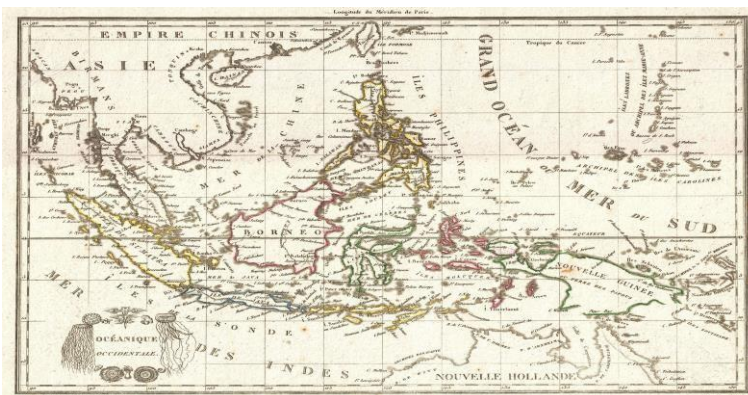
The third reason is the enforcement. The local art workers have an advantage of having a direct link to the law enforcers. Moreover, a number of local artists serve as members of the Parliament, which enable them to pressure law enforcers to stand against piracy of local works. For example, in May 2015 a group of artists visited the Criminal Detective Agency – Indonesian Police to voice their concerns about piracy. Less than 2 weeks after their visit, the police conducted raids in several big cities in Indonesia and seized more than twenty-five thousands of illegal DVDs.

Allowing the sale of illegal foreign movies/music on one hand but enforcing only the sale of local original DVDs on the other creates an unfair competition that is actually disadvantageous to the local industry. The higher cost of original DVDs discourage people to purchase them. For example, the price of a pirated DVD in Jakarta is Rp. 7000 (SG\$ 70 cents) which is 7 times less than the price of an original DVD (e.g. Rp. 50.000 for local movie). This leads to an increase in the demand for illegal foreign DVDs as a cheaper option, while at the same time, restricting local movies/music to compete fairly. By having a one-sided protection/enforcement, the government encouraged unfair competition towards local film and music industry.

“Allowing the sale of illegal foreign movies/music on one hand but enforcing the sale of local original DVDs on the other creates an unfair competition that is actually disadvantageous to the local industry”

Additionally, the ‘carrot and stick’ approach (pressure exerted through the Section 301 and assistance provided through aid) may not be the most effective way to improve the IP protection in Indonesia. The approach should be focused on the enhanced involvement and

engagement of Indonesian (art) workers in the global (music and movie) production processes. Should Indonesia become the stakeholder in ‘knowledge-based-economies’ and creative industry, it will devote its best resources to improve the protection.



Transparency in Trade Agreement Negotiations: Let the Sunshine In?

Michelle Limenta, Ph.D

President Jokowi's intention to join the Trans-Pacific Partnership (TPP) Agreement has sparked debates among observers. Many have questioned Indonesia's aptitude to join this 21st century trade agreement. While it is much easier now to evaluate the impacts of TPP Agreement by assessing its text, TPP was criticized for the lack of transparency during its negotiating process. NGOs, for example, condemned trade negotiators' secrecy approach in negotiating TPP and warned the high costs involved due to the impossibility to evaluate the agreement.

Similarly, NGOs found the 'less-heard' Regional Comprehensive Economic Partnership (RCEP) negotiations shrouded (equally or even more) in secrecy. RCEP negotiations were formally launched by the heads of state of the ASEAN Members and ASEAN FTA's trade partners (Australia, China, India, Japan, Korea and New Zealand) in 20 November 2012 at the ASEAN summit in Cambodia. The United States is notably absent in the RCEP negotiations. At the time of writing, twelve rounds have taken place.

RCEP recognised ASEAN's centrality in negotiating and strengthening the economic ties among other negotiating partners in the Asia-Pacific region. RCEP was expected to be less ambitious than the TPP Agreement. The recent leaked proposal by Japan and South Korea of an Intellectual Property chapter, however, has resulted in serious concerns for the access of medicine and has led to calls for transparency by a number of NGOs. Electronic Frontier Foundation (EFF), for example, said that the leaked text is atrocious and asked the negotiating countries to open up the process.

