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CONFLICT ON THE PROTECTION OF HUMAN RIGHTS RELATED TO TRADEMARK RIGHTS AND PUBLIC HEALTH RIGHTS: PROHIBITION OF DISPLAY OF CIGARETTE PACKAGES AT POINT-OF-SALE BASED ON INDONESIA'S POSITIVE LAW

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ABSTRAK

In attempt to reduce tobacco consumption and implement preventive measures through regulations such as the prohibition of displaying cigarette packs at points of sale regulated by the WHO FCTC, a dilemma arises regarding the protection of the intellectual property rights of trade owners, with public health. Based on this background, this study aims to examine two objectives. First, regarding what legal theory may be used as a legal basis for Trademark Rights owners against the prohibition of displaying cigarette packs at points of sale and second, regarding whether the implementation of Law Number 20 of 2016 concerning Trademarks and Geographical Indications violates the WHO Framework Convention on Tobacco Control 2003 regarding the prohibition of displaying cigarette packs in points of sale. This study uses an adjusted approach method in this writing, namely through normative juridical and qualitative juridical approaches.

Kata kunci: display of cigarette packs; trademark law; who fctc.

INTRODUCTION

Since the year of 1600s, tobacco has become a part of reality of human lives, whether in Indonesia and in other countries. However, this did not become a reality for everyone's lives until the 1800's when cigarettes and other tobacco products began to be produced commercially. Indonesia is no exception to this reality, as it is now one of the countries that now has the highest prevalence of smokers in the world. Due to this fact, tobacco products in Indonesia have become one of the factors that play a very large role in the economy.

However, despite the large positive contribution made by the tobacco industry to the economy in Indonesia, it is an unavoidable fact that tobacco and its derivative products have

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become a source of various diseases—some of which include: cardiovascular disease, oral cancer, throat cancer, acute myeloid leukemia, cancer of the nose and paranasal sinus cavities, and others. As a result, the Study of the Health Research and Development Agency published by the Ministry of Health in 2015 revealed that Indonesia accounts for more than 230,000 deaths due to consumption of tobacco products each year.¹

Due to the high percentage of deaths caused by the use of tobacco as cigarettes, countries in the world have taken the initiative through mutual cooperation through the means of the United Nations (hereinafter, “UN”) and the World Health Organization (hereinafter, “WHO”) as the main agenda maker to determine the right steps to reduce cigarette consumption. This step was then manifested forms including of international agreements, namely the WHO Framework Convention on Tobacco Control 2003 (hereinafter referred to as “WHO FCTC 2003”).

However, in efforts to reduce tobacco consumption and implement preventive measures, a dilemma arises regarding economic development and protection of the intellectual property rights of trademark owners, with public health. This dilemma arises from the fact that in marketing a cigarette product, it is indisputable that there exists a process that requires creativity and skills to produce and then market a cigarette product. Given the importance of the process, creativity, and skills needed in order to create and distribute cigarette products, the intellectual property pertaining to it certainly needs to be given legal protection. Legal protection for creations and ideas owned in this context is provided in the form of legal protection for intellectual property. Intellectual Property is generally related to the protection of the application of ideas and information that has commercial value.²

In general, democracy has a duty to promote human development, which includes the development of intellectual property, access to culture, innovation, education, and economic wealth. The existence of IPR as a human right is emphasized in the provisions of Article 27.2 of the 1948 Declaration of Human Rights (hereinafter referred to as “UHDR”), Article 15 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “ICESR”) in the form of recognition and protection of rights related to intellectual works in the field of scientific writing, art and literature.³ Next, in line with the provisions of Article 17 of the UDHR, namely regarding the guarantee of protection for everyone to defend their rights from the arbitrary actions of

¹ Cameng, Desak Ketut Juniari & Arifin. (2020). “Analisis Penerapan Kebijakan Earmarking Tax dari Dana Bagi Hasil Cukai Hasil Tembakau terhadap Kesehatan Masyarakat”, *Simposium Nasional Keuangan Negara*, p. 479.

