

ASEAN ATTITUDES TOWARD PATENT PROTECTION OF THE COVID-19 VACCINE VERSUS HUMANITARIAN INTERESTS

SIKAP ASEAN ATAS PERLINDUNGAN PATEN VAKSIN COVID-19 VERSUS KEPENTINGAN KEMANUSIAAN

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Abstract

The global pandemic of the Covid-19 outbreak has caused problems in various aspects of life. Several countries have invented or made the Covid-19 vaccine. However, many countries have not been able to find or make the Covid-19 vaccine, including ASEAN countries. This raises questions that are the topic of discussion in this article, namely about ASEAN's attitude towards 2 different interests between patent protection for the Covid-19 vaccine and humanitarian interests in overcoming the Covid-19 outbreak. Does Patent protection take priority or does humanitarian interest take precedence? To discuss this topic, the authors use normative legal research methods based on secondary data or bibliography. The topic was discussed by comparing various legal provisions, both national and international, to obtain the main findings stating that patent protection also prioritizes humanitarian interests.

Keywords: Global Pandemic, The Covid-19 Vaccine, Patent Protection, Humanitarian Interest, ASEAN

Abstrak

Pandemi global wabah Covid-19 telah menimbulkan masalah diberbagai aspek kehidupan. Beberapa negara telah menemukan atau membuat vaksin Covid-19. Namun masih sangat banyak negara yang belum mampu menemukan atau membuat vaksin Covid-19, termasuk negara-negara ASEAN. Hal ini

memunculkan pertanyaan yang menjadi topik pembahasan dalam artikel ini, yaitu tentang sikap ASEAN atas 2 kepentingan yang berbeda antara perlindungan Paten atas vaksin Covid-19 dengan kepentingan kemanusiaan dalam penanggulangan wabah Covid-19. Apakah perlindungan Paten yang diutamakan atau kepentingan kemanusiaan yang didahulukan? Untuk membahas topik tersebut, penulis menggunakan metode penelitian hukum normatif yang didasarkan pada data sekunder atau bahan kepustakaan. Topik dibahas dengan membandingkan berbagai ketentuan hukum, baik nasional maupun internasional, sehingga diperoleh temuan utama yang menyatakan bahwa perlindungan Paten juga mengedepankan kepentingan kemanusiaan.

Kata kunci: Pandemi Global, Vaksin Covid-19, Perlindungan Paten, Kepentingan Kemanusiaan, ASEAN

Introduction

Corona Virus Disease-2019 (Covid-19) is the name given by the World Health Organization (WHO) for the coronavirus which was first discovered in Wuhan City, China People's Republic (PRC) at the end of 2019.¹ Since Covid-19 broke out in the City of Wuhan and spread in several parts of PRC and even outside of PRC, Covid-19 has quickly transformed into a pandemic that is troubling in all parts of the world. The WHO finally designated the Covid-19 outbreak as a global pandemic after infecting more than 118,000 people in 114 countries and killing 4,291.² The determination of the status of Covid-19 as a global pandemic indicates the spread of Covid-19 is so fast, and almost no country can guarantee freedom from the Covid-19 outbreak.

As of the writing of the results of this study, the number of detected cases recorded has reached more than 110 million cases, where the death toll has reached up to 2 million.³ This shows that Covid-19 is a health threat that is quite worrying. In addition to threats to health,

¹ Dinda Handayani dkk, "Penyakit Virus Corona 2019", *Jurnal Respirologi Indonesia*, vol. 40, no. 2 (2020), pp. 119-129.

² Siti Nurhalimah, "Covid-19 dan Hak Masyarakat Atas Kesehatan", *Jurnal Sosial dan Budaya Syar-i*, vol. 7, no. 6 (2020), pp. 543-554.

