

## Principle of *National Treatment* in Applying Trademark Registration in Indonesia

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### ABSTRACT

One of the basic principles adopted in the TRIPs Agreement is the principle of national treatment. In general, this principle of national treatment states that foreigners will get the same treatment as the treatment given by a country for its own citizens. This research uses normative juridical research methods with a descriptive type of research. Meanwhile, data analysis is used normative legal research (legal research). Principle National Treatment in International Law Rules Related to Trademarks National Treatment set on Trademark Law Treaty and Paris Convention Application of Principles National Treatment Trademark Registration in Indonesia has not been regulated in the current trademark legislation other than dispute resolution by considering and using the principle of National Treatment Also still sidelined in law enforcement related to trademark disputes.

## **INTRODUCTION**

Brands are generally known to the public as the identity of a product in the market, in addition to brand identity is also an asset that generates profits to producers, in reality in the community, sometimes brands can influence people in deciding to buy a product or not, besides that the brand can also determine the price of a product sold. In daily practice in the community, sometimes two types of the same product with the same quality and function can have different selling prices because the brand used is better known or has a good impression in the community. Consumer behavior research states that one of the consumer decisions to buy an item or product is because of brand value and brand preferences, it illustrates that the brand is an important value in a product and is an asset for producers. Consumer behavior, especially in Indonesia, in choosing a product emphasizes brand preferences rather than looking at the quality, usefulness and function of an item or product first. The perception of the majority of consumers in Indonesia that the brand determines the quality and value of a product or goods. If the product has an internationally known brand, the product or goods of the brand have good quality and value.

Society in general sees the value of products or goods based on If the brand is known internationally or is a similar brand of products sold abroad, people will tend to buy or even judge that an item or product has the opposite quality, a product that is the same as a local brand or is only known domestically in perceived as a product whose value is below a product that has a brand that is known abroad and / or has a good quality. lower than goods or products that have brands known abroad. For example, one of them is a coffee shop that has an internationally known brand or has a brand that is also known abroad, it is perceived that the public has processed coffee products of higher quality and more value than local coffee shops that sell processed coffee products with local or domestic brands, besides that, for example, dairy products produced under certain brands that are known abroad with internationally known producers More trusted to have quality and benefits compared to dairy products with local brands.

Competition and public perception of a brand is not a problem that must be resolved because brand competition and creating trust in the brand is part of business competition between producers in marketing their products which is a problem in itself is when public trust in internationally known brands is high and when people prefer products with brands that are also marketed abroad there are people Producers of goods or products in the country who utilize and use brands known abroad in supplying their products in order to be able to seek the maximum profit by utilizing public perception with brands known abroad. For example, the Cornetto ice cream brand dispute case claimed by Unilever as an internationally renowned consumer goods product manufacturer with the domestic ice cream company Campina based on the Supreme Court Cassation Decision, then the Cornetto ice cream brand is Unilever's trademark example, the example above is one example where local product manufacturers use consumer perceptions of foreign brands to benefit their products.

The latest similar case is the case of the Timberland clothing brand that feels imitated by local clothing manufacturers Timberlake, in this case it can be seen that it seems that Timberlake producers use the Timberland brand that has been known abroad so that it seems that the Timberlake brand is part or has the same quality as Timberland from the case it can also be seen that local product manufacturers use brands that have been known abroad in determining its brand and capitalize on consumers' perception of overseas brands for profit.

## LITERATURE REVIEW

David A. Aaker, stated that a brand is a distinguishing name or symbol (both in the form of logos, stamps and packaging) to identify goods and services from a particular seller / group of sellers. A distinguishing mark used by a business entity as a marker of its identity and the products or services it produces to consumers, and to distinguish the business and the goods or services it produces from other business entities. Law No. 20 of 2016 concerning Brands and Geographical Indications defines a Brand as a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more of these elements to distinguish goods and/or services produced by people or legal entities in the trade of goods and/or services.

The above definition both states that a brand is a differentiator from a production of goods and or services as stated above, explicitly the brand is an identity of goods or products so that if an item or product uses a brand from other products or goods that have been known or registered first, then the product or goods that use the mark of the other product uses the identity of another brand illegally. Related to the rampant use of foreign brands by producers of local goods or products to attract consumers and seek profit, in fact legally the international TRIPs *Agreement* has adopted the protection of internationally known brands in order to protect these brands from abuse committed in a country. One of the basic principles adopted in the TRIPs *Agreement* is the principle of *national treatment*.