Transparency has generally been considered an element of good governance. It underpins democracy. For democratic societies, a secretive approach is deemed to undermine the legitimacy and the law being created.

“The suggested answer to the problem of ‘secret negotiation’ is not an open negotiation, but public participation in a closed door negotiation”.

Despite such concerns, it appears that opening up the negotiations does not fall into one of the RCEP negotiating parties' priority areas. Internal/domestic demand for transparency in RCEP negotiating countries is not as strong as the one in the TPP. There are, at least, three reasons for this 'less-demand' or 'non-urgency' for transparency in the RCEP negotiations. Firstly, some RCEP negotiating parties have non-democratic or 'less than democratic' government. China, Laos and Vietnam are examples of such form of government. As pointed out by Brian J Schoenborn in his article entitled: 'Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?', trade agreements are often treated as either legislation or contracts. The legislative process in a democratic country requires an open system. In contrast, transparency may not be much required in the 'non-democratic' political system. Secondly, two of the 2015 world's top ten most democratic nations (based on the Democracy Index compiled by the Economist Intelligence Unit), New Zealand and Australia, are RCEP negotiating

parties as well as TPP members. As RCEP is considered less ambitious and has not yet been finalised, most of the domestic attention and debate have been focused more on the TPP agreement which at the moment has entered the ratification process in the legislative bodies of each TPP member. Thirdly, there is a considerable lack of public awareness about the impact of FTAs and trade negotiations in most of RCEP negotiating countries. For example, public awareness of ASEAN Economic Community (AEC) remains low not only in Indonesia but also among ASEAN Members.



It is not the intention of this article, however, to claim that transparency, or other democratic values, should be the benchmark in trade talks. Governments are by no means alike. Interestingly, regardless of the form of governments (democratic or non-democratic, absolute/constitutional monarchy or republic), they often prefer to conduct negotiations behind closed doors. Secrecy is a negotiation strategy and habit that has been established for centuries. François de Callières, a special

envoy of Louis XIV, in 'The Practice of Diplomacy' wrote that 'secrecy is the very soul of diplomacy'. Historically, diplomats and international negotiators have embraced secrecy and discretion. Maintaining secrecy, from the negotiators' perspective, would benefit the process of negotiations. The negotiations would run more smoothly and more efficiently, because they are shielded from external pressures such as opposition from NGOs or civil society groups. As noted by Peter Yu in his article 'Six Secret (and Now Open) Fears of ACTA', other negotiating parties might be reluctant to allow what they put on the table to be disclosed to the public. Secrecy approach is a way to promote an amicable long-term negotiating relationship between negotiating parties.

As the content of trade agreement has evolved to cover various behind-the-border issues, public interests in trade agreement are growing (slowly, moderately or rapidly). In my article entitled: 'Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation', I proposed that the suggested answer to the problem of 'secret negotiation' is not an open negotiation, but public participation in a closed door negotiation. I also emphasised that the government should not overlook the public as the stakeholders to the trade agreement. A number of stakeholders might develop unrealistic expectations about the outcome and get frustrated when their expectations are not fulfilled. So the bottom line (I referred to a Canadian economist, Sylvia Ostry's view) is that 'it is the role of government to make policy; transparency and participation are not a replacement for government responsibility'.



Indonesia's legal battle against the tobacco plain-packaging legislation, a worthwhile effort?

Akhmad Ramadhan Fatah

As of December 2012, the Australian government have passed and implemented a plain-packaging legislation on all tobacco products in order to reduce the tobacco consumption amongst its population through getting rid of its packaging appeal. But this legislation has been facing on-going challenges within three jurisdiction, namely domestic court, International Arbitration under Australia-HK BIT, and within the WTO dispute settlement. Under the WTO dispute settlement, 5 nations have challenged Australia's tobacco plain-packaging legislation since its implementation, namely Ukraine, Honduras, Cuba, the Dominican Republic, and Indonesia (which Ukraine later dropped in June 2015). These nations were not against the plain packaging on the basis of disagreeing the move to reduce tobacco consumption in order to improve the people's wellbeing, they did it due to their concern of the policy violation of country's obligations under the WTO's Trade-Related Aspects of Intellectual Property Rights agreement that Australia is breaching by introducing this legislation.