² Lindsey, Tim., et. al. (2011) *Hak Kekayaan Intelektual Suatu Pengantar*, Bandung: PT. Alumni. p. 3

³ Dharmawan, Ni Ketut Susure. (2014). Relevance _ Right Riches Intellectual With Right Fundamental Man Generation Second “. *Journal Legal Dynamics*, 14(3), p. 519.

other parties, Hector Mac Queen emphasizes that everyone who succeeds in realizing creative works based on their intellectual abilities, is entitled to protection.⁴

Meanwhile, the prohibition of displaying cigarette packs as a manifestation of protecting people's rights to health, which is also a human right, is a regulatory concept that has been enforced in many countries around the world. For example, several regions in Australia have imposed a ban on the display of cigarette packs through their local regulations, which are allowed in the Australian Tobacco Advertising Prohibition Act 1992. Apart from Australia, the Netherlands is one of the countries that has implemented a ban on displaying tobacco products in supermarkets since 2020, and has targeted to ban display in other points of sale such as gas stations, convenience stores, drugstores, bars and cafes, night shops, and kiosks by 2022.⁵ This ban was enforced in the Netherlands on the basis that the display could act as a signal to smoke, even to people trying to avoid it.⁶

The ban that has been implemented in the Netherlands runs linearly with Article 13 WHO FCTC 2003 which the Netherlands ratified in 2005 to carry out a complete ban on advertising, promotion, and sponsorship. As of 1 July 2020 and 1 January 2021, the ban on displaying tobacco products in supermarkets and other point of sale at retail stores, (hereinafter referred to as "PoS") is enforced. The tobacco products referred to in this prohibition include conventional, electric, and herbal tobacco products.

As an internationally legally binding instrument for countries that ratify it, WHO FCTC 2003 is a convention or treaty that has the objective of protecting people's rights to protection from damage to health, social, environmental, and economic consequences due to tobacco consumption and exposure to secondhand smoke.⁷ Meanwhile, Cigarette Packs in this case is one derivative in association to the subject of the WHO FCTC 2003 regulation included as a Cigarette product which is defined in Chapter 4(1) Part 1 of the regulation, as a roll of cut tobacco used for smoking and covered in paper ("*sebuah gulungan tembakau potong yang digunakan untuk merokok dan tertutup kertas*"). In addition, WHO FCTC 2003 also provides a definition for Other Tobacco Products as another subject which is also regulated therein to include processed tobacco and all products containing tobacco, which are used for smoking, smoking, chewing, and for inhalation.

⁴ *Ibid.*

⁵ van Rijn, MJ. Letter from the state secretary for Public Health Welfare and Sport (Originally Dutch: Brief van de staatssecretaris van Volksgezondheid Welzijn en Sport)", 2017, Available online from: <https://www.rijksoverheid.nl/ministeries/ministerie-van-volksgezondheid-welzijn-en-sport/documenten/kamerstukken/2017/07/05/kamerbrief-over-tabak-en-rookwaren>. Diambil dari van Mourik, Dirk-Jan A. *et. al.* (2018). "Support for a point-of-sale cigarette display ban among smokers: findings from the international tobacco control (ITC) Netherlands survey". *BMC Public Health*,18(740), p. 2.

⁶ van Mourik, Dirk-Jan A. *et. al.* (2018). *Op.Cit.*, p. 1.

⁷ WHO Framework Convention on Tobacco Control, "History of the WHO FCFC Process". annex 1, p. 30, Available online from: <http://www.who.int/>, [Accessed on May 13, 2022].

Regulations related to the Prohibition of Cigarette Packs Display in Indonesia are currently regulated regionally in various regions. One of the regions that regulates this include DKI Jakarta Governor's Call Number 8 of 2021 concerning the Development of No-Smoking Areas, which stipulates that all building managers are urged not to post smoking or addictive substance billboards both indoors and outdoors, including displaying packs/packages of cigarettes or addictive substances at PoS.