In general, *this national treatment principle* states that foreigners will get the same treatment as the treatment given by a country for its own citizens. The principle of *national treatment* itself has been widely included in various international conventions related to IPR, including *The Madrid Agreement Concerning the International Registration of Marks* (Madrid Agreement), Rome Convention, Bern Convention, and Paris Convention. So that legally international brands that have been registered abroad get protection and can no longer be used by producers of goods and or services in a country by utilizing other brands that have been known abroad. Indonesia as a WTO member country must automatically follow the TRIPs *Agreement* in intellectual property protection, especially in this case brand protection, so that in legislation related to intellectual property in Indonesia, the principles of brand protection as regulated in the TRIPs *Agreement* should be adopted by laws related to IPR, especially in this case brands in Indonesia. This TRIPs *Agreement* is one of the

multilateral agreements in the WTO that is coercive. That is, the TRIPs Agreement is one of the WTO agreements that binds and mandates all WTO members to adjust their national laws and regulations to the provisions of the TRIPs Agreement.

The practice of trademark registration when using the principles of the TRIPs Agreement should be able to minimize the occurrence of disputes, especially with marks that have been used or have been registered first abroad, it's just that currently in the practice of trademark registration, the director general of intellectual property only seems to be a researcher of administrative files rather than as an intellectual property rights protection agency, often marks that have been registered or used Abroad used by domestic manufacturers of goods or products or brands that have been registered or used abroad have similarities in essence or overall similarities with brands used domestically. This then becomes the root of the problem of brand disputes between domestic producers and foreign producers. Respect for intellectual property such as brands is important to do, especially in the business world, intellectual property rights are an asset or property like objects for people or legal entities that must be protected and respected the use of intellectual property or in this case illegal marks are a form of intellectual property theft and actions that are very contrary to the law. Brand as one of the identities in the business world in fact is also one of the reasons for disputes which are basically not to fight over the logo or name of a brand but to fight for the economic benefits of the brand.

Related to brand protection Brand regulations in Indonesia, which have been adjusted to the regulations in the TRIPs Agreement and various other international agreements that have been ratified by Indonesia, have not made brand protection in Indonesia effective. This can be concluded from the many brand disputes in Indonesia, especially related to foreign famous brands. Applications for trademark registration in bad faith and applications and uses of marks that have similarities in principal or in whole with famous marks owned by foreign parties are still common in Indonesia. Even though this is something that is prohibited under brand regulations in Indonesia. Related to famous brands, until now there is still a problem about the definition of this famous brand. Whether a particular brand can be categorized as a well-known brand is a difficult thing to determine. This will greatly depend on the products produced and used in general by consumers, or products with certain brands that are close to consumers' daily lives. The trademark law itself has not clearly defined and regulated what is meant and the criteria for famous marks so that this is used as a legal loophole in trademark registration and disputes. In addition, related to the protection of foreign marks, the Trademark Law also does not regulate the principle of *national treatment*, so that with the unclear regulation of the two things above, which causes many disputes over the mark, the author is then interested in discussing further related to the *National Treatment Principle* in applying trademark registration in Indonesia.

## METODOLOGY

### 1. Types and Approaches of Research

This type of legal research uses an approach that focuses on normative legal research (normative juridical) which is also called doctrinal legal research by analyzing certain laws and regulations or written laws obtained.

### 2. Nature of Research

The nature of the research used is descriptive. Descriptive research is research that merely describes the state of the object or event without an intention to draw generally accepted conclusions.

## RESEARCH RESULT AND DISCUSSION

### A. National Treatment *Principles* in International Law Relating to Trademarks

The principle of *national treatment* is a principle that demands equal treatment or prohibits differences in treatment between local products and products from outside. The implementation of the principle of *national treatment* is based on the desire to open the market of trade freely in a country and oppose all forms of protective policies, including the policy of applying the principle of *national treatment* to foreign brands. One form of trade protection carried out in international trade is based on conventions carried out by the World Trade Organization (WTO), the TRIPS Agreement or other conventions.

In International Law theory, *National treatment* is one form of the theory of reciprocity and retaliation in Private International Law (HPI). The theory of reciprocity and retaliation in HPI implies the condition of foreigners, recognition rather than foreign decisions, and the use of foreign law. This reciprocity and retaliation can be exceptions to the use of foreign law within a State in the settlement of disputes related to HPI. Foreign laws that judges must use by HPI rules, we finally see are not used either, because reciprocity conditions are not fulfilled or retaliation must be carried out. However, it does not mean that by not fulfilling the reciprocal conditions in a State, then foreign laws that should be used become unused. The use of reciprocity in HPI is not an absolute requirement. Reciprocity is divided into two, namely, formal reciprocity and material reciprocity.