Indonesia have pushed for this legal battle since September 2013, being the 5th nation to challenge the legislation, with an intention to point out Australia's violation of international trade rules and intellectual property rights of branding. Their concern for the violation arise from the fear that this tobacco plain-packaging legislation can lead to a further implementation on other products and applied by other countries (systemic implications). The tobacco plain packaging legislation uniforms the packaging of all sorts of tobacco products as specified by the legislation, with research-proven unappealing colour choice package, particular typeface, and a large pictorial warning depicting the impacts of tobacco consumption, amongst other specific requirements. Despite the fear of systemic implication of the plain-packaging on other products, it appears to be unjustified.

“An alternative move that Indonesia can do, had it wanted to voice their concern on Australia's violation of international obligation, could be through being a third-party with interest to the lawsuit”.

Indonesia will not be facing a huge loss if the demand for tobacco from abroad declined, as the demand remained consistently high domestically. A news article being linked with Indonesia's ministry of industry stated that out of the 300 billion cigarettes being produced in Indonesia over the past 3 years, 279 billion are consumed domestically while 21 billion are exported.

Countries such as Ireland, France, New Zealand, and the United Kingdom are those who have announced or have implemented the use of tobacco plain packaging legislation in their respective countries as of today. Within the WHO's indicator for prevalence of tobacco smoking in 2015 indicates that these developed nations are already facing a low demand in tobacco consumption, ranging from 16.7-29% of tobacco prevalence. This is contrast to the figures that Indonesia and other complainant countries have within the same report, ranging from 50-76% of tobacco prevalence. If Indonesia were to on increasing their exporting capacity, it is very likely that the nations mentioned above will not be a profitable market to boost exporting capacity.

Indonesia's fear might be stimulated by the fact that systemic implication can lead to many more nations complying to implement, beyond the developed nations, including nations who have a high demand in tobacco products. Within that case, it is very unlikely that these nations would comply. For instance, as mentioned by the Secretary General of the ministry of trade in December 2010, Indonesia's largest tobacco export has been to Cambodia, Malaysia, and Thailand, nations that are unlikely to comply with plain-packaging legislations. Another example would be the very fact that the other complainant countries, such as Cuba and Honduras, are those with high tobacco demand as well. These nations are less likely to adopt the tobacco plain-packaging legislation given the benefit that tobacco has on the nation from the high demand.

Indonesia could have remained being a third party with interest to the lawsuit as it is they were initially prior to being one of the main complainant to the legislation. This would allow Indonesia to remain voicing their concern regarding the issue of the intellectual property violation without having to be the complainant against the legislation overall. It is clear that in terms of market profitability, as explained earlier, Indonesia has no benefit to further continue the lawsuit, and seems to be saving time and energy by being a third party instead.



The Indonesian government have introduced a healthcare system (BPJS) in 2014, an ambitious program aiming to provide healthcare services to all parts of the population regardless of their economic capabilities. The guardian have identified how the initial launch of the program managed to gather more than expected amount of people within the program, hence indicating the popularity of the program and people's concern for their wellbeing. Therefore, despite the claim that Australia violated an intellectual property rights, their tobacco plain-packaging legislation comes with results. Australia's Department of

Health stated a figure indicating the consumption level at \$3.720 billion in December 2012, to which it declined to \$3.260 billion as of December 2015, with signs of further decline in the near future. Hence, without advocating for a healthier living and even putting the effort to go against a legislation that shows results, Indonesia's ambitious healthcare system may not likely have its desired impact.

The large presence of the tobacco industry might bring benefits to some parties, including large excise tax revenue on domestic tobacco purchases, employment opportunities within the tobacco industry, and benefit that tobacco industry can offer to other industries. But these benefits overlook the damages that tobacco consumption has created. If Indonesia intends to not adopt a plain-packaging legislation in the near future, the country will need to find other ways to improve the wellbeing of the population, perhaps through a mass campaign on encouraging a healthier diet, which may have a positive spillover effect on reducing tobacco consumption.