The Smoking Prohibited Area itself is regulated in Article 1 number 22 of DKI Jakarta Governor Regulation Number 88 of 2010 concerning Amendments to Governor Regulation Number 75 of 2005 concerning No Smoking Areas, which explains that no smoking areas are rooms or areas declared as places or areas where smoking is prohibited. Smoking activities are in accordance with Regional Regulation No. 2 of 2005 concerning Air Pollution Control, namely public places, places for health services, places for teaching and learning, places of worship, places of work, arenas for children's activities and public transportation.

This Governor Regulation is a derivative of Law Number 36 of 2009 concerning Health (hereinafter referred to as the "Health Law"), where in Paragraph (2) of Article 115 it is emphasized that local governments have the obligation to establish smoking-free areas in their territories. In addition, the Prohibition of Displaying Cigarette Packs can also be regarded as a form of implementation of Article 113 of the Health Law which provides direction to encourage the use of materials containing addictive substances such as cigarettes so that they do not interfere with and endanger the health of individuals, families, communities, and the environment.

However, in its application, the implementation of this prohibition in Indonesia can still cause legal uncertainty for holders of cigarette brand rights, especially regarding the protection of their intellectual property. Therefore, in order to create a healthy and sustainable climate for brand producers, communities and governments as stakeholders, clear, firm and concrete protection is needed which departs from harmonizing the arrangements in the 2003 WHO FCTC, TRIPS Agreement and the Trademark Law. So, from the background that has been described, this research will examine the protection for brand rights holders in the enactment of the prohibition to display cigarette packs at points of sale in the DKI Jakarta Governor's Appeal Number 8 of 2021 concerning the Development of Smoking Areas based on Law Number 20 of 2016 concerning Trademarks and Geographical Indications (hereinafter referred to as "Trademark Law") and how to achieve a balance to bring together protection for intellectual property and public health.

RESEARCH METHODS

In conducting research, a useful research method is needed to find a solution to a problem under study by answering the questions contained in the identification of a research problem. Therefore, the researcher in this study will use a normative juridical approach. The normative juridical approach is legal research on literature or secondary data as research material by tracing regulations and literature or doctrine related to the problem to be studied.⁸ Based on this approach, the researchers in this study will refer to theories and regulations relating to protection for brand rights holders for cigarette products and legal certainty for cigarette product brand rights holders in terms of restrictions on other tobacco products. Next, the specification of this research is analytical descriptive, which describes and analyzes the applicable laws and regulations and is connected with legal theories in the practice of implementing positive law in Indonesia that relate to the problems that the researcher will discuss to draw conclusions which can be in the form of confirmation of the theory or existing or future regulations.⁹ It aims to provide accurate and thorough data related to humans or other legal phenomena, so that researchers in this study will refer to the Trademarks and Geographical Indications Law, WHO FCTC 2003, as well as other regulations related to the issues to be studied.

DISCUSSION

Protection of Trademark Rights related to the Prohibition of Displaying Cigarette Packs at Points of Sale and its Implementation according to Law 20/2016.

As part of modern human rights, intellectual property rights regarding trademarks are manifested in the form of exclusive rights granted by the state to trademark owners who are registered for a certain period to use the trademark themselves or to give permission to other parties to use it. Trademark protection especially has a crucial role for both registered trademark owners and potential trademark registrars. Basically, the protection of trademarks and IPR in general needs to be protected on the basis of natural rights which actually belong to the maker.¹⁰ This, in theory, is the foundation of the argument regarding the protection of intellectual property rights, which in this case are trademark rights.

In addition, in the context of protection related to the prohibition of displaying cigarette packs, the theory of utilitarianism initiated by Jeremy Bentham can also be used as a basis that can excuse the existence of restrictions on the rights of brand owners. The theory of utilitarianism views the purpose of law as providing the greatest benefit and

⁸ Soekanto, Soerjono & Mamudji, Sri. (2003). *Penelitian Hukum Normatif suatu Tinjauan Singkat*, Jakarta: UI press, p. 23.