³ Benny D Koestanto, "Korban Meninggal Akibat Covid-19 Di Seluruh Dunia Menembus 2 Juta Jiwa", *Kompas.id* (16 Januari 2021), <https://www.kompas.id/baca/internasional/2021/01/16/korban-meninggal-akibat-covid-19-di-seluruh-dunia-menembus-2-juta-jiwa/>, accessed 20 February 2021.

the massive and rapid spread of Covid-19, of course, has had a profound impact on various aspects of life, such as the economic, social, and cultural sectors and even security. Once the massive spread of Covid-19, which is quite frightening, has created a challenge for countries worldwide to respond by working to prevent and stop the spread of Covid-19 more widely.⁴ Almost all countries in the hemisphere continue to work hard to cut or at least reduce the growth and spread of Covid-19 cases. In addition to efforts to prevent the spread of Covid-19, several countries are working to accelerate the production of the Covid-19 vaccine so that the health crisis and crises in other sectors can be quickly resolved.⁵

The efforts to make the Covid-19 vaccine that several countries have carried out have been successful, such as the Sinovac Biotech vaccine from PRC, Novavax from Canada, AstraZeneca from the UK, Pfizer from the United States.⁶ The success of making the vaccine is expected to be able to reduce the spread of Covid-19 transmission. However, what about countries that have not succeeded in making a Covid-19 vaccine? These countries have received the Covid-19 vaccine by buying from countries that found the Covid-19 vaccine. The sale and purchase of the Covid-19 vaccine can be understood as part of the commercialization of the Covid-19 vaccine, where the countries that invent and manufacture the Covid-19 vaccine will benefit economically by making other countries a market share that inevitably has to buy the Covid-19 vaccine.

The discovery of the Covid-19 vaccine, which then generates profits for the country of discovery or manufacture, is possible to be registered as an object of Intellectual Property Rights (IPR), namely:

⁴ Anggia Valerisha dan Marshall Adi Putra, "Pandemi Global Covid-19 dan Problematika Negara-Bangsa: Transparansi Data Sebagai Vaksin Socio-digital?", *Jurnal Ilmiah Hubungan Internasional, Edisi Khusus* (2020), pp. 131-137, <https://journal.unpar.ac.id/index.php/JurnalIlmiahHubunganInternasional/article/view/3871>, accessed 20 February 2021.

⁵ Berlianto P.H. Situngkir, "Kerjasam Asean di masa Pandemi", *Majalah Masyarakat Asean Lawan Covid-19* (Edisi 25/ Sept 2020), <http://setnas-asean.id/site/uploads/document/magazine/5f962e5edd3d2-edisi-25.pdf>, accessed 22 February 2021.

⁶ Bbc.com, "Vaksin Covid-19 Mulai dikirim ke 34 Provinsi di Indonesia", *www.bbc.com/* (30 Dec 2020), <https://www.bbc.com/indonesia/indonesia-55481866>, accessed 22 Februari 2021.

rights arising from the ability to think or think that produce a product, or process that is useful to humans.⁷ Where the Covid-19 vaccine is included in the discovery of the technology field, the party who discovered it for the first time could register the vaccine as a Patent object. According to the provisions of Article 1 number 1 of Law Number 13 of 2016 concerning Patents (Patent Law), it is stated that a patent is an exclusive right granted by the state to an inventor for the results of his invention in the field of technology for a certain period of time to carry out the invention himself or give approval to the other party to do it. The right is exclusive because only the inventor can be given the right to carry out his own invention or give a license to another party to carry it out.⁸ The state grants patents in the form of rights to prohibit other parties from using/ making/ selling inventions by recognizing economic rights and legal moral rights for inventors' creations.⁹ Therefore, patent protection for the Covid-19 vaccine is considered very important for its discoverers because the pharmaceutical company or institution that discovered it has spent a large investment cost and requires a long time to develop and test it.¹⁰

Patent registration and protection are intended to protect the moral and economic rights of the inventor. Protection of economic rights needs to be given considering that the development of the Covid-19 vaccine made by companies and research institutions requires large funds where this needs to be pursued through international cooperation.¹¹ This means that the response to the global pandemic Covid-19 requires cross-border handling, at least in one regional region,

⁷ Bureau of Public Relations, Law and Cooperation, "Pentingnya Mendaftar Kekayaan Intelektual", *kemenkumham.go.id* (26 April 2016), <https://www.kemenkumham.go.id/berita/berita-pusat/pentingnya-pendaftaran-kekayaan-intelektual>, accessed 22 February 2021.

⁸ Saidin, *Aspek Hukum Hak Kekayaan Intelektual: Intellectual Property Rights*, (Depok: Rajawali Pers, 2019), p. 346.

⁹ Novianti, "Pelindungan Paten Melalui Patent Cooperation Treaty Dan Regulations Under The Patent Cooperation Treaty", *Negara Hukum*, vol. 8, no. 2 (2017), pp. 289-307.