In formal reciprocity it is not known exactly what will be the treatment in each State because only equal treatment is determined, without any exact details of the forms of equal treatment. Therefore this formal reciprocal nature is abstract. Meanwhile, in material reciprocity, detailed treatment will be given. So, in this material reciprocity, everything becomes more concrete, more real than in the formal form above. With this formal reciprocal term, it is put forward that foreigners will be treated the same as their own citizens, provided that in the country of the foreigner concerned the citizens of other parties are treated as such.

There are two forms of formal reciprocity: assimilation with citizens (*national treatment*) and the clause "*most favored nation*". The principle of *most favored nation* requires a country to give equal treatment to foreign nationals (WNA) from countries that are bound by the same agreement with it. For example, Indonesia, Malaysia, and Singapore are bound by a trade agreement that requires the application of the *principle of most favored nation*. With respect to Singaporeans and Malaysians residing in Indonesia, Indonesia shall give equal treatment, in relation to the application of the provisions of the agreement. Furthermore, the principle of *national treatment* requires a state to give citizens of a country bound by the same treaty with it, the same treatment as given to its own citizens. Thus, with *national treatment* foreigners are equated their rights and obligations like their own citizens

In order to protect the brand, the principle of *national treatment* is regulated in the *Trademark Law Treaty (TLT)*, Trademark Law Treaty is an agreement produced in negotiations between WTO member countries on October 27, 1994 in Geneva, Switzerland. TLT entered into force on August 1, 1996.<sup>222</sup> Based on the latest data obtained from the WIPO website, on April 6, 2009 there were 43 countries participating in the TLT.

Initially, TLT was created with the aim of creating a harmonization law in brand protection. The harmonization in question includes administrative and substantive matters. In the TLT establishment negotiations held in Geneva, many non-European countries rejected the harmonization of substantive matters in brand protection arrangements in TLT, because they were reluctant to change substantive matters regarding marks that had been regulated in their respective national laws. By due to resistance from these non-European countries, the original goal of establishing TLT to harmonize substantive matters regarding brand protection was not achieved. Thus, in the end, the harmonization regulated in TLT only concerns administrative matters in brand protection.

The provisions regarding administrative matters in trademark protection regulated in TLT include:

- a. Submission of an application for registration of a mark;
- b. Changes after registration; and
- c. Extension of the validity of brand protection.

In TLT, there is no explicit provision that requires participating countries to apply the principle of *national treatment*. However, Article 15 of TLT stipulates that each TLT party State is obliged to comply with the Paris Convention, in relation to trademark provisions. Article 2 paragraph (1) of the Paris Convention regulates the applicability of the principle of *national treatment*, which is a basic principle in the Paris Convention. This principle of *national treatment* is applied in terms of the application of provisions regarding the protection of industrial property rights regulated in the Paris Convention, including provisions regarding trademarks.

Thus, based on the provisions of Article 15 TLT, the *principle of national treatment* in the Paris Convention also applies to TLT. Therefore, it can be concluded that TLT requires its participating countries to apply the principle of national treatment, in the *form of arrangements as stipulated in the Paris Convention namely, "the same treatment"* The principle of *national treatment* is one of the basic principles in the TRIPs Agreement. This principle is stipulated in Article 3 which states; "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

Each WTO member shall give treatment to citizens of other Member States shall be less favorable than that which it gives its citizens the protection of intellectual property, having regard to exceptions to the Paris Convention (1967), the Convention Bern (1971), and the Rome Convention and IPIC Treat From the provisions of Article 3 of the TRIPs Agreement, it can be seen that the form of regulation of the national treatment principle in the TRIPs Agreement is "*no less favourable*". Thus, in the application of the provisions of the TRIPs Agreement, it is possible for WTO member states to give more favorable treatment to foreign parties, than to their own citizens.

With regard to the exceptions contained in the Paris Convention (1967), the Berne Convention (1971), and the Rome Convention or IPIC Treaty, Article 3 paragraph (2) of the TRIPs Agreement provides that such exemptions can be utilized by WTO member states only when necessary to ensure compliance with laws and regulations that do not conflict with the provisions of the TRIPs Agreement, and are not carried out in a way that may cause obstacles Share trade. The protection provided related to the applicability of the *national treatment principle* in this TRIPs Agreement *includes protection of the availability, acquisition, continuity, and enforcement of IPR, as well as matters affecting the use of IPR specifically regulated in TRIPs* . Regarding dispute resolution, in the event of IPR violations, in the TRIPs Agreement part III chapter 2 concerning *Civil and Administrative Procedures and Remedies* it is stated that, WTO member states must provide civil judicial procedures for rights holders with regard to enforcement of IPR covered by the TRIPs Agreement.