⁹ Soemitro, Ronny Hanitjo. (1990). *Metodologi Penulisan Hukum dan Jurimetri*, Jakarta: Ghalia Indonesia, p. 97-98.

¹⁰ *Vide* Tim Lindsey, *et. al.*, *Op. Cit.*, p. 14.

happiness to as many citizens as possible.¹¹ Therefore, with this theory, expediency is the main goal of law with a measure of success, namely the greatest happiness for as many people as possible. If it is related to this research, public health is something that is aspired to be improved with the prohibition of displaying cigarette packs at PoS, and because of the theory of utilitarianism, the prohibition against displaying cigarette packs is a matter of fact. In the formulation of statutory products at both the national and international levels, the rationalization of these two theories can be considered as a consideration for formulating relatively balanced trademark protection regulations for brand owners, other producers and for people who are affected by the trademark or otherwise.

The regulation on trademark rights in the Trademark Law defines trademark rights as a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, in 2 (two) dimensions and/or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more of these elements to differentiate goods and/or services produced by persons or legal entities in trading activities of goods and/or services.

Furthermore, the Trademark Law divides trademark rights into three categories of rights, namely: (a) Trademarks intended for trademarks used on goods traded by a person or several persons jointly or a legal entity to differentiate from other similar goods; (b) Service Trademark is a trademark used for services traded by a person or several people jointly or a legal entity to differentiate it from other similar services; and (c) Collective trademark or trademarks that are used on goods and/or services with the same characteristics regarding the nature, general characteristics, and quality of goods or services and their control which will be traded by several persons or legal entities jointly to differentiate goods or services. and/or other similar services.

The Trademark Law also explains that trademark rights are actually owned by trademark owners who are registered either individually or in groups for a certain period of time by using the trademark themselves or giving permission to other parties to use it.

One of the industries that is closely related to the trademark rights intellectual property regime is the cigarette industry. Basically, many regulations are made both nationally and through international forums in order to support the movement to improve the health level of the world community by restraining people from consuming cigarettes or using other tobacco products. One form of prohibition is described in Article 13 of WHO FCTC 2003, which states that "Each Party shall, in accordance with

¹¹ Besar. (2016), "Utilitarianisme dan Tujuan Perkembangan Hukum Multimedia di Indonesia", Rubric of Faculty Members Binus University, Universitas Bina Nusantara, Available online from: <https://business-law.binus.ac.id/2016/06/30/utilitarianisme-dan-tujuan-perkembangan-hukum-multimedia-di-indonesia/>.

its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship." This was then implemented in the DKI Jakarta Governor's Call No. 8 of 2021, which called for "Not to put up advertisements for cigarettes or addictive substances both indoors and outdoors, including displaying cigarette packs/packages or addictive substances at PoS."

In the trademark rights regime itself, the existence of legal protection is intended to provide exclusive rights for the trademark owner so that other parties cannot use the same or similar mark to his own for the same or nearly the same goods or services. The right holder can use the mark, without violating the rules in the use of the mark, and also has the right to prohibit other parties and vice versa to give permission to other parties to use the mark. The concept of legal protection for trademark rights based on the following description has a monopoly nature, so that the right can only be exercised by the brand owner, and other people or third parties may not use this special right without the permission of the trademark owner.

To research the provisions related to the first mark, it is necessary to know that changes to the Trademark Law in Law Number 11 of 2020 concerning Job Creation only change the provisions of Articles 20, 23 and 25, so other provisions that have not been changed are still valid as stipulated in the Trademark Law. With this understanding, the regulations regarding the protection of trademark rights holders in it are still valid. In the Trademark Law, a trademark is defined as a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more of these elements to differentiate goods and/or services produced by persons or legal entities in the activity of trading goods and/or services.