¹⁰ Rio Christiawan, "Menyoal Paten Vaksin Covid-19", *beritasatu.com* (24 Juni 2020), <https://www.beritasatu.com/opini/6979/menyoal-paten-vaksin-covid19>, accessed 22 February 2021.

¹¹ Lisbet, *Penyebaran Covid-19 dan Respons Internasional*, Vol. XII, No.5/I/Puslit/Maret/2020 (Jakarta: Info Singkat, Pusat Penelitian Badan Keahlian DPR RI, 2020), p. 9.

such as the ASEAN region (Association of Southeast Asian Nations), whose formation aims to create a peaceful, safe, stable, and prosperous Southeast Asia region.¹² Therefore, ASEAN must take a role in making a policy to tackle the Covid-19 outbreak to anticipate the commercialization of the Covid-19 vaccine by the inventor or manufacturing country by registering a patent. On the other hand, overcoming the Covid-19 outbreak is of humanitarian interest worldwide, including in the Southeast Asia region.

The purpose of writing this article is to provide an overview of the 2 different interests in overcoming the Covid-19 outbreak, namely: between Patent protection for the Covid-19 vaccine and humanitarian interests in overcoming the Covid-19 outbreak. This article is written using normative legal research methods, namely using bibliography. The issues to be discussed include: how will ASEAN respond to the response to the Covid-19 outbreak? What are the legal rules regarding the Covid-19 vaccine patent, both in Indonesian law and in international law? Does Patent protection take priority or does humanitarian interest take precedence? This article is expected to provide an overview or explanation of these problems.

ASEAN In Responding to The Covid-19 Outbreak

ASEAN is an international organization. This follows the definition of an international organization: a government organization whose members are countries, whose establishment is based on international agreements with specific objectives, whose personality is separate from its member countries.¹³ International organizations are generally formed based on the desire to achieve the common goals aspired by their member countries.¹⁴ Basically, an international organization is a cooperation or coordination organization,¹⁵ This

¹² Heru Prayitno dan Tim Penyusun, *Asean Selayang Pandang*, (Jakarta: Sekretariat Direktorat Jenderal Kerjasama ASEAN, Ditjen Kerjasama ASEAN, Kementerian Luar Negeri, 2017), p. 4.

¹³ Made Pasek Diantha et.al, "*Buku Ajar Hukum Internasional*" (Fakultas Hukum Universitas Udayana, 2017), p. 83

¹⁴ Sefriani, *Peran Hukum Internasional: Dalam Hubungan Internasional Kontemporer*, (Jakarta: Rajawali Pers 2016, p. 189.

¹⁵ Boer Mauna, *Hukum Internasional: Pengertian Peranan Dan Fungsi Dalam Era Dinamika Global*, (Bandung: Alumni 2005), p. 465.

carries out the will of member countries through an international agreement so that international organizations with various kinds of ties are very close to the founders' countries.¹⁶

ASEAN is a regional organization that facilitates countries' cooperation in Southeast Asia, namely: Indonesia, Philippines, Thailand, Singapore, Brunei Darussalam, Malaysia, Vietnam, Laos, Myanmar, and Cambodia. The formation of ASEAN was motivated by the desire to create a peaceful, safe, stable and prosperous Southeast Asia region. Meanwhile, the aims and objectives of establishing ASEAN are: to accelerate economic development, social progress, and glorious development to strengthen the basis for a prosperous and peaceful community and enhance peace and stability in the Southeast Asian region.¹⁷ As an organization, ASEAN has a Charter of the ASEAN as the basic article for the Association of Southeast Asian Nations or ASEAN, which was ratified at the 13th ASEAN Summit, November 20, 2007, in Singapore, which came into effect on December 15, 2008.¹⁸ Indonesia has ratified the Charter of The ASEAN with Law Number 38 of 2008 concerning Ratification of the Charter Of The Association Of Southeast Asian Nations.

The establishment of the Charter of the ASEAN aims to transform ASEAN from a loose political association to an international organization that has a strong legal basis (legal personality) with clear rules and has an effective and efficient organizational structure,¹⁹ Regulating the cooperation of ASEAN member countries to become clearer and directed so that it is expected to be able to answer all ASEAN problems effectively and efficiently.²⁰ This means that the Charter of the ASEAN has become a control mechanism and a tool to

¹⁶ Boer Mauna, *Hukum Internasional*, p. 463.