Rights holders in this provision refer not only to citizens of each country, but also foreign nationals or foreign legal entities who are IPR holders in that country related to the protection of famous marks, contained in Article 16 paragraphs (2) and (3) of the TRIPs Agreement. Protection of famous marks under this TRIPs Agreement refers to the protection provisions for famous marks contained in Article 6 bis of the Paris Convention. This form of protection against famous marks is in the form of refusal or cancellation of registration and prohibition of use of marks that are reproductions, imitations, or translations of marks that by the competent authorities in a country have been considered well-known marks, so that along with it can cause confusion.

The above protection also applies to goods or services that are not similar to the registered mark, if the use of the mark will indicate a relationship between the goods or services of the mark and the goods or services of the registered mark, and if the use of the mark

The mark results in losses for the owner of the registered mark. Based on the explanation in sub-sub-chapter number four above, it is known that the principle of *national treatment in the TRIPs agreement is regulated in the form of "no less favourable treatment"*.

### **B. Application of National Treatment Principles in Trademark Registration in Indonesia**

The forms of protection for famous marks provided according to Article 21 of the Trademark Law are:

1. An application is rejected if the Mark is substantially or wholly similar to:
  - a. Registered marks belonging to other parties or applied in advance by other parties for similar goods and/or services;
  - b. Famous brands belonging to other parties for similar goods and/or services;
  - c. Other parties' well-known marks for non-similar goods and/or services that meet certain requirements; or
  - d. Geographic indication is registered.
2. An application is rejected if the Mark:
  - a. is or resembles the name or abbreviation of a famous person's name, photograph, or the name of a legal entity owned by another person, except with the written consent of the rightful person;
  - b. is an imitation of or resembles the name or abbreviation of the name, flag, emblem or symbol or emblem of a State, or any national or international institution, except with the written consent of the competent authorities; or
  - c. is an imitation or resembles an official mark or stamp or seal used by a state or Government agency, except with the written consent of the competent authority.
3. An application is rejected if it is submitted by an applicant in bad faith.

In providing legal protection to foreign famous brand owners, Indonesia is obliged to apply the principle of national treatment. This also applies to the dispute resolution process, if there is an infringement of a foreign famous brand in Indonesia. IPR dispute resolution is part of the IPR law enforcement process in Indonesia.

Trademark Law What is currently in force does not regulate the principle *National Treatment* in the registration of the brand as practiced *TRIPs agreement* Both through the Paris Convention and *Trademark Law Treaty* This then causes frequent disputes between foreign brands and local brands that adopt or that have similarities in essence with foreign brands. Although the Trademark Law has not regulated the principle *National Treatment* however, this principle cannot be excluded in trademark registration in Indonesia considering that Indonesia is a member of the WTO and WIPO which is bound to *TRIPs agreement* So it should be even though the principle *National Treatment* is not specifically regulated in

trademark legislation in Indonesia, but the rights to foreign marks that have been registered abroad or that have been known abroad should still be respected and become a consideration or option for rejection in trademark registration. In resolving trademark disputes between foreign marks that have been registered and known with local marks that should be suspected of having similarities in principal or overall similarity, the principle is appropriate *National Treatment* be considered in the resolution of trademark disputes

As in the case between Timberland and Timberlake in Decision Number 42/Pdt.Sus-TBrand/2020/ PN. Niaga.Jkt.Pst which decided there was no resemblance in essence between Timberland and Timberlake related to the use of Timber in their respective products that Timberland and Timberlake are producers that are both engaged in *bidanh Fashion* And please note that Timberland can prove with brand rights recognition in various countries Such as in the United States, Australia, Austria, Bahrain, Barbados, Belize, Benelux, Brazil, Canada, China, Colombia, European Trademark, Fiji, France, Germany, Greece, India, Japan, Jordan, Kuwait, Lebanon, Malaysia, Mexico, New Zealand, Poland, Saudi Arabia, Singapore, South Africa, Spain, Thailand, United Arab Emirates, United Kingdom, Uruguay, and in Indonesia.