Provisions that contain elements of protection for the rights of the trademark owners themselves are scattered in various Articles, including the provisions in Part One Chapter IV of the Trademark Law concerning Trademarks That Cannot Be Registered and Rejected, which regulates what kinds of brands cannot be registered and rejected. The prohibitions in this section read as follows:

Article 20:¹²

Trademark cannot be registered if:

- a. contrary to state ideology, laws and regulations, religious morality, decency, or public order;
- b. the same as, related to, or only mentions the goods and/or services being applied for registration;

¹² Article 20, Part Four, Chapter VI on Ease of Doing Business, Law No. 11 of 2020 on Job Creation. ["Omnibus Law"]

- c. contains elements that can mislead the public about the origin, quality, type, size, type, purpose of using the goods and/or services being applied for registration or are names of protected plant varieties for similar goods and/or services;
- d. contains information that is inconsistent with the quality, benefits, or efficacy of the goods and/or services produced;
- e. has no discrimination;
- f. is a public name and/or a symbol of public property; and/or
- g. have a functional form.

Article 21:¹³

- (1) The application is rejected if the trademark is similar in principle or in whole with:
 - a. a registered trademark belonging to another party or applied in advance by another party for similar goods and/or services;
 - b. Famous trademark owned by another party for similar goods and/or services;
 - c. Well-known trademark belonging to other parties for goods and/or services that are not of the same type that meet certain requirements; or
 - d. registered Geographical Indication.
- (2) The application is rejected if the trademark:
 - a. constituting or resembling the name or abbreviation of a famous person's name, a photo, or the name of a legal entity owned by another person, except with written approval from the person entitled;
 - b. is an imitation or resembles the name or abbreviation of the name, flag, symbol or symbol or emblem of a country, or national or international institutions, except with written approval from the competent authority; or
 - c. constituting an imitation or resembling an official sign or stamp used by a state or government agency, except with written approval from the competent authority.
- (3) An application is rejected if it is filed by an applicant with bad faith.
- (4) Further provisions regarding the rejection of trademark applications as referred to in paragraph (1) letters a to c shall be regulated by the Ministerial Regulation.

Therefore, it can be concluded that the provisions stipulated in the attached Article are an attempt to maintain the authenticity of each registered mark by avoiding the possibility of passing off.

With the following articles, it can be assumed that legal protection of registered trademark is considered very important, this is even more relevant for well-known

¹³ Constitution Number 20 of 2016 concerning Brands and Indications geographic.

brands which are often piggybacked by people who do not have the rights to these famous trademarks. If a trademark has obtained a well-known title, then it is necessary to have special legal protection so that the trademark is prevented from being imitated or misused by other people.¹⁴

As for the Trademark Law itself, violations against trademark recognized in Article 83 are only in the form of unauthorized misuse of a trademark, while the prohibition against displaying cigarette packs is not regulated explicitly or implicitly as a violation of trademark. Thus, the banning of displaying cigarette packs at points of sale, especially related to the Governor of DKI Jakarta's Call Number 8 of 2021 concerning Development of Smoking Prohibited Areas, is not a violation of trademark rights based on the Trademark Law. The absence of regulation on this matter in the Trademark Law indicates that there is a need to concretize regulations regarding the prohibition of displaying cigarette packs in the legal order of trademark rights in order to avoid excessive losses being borne by the owner of the trademark rights.

An Analysis of the Protection of Trademark Rights Related to the Prohibition on Displaying Cigarette Packs at Points of Sale Based on the Agreement on Trade-Related Aspects of Intellectual Property Rights

The protection of trademarks was first regulated in the Convention for the Protection of Industrial Property (hereinafter referred to as the "Paris Convention") in 1883. In this convention the principles of IPR protection and guidelines for the scope of IPR for countries in the world are regulated for the first time internationally. The arrangement concerning the protection of IPR that is most relevant in this research is the TRIPS Agreement. Where, in the history of the TRIPs negotiations, the discussion on public health issues is a topic that invites differences of opinion between developed and developing countries - including discussions on preventive efforts against the misuse of tobacco products for the health of the general public.