¹⁷ Achmad Zulfikar, Efektivitas Peran ASEAN dalam Mengatasi Masalah Human Security di Kawasan Asia Tenggara, Jurusan Ilmu Hubungan Internasional, Universitas Muhammadiyah Yogyakarta, p.2.

¹⁸ Wikipedia, "Piagam Perbara", *wikipedia.org*, (4 April 2021), https://id.wikipedia.org/wiki/Piagam_Perbara, accessed 26 February 2021.

¹⁹ Kementrian Luar Negeri Republik Indonesia, "Piagam Asean", *kemlu.go.id*, (5 September 2009), https://kemlu.go.id/portal/id/read/117/halaman_list_lainnya/piagam-asean#!, diakses 26 February 2021.

²⁰ Directorate General of ASEAN Cooperation, Ministry of Foreign Affairs of the Republic of Indonesia, *Ayo Kenali ASEAN*, (2018), p. 35.

remind member countries that do not implement the agreements that have been made.²¹

ASEAN as an international organization expressly states its objectives contained in the provisions of Article 1 of the ASEAN Charter, as follows:

1. To maintain and enhance peace, security, and stability and further strengthen peace-oriented values in the region;
2. To enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation;
3. To preserve Southeast Asia as a Nuclear-Weapon-Free Zone and free of all other weapons of mass destruction;
4. To ensure that the peoples and the Member States of ASEAN live in peace with the world at large in a just, democratic, and harmonious environment;
5. To create a single market and production base which is stable, prosperous, highly competitive, and economically integrated with effective facilitation for trade and investment in which there is a free flow of goods, services, and investment; facilitated movement of business persons, professionals, talents, and labor; and freer flow of capital;
6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;
7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;
8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes, and transboundary challenges;
9. To promote sustainable development to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage, and the high quality of life of its peoples;
10. To develop human resources through closer cooperation in education and life-long learning, and in science and technology, for

²¹ Elfia Farida, "Efektivitas Piagam Asean (Asean Charter) Bagi Asean Sebagai Organisasi Internasional", *Jurnal Ilmiah Ilmu Hukum OISTI*, p. 4.

the empowerment of the peoples of ASEAN and the strengthening of the ASEAN Community;

11. To enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare, and justice;
12. To strengthen cooperation in building a safe, secure, and drug-free environment for the peoples of ASEAN;
13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building;
14. To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region; and
15. To maintain ASEAN's centrality and proactive role as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent, and inclusive.

The provisions of Article 1 of the ASEAN Charter confirm that ASEAN is an association of countries with clear objectives and is given legal status following the provisions of Article 3 of the ASEAN Charter, which states that ASEAN as an inter-governmental organization is granted legal status. As an international organization that has legal status, ASEAN can carry out cooperation as outlined in various forms of agreements through the ASEAN Summit. This is in accordance with the provisions of Article 7 of the ASEAN, which states:

1. The ASEAN Summit shall comprise the Heads of State or Government of the Member States.
2. The ASEAN Summit shall:
 - a. be the supreme policy-making body of ASEAN;
 - b. deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of the objectives of ASEAN, important matters of interest to the Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils, and ASEAN Sectoral Ministerial Bodies;
 - c. instruct the relevant Ministers in each of the Councils concerned to hold ad hoc inter-ministerial meetings and address critical issues concerning ASEAN that cut across the Community Councils. The ASEAN Coordinating Council shall adopt rules of procedure for such meetings;

- d. address emergencies affecting ASEAN by taking appropriate actions;
- e. decide on matters referred to it under Chapters VII and VIII;
- f. authorize the establishment and the dissolution of Sectoral Ministerial Bodies and other ASEAN institutions; and
- g. appoint the Secretary-General of ASEAN, with the rank and status of Minister, who will serve with the confidence and at the pleasure of the Heads of State or Government upon the recommendation of the ASEAN Foreign Ministers Meeting;