Timberland itself is a well-known clothing brand under Timberland under the auspices of TBL Licensing LLC based in Delaware, United States which markets its products almost all over the world, including Indonesia, the Timberland brand is a brand originating from abroad that is known for a long time throughout the world juridically in Indonesia, the Timberland brand has been registered in the General Register of Trademarks at the Directorate of Trademarks, namely the brand TIMBERLAND No. IDM000010344 registered on July 9, 2004 which is an extension of the previous registration number No. 336470 registered on June 8, 1995 and has been extended by Agenda Number R.2991/2014 dated February 26, 2014 to protect types of goods belonging to class 25 and under international law the Timberland brand has been registered with WIPO International with register No. IR509706, dated November 10, 1986, to protect the types of goods belonging to classes 01, 03, 08, 09, 11, 14, 16, 18, 20, 21, 22, 25, 26, 28 and 34

That the Timberlake brand has been registered on Directorate of Trademarks No. IDM000471725 registered on August 28, 2015 that in its argument Timberland states that the use of the word Timber in the Timberlake brand can confuse consumers and suggest that Timberlake is part of Timberland so that according to Timberland it is a similarity in essence from the Timberland brand. That the judge in his judgment held that there was no resemblance in essence to the Timberland brand is something that must be criticized that the Timberland brand already has brand recognition from Wipo and has been first registered in Indonesia and first known abroad compared to the Timberlake brand That in addition to the Timberlake mark No. idm000471725 registered on August 28, 2015 in the name of the defendant, the use of the word Timber as a mark has also been used by another party, namely the Timberjeans brand list number 544169. Where against the Timberjeans brand list Number 544169, Timberland has filed a cancellation lawsuit Number 06/BRAND/2008/PN.

TRADE. JKT. PST. and the suit was granted by petitum stating that Timberland mark No. 544169 register has similarities in essence with Timberland mark No. IDM000010344 registered on July 9, 2004 and has been extended by Agenda No. R.2991/2014 dated February 26, 2014 belonging to Timberland.

Decision Number 42/Pdt.Sus-TBrand/2020/ PN. Niaga.Jkt.Pst illustrates that the principle of *national treatment* has been set aside in the enforcement of trademark dispute law, this can then be interpreted as a denial of Indonesia as a member of the WTO and WIPO against the *TRIPs agreement*, in addition to the Timberland and Timberlake cases, it can also be seen the inconsistency of judicial institutions in Indonesia in enforcing the law, especially in this case related to the law governing trademarks because in the case Timberland and Timberjeans judges ruled that there was a major error in the use of the word Timber in Timberjeans products, further illustrating the inconsistencies of the judiciary in Indonesia.

The National Treatment Principle which is still inconsistently applied in Indonesia illustrates that law enforcement in Indonesia shows uncertainty because rulings on the same juridical grounds can be decided with different ammar respect for intellectual property values can actually be seen from the National Treatment Principle because intellectual property, especially brands as identities that have economic benefits, must be respected, in addition, the application of the *National Treatment* Principles related to brand protection in Indonesia has not been consistently seen to be applied in law enforcement and registration related to trademarks, which is not in line with the *Trips Agreement* that must be obeyed by Indonesia as a WTO member country.

## CONCLUSIONS AND RECOMMENDATIONS

1. The principle of National Treatment in the Rules of International Law Related to National Trademark Treatment is regulated in the Trademark Law Treaty, Trademark Law Treaty Article 15 of the Trademark Law Treaty regulates that each country participating in the Trademark Law Treaty it is mandatory to comply with the Paris Convention, relating to the provisions regarding marks. Article 2 paragraph (1) of the Paris Convention regulates the applicability of the principle of national treatment, which is a basic principle in the Paris Convention. This principle of national treatment is applied in terms of the application of provisions regarding the protection of industrial property rights regulated in the Paris Convention, including provisions regarding trademarks.
2. The application of the National Treatment Principle in Trademark Registration in Indonesia has not been regulated in the current trademark legislation, besides that dispute resolution by considering and using the National Treatment principle is also still ruled out in law enforcement related to trademark disputes, this can be seen from the example of a trademark dispute case between Timberland and Timberlike.

3. Renewal of brand protection and regulation in Indonesia is an urgency to improve the implementation of principles in international conventions must be implemented immediately, especially in this case related to National Treatment because it is related to Indonesia's commitment as a country that is a member of international organizations such as WIPO and WTO.
4. The implementation of the principle of IPR protection even though it has not been regulated in the IPR legislation is important to be implemented in this case, especially the principle of national treatment because this is related to Indonesia as one of the member countries of the world trade organization because if Indonesia does not appear to have a commitment to implement international conventions related to IPR, it will harm Indonesia in terms of economy in world trade.

#### **ADVANCED RESEARCH**

Still conducting further research to find out more about the Principles of National Treatment in Trademark Registration in Indonesia.

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