Distinguished Guest Seminar on “The Future is Now – Digital Trade”
Jakarta, 16 March 2015

Center for International Trade and Investment (UPH-CITI) hosted a Distinguished Guest Seminar entitled, “The Future is Now – Digital Trade”. The seminar included a leading expert Mr. James Lockett – Vice President, Head of Trade Facilitation and Market Access of Huawei Technologies co. ltd. as the main speaker. Mr. Lockett discussed about the concept of digital trade and how it will have an economic and legal implications, as he discussed how digital trade is included within the TPP framework.

Distinguished Guest Seminar on “Skeptical Ruminations on the Transatlantic Trade and Investment Partnership (TTIP)”
Jakarta, 3 May 2015

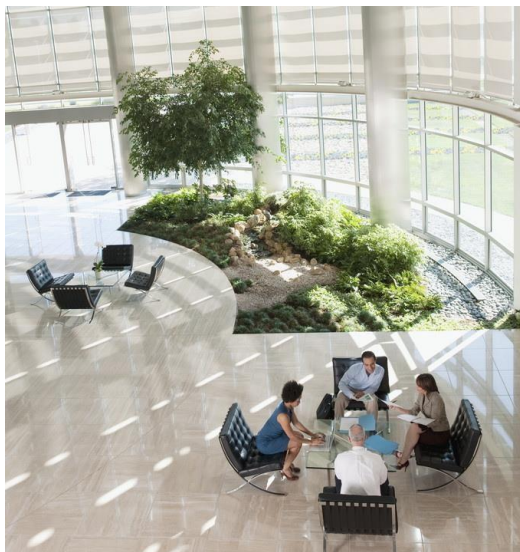
Mr. Pierre Sauve, director of external programmes and academic partnerships and faculty member at World Trade Institute, University of Bern, Switzerland, leads the seminar on the topic of “Skeptical Ruminations on the Transatlantic Trade and Investment Partnership (TTIP)”. He first discussed the strength that the agreement introduces, but he then continues the discussion with a few points to justify his skepticism of the agreement. This seminar is organized by UPH Center for International Trade and Investment.



Director General of the WTO visit to Indonesia
Jakarta, 13 April 2016



WTO Chief- Roberto Azevêdo visited Jakarta and gave a public speech in the Ministry of Trade of Indonesia on April 13th, 2016. He encouraged Indonesia’s further engagement in world trade. The UPH Center of International Trade and Investment (UPH-CITI) team attended the session and had an opportunity to briefly have a photo with the director general.



Our goal: To be the preeminent center for thought leadership and expertise on trade and investment policy and law in Indonesia

Universitas Pelita Harapan - UPH

Founded in 1994 with the vision of educating a new generation of leaders for Indonesia and the wider ASEAN region, Universitas Pelita Harapan is the number one private university in Indonesia according to the QS World University Ranking 2013. UPH was the first university in Indonesia to introduce programs entirely taught in English, the first to offer a liberal arts curriculum, and the first to introduce a multi-disciplinary approach to its program. While consistently underlining the vision of “knowledge, faith, and character”, UPH, in cooperation with overseas partner universities, has developed a rich curriculum in many areas of study, ensuring that its graduates are respected globally and appreciated by modern businesses and industries.

The Center for International Trade and Investment - CITI

Established in September 2014, CITI’s objective is to raise awareness in Indonesia of the importance of an outward-looking and liberal trade and investment policy, so as to ensure the country’s continued commercial competitiveness and support its economic development goals. CITI runs a number of research, education, and outreach initiatives with the generous support of both the Swiss State Secretariat for Economic Affairs (SECO) and the WTO Secretariat (WTO Chairs Program).

Contributors of this edition

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Disclaimer: The articles are representative of the author’s view, not necessarily the general view of the center

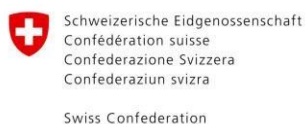
This quarterly newsletter seeks to provide updates, insights analysis on current developments in trade and investment law and policy in Indonesia. Constructive feedback and comments are always welcome.



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