Regarding the handling or handling the Covid-19 outbreak, ASEAN has held a summit on Covid-19 on April 14, 2020, which was conducted virtually. The result of the ASEAN Summit meeting on Covid-19 is virtually a commitment to tackling the outbreak and preparing for post-outbreak recovery, both socially and economically. The ASEAN Summit agreed on several essential points regarding the handling of Covid-19, namely: strengthening cooperation against Covid-19 by exchanging information, best practices, research development, epidemiological development, and others.²² In addition, it also provides protection for ASEAN citizens during the Covid-19 pandemic, strengthens public communication and efforts to combat stigmatization and discrimination, is committed to taking collective action and coordinated policies to mitigate economic and social impacts, the importance of a comprehensive, multi-involvement approach. -stakeholders and multi-sectoral, assigning ASEAN economic ministers to ensure the operation of supply chain connectivity so that trade can continue and supporting the reallocation of the ASEAN Trust Fund to tackle the Covid-19 pandemic.²³

However, at the ASEAN Summit on April 14, 2020, there was no agreement or cooperation or particular discussion regarding the Covid-19 vaccine, let alone discussion of Patent protection for the Covid-19 vaccine. This can hinder the handling and handling of Covid-19. Even though as an international organization that aims to advance political,

²² Yosinta Margaretha, "Tantangan Kerjasama Regional ASEAN dalam melawan Covid-19", *psdr.lipi.go.id/* (10 September 2020), <http://psdr.lipi.go.id/news-and-events/opinions/tantangan-kerja-sama-regional-asean-dalam-melawan-covid-19.html>, accessed 26 February 2021.

²³ Yosinta Margaretha, "Tantangan Kerjasama Regional", accessed 26 February 2021.

security, and economic cooperation in the Southeast Asia region, ASEAN can play a significant role in dealing with the Covid-19 outbreak. Especially considering that there are no ASEAN member countries that are capable of producing the Covid-19 vaccine. ASEAN should make policies in the form of cooperation, both among ASEAN member countries or with other countries or other international organizations, to anticipate the possibility that later countries that invent or manufacture the Covid-19 vaccine will register for the protection of the Covid-19 vaccine Patent considering that the spread of Covid-19 has not yet resolved and the number of victims who died because of being infected with Covid-19.

Indeed, several countries in ASEAN have received the Covid-19 vaccine by purchasing from countries that found the vaccine, including Indonesia. In fact, Indonesia has vaccinated based on the provisions stipulated in the Decree of the Minister of Health Number HK.01.07/MENKES/9860/2020, which states that the type of Covid-19 vaccine that can be used for vaccination in Indonesia is AstraZeneca, China National Pharmaceutical Group Corporation (Sinopharm), Moderna, Pfizer Inc., and BioNTech, and Sinovac Biotech Ltd. The sale and purchase of the Covid-19 vaccine is part of the commercialization of the Covid-19 vaccine, which can encourage countries that find or manufacture to register Patent protection for the Covid-19 vaccine.

Patent Protection Laws

Patents as part of IPR are internationally regulated in several international conventions. The Paris Convention For The Protection of Industrial Property, signed in Paris on March 20, 1883, regulates industrial property rights and has been refined with several revisions or changes.²⁴ The objects for protecting industrial property rights regulated in the Paris Convention are Patents, Utility Models, Industrial Design, Trade Marks, Trade Names, Indication of Source, or Appellation of Origin.²⁵ The Paris Convention has so far been signed by the 173

²⁴ Saidin, *Aspek Hukum Hak*, p. 424.

²⁵ Maidonfik Ficand, "Perlindungan Paten Secara Internasional", *Kompasiana.com* (12 Desember 2016), <https://www.kompasiana.com/maidonfik/584e4b6c7493735552c894dd/perlindungan-paten-secara-internasional?page=all>, accessed 22 February 2021.

participating countries.²⁶ Indonesia has even ratified the Paris Convention in 1979 with Presidential Decree No. 24/1979 concerning Ratification of the "Paris Convention for the Protection of Industrial Property" dated March 20, 1883, as several times Amended. Lastly, in Stockholm, July 14, 1967, accompanied by Requirements against Article 28 Paragraph (1) and Article 1 to Article 12 of the World Intellectual Property Organization's Convention and Establishing Convention, which was signed in Stockholm, on July 14, 1967.

The Paris Convention regulates the principles of National Treatment which are used as mandatory guidelines for member countries. This principle is regulated in the provisions of Article 3 of the Paris Convention, which states: Nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union. This means that a member state of the Union is obliged to treat foreigners or citizens of other countries that are members of the Union, just like their own citizens in IPR issues, one of which is a patent.²⁷ The Paris Convention also regulates Compulsory Licenses, as stated in the provisions of Article 5A of the Paris Convention, as follows:

1. Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.
2. Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.
3. Forfeiture of the patent shall not be provided except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or

²⁶ Wikipedia, “Konvensi Paris tentang Perlindungan Kekayaan Industri, *id.wikipedia.org* (15 Mei 2020), [https://id.wikipedia.org/wiki/Konvensi_Paris_tentang_Perlindungan_Kekayaan_Industri#:~:text=Konvensi%20Paris%20tentang%20Perlindungan%20Kekayaan%20Industri%20\(Paris%20Convention%20for%20the_perjanjian%20internasional%20mengenai%20kekayaan%20intelektual](https://id.wikipedia.org/wiki/Konvensi_Paris_tentang_Perlindungan_Kekayaan_Industri#:~:text=Konvensi%20Paris%20tentang%20Perlindungan%20Kekayaan%20Industri%20(Paris%20Convention%20for%20the_perjanjian%20internasional%20mengenai%20kekayaan%20intelektual), accessed 22 February 2021).

²⁷ Saidin, *Aspek Hukum Hak*....., p. 422.

revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

4. A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill that exploits such license.

The provisions of Article 5 of the Paris Convention give each participating country the right to take legal action by making legal rules governing the granting of Compulsory Licenses to prevent misuse caused by the existence of an exclusive right to grant patent protection, for example, patent non-implementation or inadequate implementation.²⁸

Apart from the Paris Convention, IPR issues are also regulated in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). The TRIPs Agreement is an agreement that applies to member countries of the World Trade Organization (WTO), the TRIPs Agreement sets the minimum standard for intellectual property regulation in WTO member countries. Currently, there are 164 WTO member countries.²⁹ The TRIPs Agreement is not a rule regarding the protection of intellectual property rights specifically but is part of the WTO Agreement signed by WTO member countries which obliges all its members to make rules regarding IPR in their respective countries.³⁰ TRIPs aims to protect and enforce IPR laws in order to encourage innovation, transfer, and dissemination of technology, to gain mutual benefits from technology knowledge makers and users in a

²⁸ Saidin, *Aspek Hukum Hak*, p. 422.

²⁹ Kompas.com, WTO: Sejarah, Tujuan, Fungsi dan Struktur, www.kompas.com (14 Desember 2020), <https://www.kompas.com/skola/read/2020/12/14/150909569/wto-sejarah-tujuan-fungsi-dan-struktur>, accessed 26 February 2021.

³⁰ Risa Amrikasari, "Peran TRIPS Agreement dalam Perlindungan Hak Kekayaan Intelektual", hukumonline.com (31 Agustus 2017), <https://www.hukumonline.com/klinik/detail/ulasan/lt592407520f6f7/peran-trips-i-agreement-i-dalam-perlindungan-hak-kekayaan>, accessed 26 February 2021.

way that creates social and economic welfare and balances rights and obligations.³¹

Indonesia has ratified the TRIPs Agreement with Law Number 7 of 1994 concerning Ratification of the Agreement Establishing The World Trade Organization. The TRIPs Agreement has accommodated actions that WTO member countries can take to protect public health, as stated in Article 8 of the TRIPs Agreement, namely:

1. In formulating or amending their laws and regulations, members may adopt measures necessary to protect public health and nutrition and promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology.

Although Article 8 of the TRIPs Agreement provides provisions that protect public health, the TRIPs Agreement does not regulate international standards for WTO member countries. Article 31 of the TRIPs Agreement even states: Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected. That is, it is possible for the national law of WTO members to regulate other uses of a Patent. Other uses include Compulsory Licenses and the use of Patents by the government. What is meant by Compulsory Licenses is the granting of a license from a country to a person or company or the government itself to produce a patented product without the consent of the owner or patent holder.³²

In particular, Patent arrangements in international law are contained in the Patent Cooperation Treaty (PCT), namely: a

³¹ Siti Munawaroh, "Peranan TRIPS's (Trade Related Aspects of Intellectual Property Rights) Terhadap Hak Atas Kekayaan Intelektual di Bidang Teknologi Informasi di Indonesia", *Jurnal Teknologi Informasi Dinamik* vol. xi, no.1, (2006), p. 25.

³² Achmad Amri Ichsan, "Analisis Yuridis Terhadap Lisensi Wajib dan Pelaksanaan Paten oleh Pemerintah berdasarkan Perjanjian Trip's", *Jurnal Ilmu Hukum Legal Opinion*, vol. 2, edisi. 1 (2014), p. 4.

multilateral Patent cooperation agreement, which was agreed upon at a conference of diplomats from 78 countries and 22 international organizations in Washington on June 19, 1970. Moreover, Indonesia ratified the PCT in 1997 with Presidential Decree Number 16 of 1997 concerning Ratification of the Patent Cooperation Treaty and Regulations Under PCT.³³ This PCT is a special agreement under the Paris Convention, intended to facilitate and provide patent protection in several participating countries of the Paris Convention. The PCT aims to simplify international Patent registration. Previously, international Patent applications had to be filed in every country where Patent protection was desired, which was time-consuming and costly.³⁴

Meanwhile, in ASEAN, there are provisions on Intellectual Property Rights made by The ASEAN Working Group On Intellectual Property Cooperation (AWGIP) in Bangkok in 1995, namely: ASEAN Framework Agreement On Intellectual Property Cooperation. Indonesia has ratified it with Presidential Decree Number 89 of 1995 concerning Ratification of the ASEAN Framework Agreement on Intellectual Property Cooperation.³⁵ Subsequently, the ASEAN Patent Examination Cooperation (ASPEC) was formed, namely: this is the first regional patent cooperation program between ASEAN member countries to reduce complexity, save time and improve the quality of searches and inspections as well as accelerate several patent registration processes at the IP offices of ASEAN member countries. in ASPEC.³⁶

In Indonesia, the provisions concerning Patents are regulated in Law Number 13 of 2016 concerning Patents (Patent Law). Article 1 point 1 of the Patent Law states that a patent is an exclusive right granted by the state to an inventor for his invention in the field of technology for a certain period of time to carry out the invention himself or to grant approval to other parties to implement it. Patents are rights for someone who has received a new invention or a new way of working and improvements (invention) in the field of technology

³³ Novianti, "Pelindungan Paten", p. 291.

³⁴ Saidin, *Aspek Hukum Hak*, p. 422.

³⁵ Hemastuti Arini, Etty Susilowati, Djoko Priyono, "Implementasi Asean Framework Agreement On Intellectual Property Cooperation Dalam Memberikan Perlindungan Merek Bagi Usaha Mikro Kecil Dan Menengah Menghadapi Asean Economic Community", *Diponegoro Law Jurnal*, vol. 5, no. 3 (2016), p. 3.

³⁶ Regional Cooperation Initiatives by IP Offices of ASEAN Member Countries, "ASEAN Patent Examination Cooperation (ASPEC)"

granted by the government. Several provisions in International Treaties that have been ratified by Indonesia have been adopted into the Patent Law. For example, Compulsory Licenses contained in the Paris Convention or TRIPs Agreement. Article 82 of the Patent Law states: a compulsory license is a license to implement a patent granted based on a ministerial decree based on an application for the following reasons: a. The Patent Holder does not carry out the obligation to make products or use processes in Indonesia as referred to in Article 20 paragraph (1) within 36 months after being granted the patent; b. The patent has been exercised by the Patent holder or licensee in a form and in a way that is detrimental to the public interest; or c. Patents resulting from the development of previously granted Patents cannot be exercised without using the patents of other parties which are still under protection.

Patent Protection for Covid-19 Vaccines versus Humanitarian Interests

Vaccines as an invention in the health sector are part of intellectual property that can be registered as objects of patents. This is in accordance with the provisions of Article 109 paragraph b. jo. Article 111 letter b. Patent Law (1), which reads: The Government can implement a Patent in Indonesia on its own based on a very urgent need for the benefit of the community, including pharmaceutical and/or biotechnology products that are expensive and/or required to deal with diseases that can lead to death. suddenly in large numbers, causing significant disability, and is a Public Health Emergency that Concerns the World. Meanwhile, a very urgent need for the benefit of society in the health sector is for drugs that are still patent protected in Indonesia, which are needed to tackle widespread diseases (endemic). This means that vaccines as part of medicine receive patent protection, even if the government implements it. Because what cannot be granted Patent protection is the methods of examination, treatment, medication, and/or surgery. Meanwhile, medical equipment, materials, and medicines are not subject to patent protection, as stipulated in Article 9 letter b: Patent Law and its explanations.

If the Covid-19 vaccine has been registered as a Patent object by the (state) inventor or manufacturer, the Covid-19 vaccine will receive

Patent protection. This means that another party (state) cannot use the invention without the party's consent (state) of the inventor. This will make other countries dependent on the country that invented the Covid-19 vaccine or made it. So that if another country (not the inventor or manufacturer) needs the Covid-19 vaccine, it must first obtain a license from the country of the inventor (maker), of course, by promising the benefits that the inventor or manufacturing country will get. This is in line with the opinion of Julio Nogues: that drug patent protection only gives a big advantage to the pharmaceutical industry. This means that granting patent protection to pharmaceutical products will result in significant loss of welfare for buyers. On the other hand, the patent owner will benefit from the patent.³⁷ So it is not impossible, the country that invented the Covid-19 vaccine or made use of a situation where countries in the world desperately need the Covid-19 vaccine to overcome the spread of Covid-19.

On the other hand, the right to health is part of human rights. Internationally, the guarantee of the right to health is stated in Article 12 paragraph (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), namely: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. ICESCR is a multilateral agreement established by the General Assembly of the United Nations on December 16, 1966, which came into force on January 3, 1976. Indonesia only ratified the ICESCR in 2005 with Law Number 11 of 2005 concerning Ratification of the International Covenant On Economic, Social, And Cultural Rights. The ICESCR is part of the Universal Declaration of Human Rights.

Whereas in the legal rules in Indonesia, regulated in the provisions of Article 28 H paragraph (1) of the 1945 Constitution, it reads: everyone has the right to live in physical and mental well-being, to live in, and to have a good and healthy living environment and the right to obtain health services. Furthermore, Law Number 39 of 1999 concerning Human Rights, Article 9 states: everyone has the right to live, to maintain life and to improve their standard of living; have the right to live in peace, security, peace, happiness, prosperity, physical and mental; and have the right to a good and healthy environment. In fact,

³⁷ Achmad Amri Ichsan, *Analisis Yuridis Terhadap*, p. 2.

the provisions of Article 4 of Law Number 36 Year 2009 concerning Health clearly state: Everyone has the right to health.

Therefore, the government has an obligation to fulfill the right to health as a human right, as stated in Article 2 paragraphs (1) and (2) of the ICESCR. And in Indonesia, the 1945 Constitution, Article 28I paragraph (4) states: protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government, and Article 34 paragraph (3) states: the state is responsible for the provision of proper health service facilities and public service facilities. Article 12 paragraph (2) of the ICESCR even specifies the steps that must be taken to achieve the highest standards in achieving physical and mental health, namely: (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment, and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Conclusion

The two things mentioned above, between patent protection for the Covid-19 vaccine and the right to health as part of human rights (humanitarian interests), both of which are the responsibility of each country (Government). It is not only protected under national law but also by provisions of international law.

To respond to the importance of registering Covid-19 vaccine Patent protection as well as humanitarian interests in dealing with the Covid-19 outbreak, ASEAN as an international organization can make a policy regarding the Covid-19 vaccine through the Summit Forum, namely: the policy agreement of ASEAN member countries and with the country that invented or produced the Covid-19 vaccine to prioritize humanitarian interests in dealing with the Covid-19 outbreak while still not ignoring the interest of protecting the Covid-19 vaccine Patent. The provisions of the TRIPs Agreement and the Paris Convention have actually regulated the protection of public health through Compulsory Licenses and Government Use for drugs (read: vaccines) that have been registered for patent protection. However,

ASEAN has not regulated provisions on Compulsory Licenses or Government Use for ASEAN member countries.

The author hopes that ASEAN as an international organization can make a Cooperation agreement, both between ASEAN countries and with countries that invent or manufacture the Covid-19 vaccine to apply Compulsory Licenses and Government Use specifically for the Covid-19 vaccine and even make an agreement on the obligation to transfer technology so that all countries- ASEAN member countries can produce the Covid-19 vaccine.

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