In fact, the TRIPs Agreement provides two safeguards for each country which provide individual freedom to comply with the human rights of their people in order to create freedom for a sovereign State.¹⁵ The first form of freedom is contained in Article 8 TRIPs which reads,

"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to 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."

¹⁴ Hidayah, Khoirul. (2017). *Hukum HKI Hak Kekayaan Intelektual*, Malang: Setara Press, p. 57.

¹⁵ Castro, Carla Frade de Paula. (2020). *Intellectual Property, Public Health and Tobacco: a new orientation for developing countries at the WTO?*. Brazil: Universidade de Brasília, hlm. 13, Available online from: https://bdm.unb.br/bitstream/10483/28539/1/2020_CarlaFradeDePaulaCastro_tcc.pdf.

With this regulation, countries have the right to issue policies in the national realm that are deemed necessary in order to safeguard their national interests, provided that these policies will not conflict with the basic principles of the WTO and also in the end may not create trade barriers for other countries. Such provisions then become one of the foundations for various countries to issue regulations to protect the health interests of their citizens.

The basis for protecting the trademark itself is contained in Article 16(1) TRIPS Agreement, where:

“The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use”

However, while TRIPs recognize trademarks as personal rights similar to the patents described in the Preamble, TRIPs appear to fail to recognize “the enjoyment of the right without discrimination”. When compared with the provisions regarding patents in Article 27, the term chosen to regulate Mark in Section 2, Part II of the TRIPS Agreement appears to be interpreted literally in a limited manner similar to Articles 15, 16, 17 and 20.¹⁶

As for the Doha Declaration on the TRIPs Agreement and Public Health 2001 (hereinafter referred to as, "Doha Declarations") a reference is set for interpreting the regulations in TRIPs, including the narrowing of protections that can be implemented by the State in accordance with TRIPs related to public health. This is stated in paragraph 4 of the Doha Declarations, which states that,

“We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.”

Furthermore, it is also emphasized in Article 5 regarding the flexibility that is recognized to be granted, with due observance of the regulations in the TRIPs, which

¹⁶ Suwan-in, Nattapong. “The Controversy of Trade in Tobacco and Protection of Public Health, A Study of Tobacco Control Measures and Impacts on Trademark Practice: The Stricter, The Better?”, *Indonesian Journal of International Law*, 11(4), p. 561.

include: a) the implementation of the provisions in the TRIPs Agreement is read by taking into account the aims and objectives of the agreement as stated, in particular, in its objectives and principles; b) the right to grant compulsory licenses and the freedom to determine the reasons for which such licenses are granted; c) the right to determine what constitutes a national emergency or other circumstances of extreme urgency, with the understanding that public health crises, including those related to HIV/AIDS, tuberculosis, malaria and other epidemics, may represent national emergencies or other emergencies.¹⁷

However, it should be noted that the legal status of the Doha Declarations itself is debatable. For this matter, the Researcher refers to the legal status of the Doha Declarations based on the jurisprudence of the Appellate Body's decision in the US - Clove Cigarettes case filed by Indonesia, as a further agreement as defined in Article 31(3)(a) VCLT 1969 and thus, the obligation and the flexibility of TRIPs should be interpreted in accordance with the declaration.¹⁸

Furthermore, in order for a country to justify deviations from the TRIPs regulations, there are justification reasons set out in various WTO agreements that need to be fulfilled. These specified standards are of sufficiently high standards to avoid abuse by member states. In the case of marks, Article 20 prohibits trademarks from being "unreasonably burdened by special requirements, such as use with other marks, use in a special form, or use in a way that is detrimental to their ability to distinguish the goods".

Therefore, based on the provisions and prohibitions contained in the TRIPs Agreement, the prohibition on displaying cigarette packs at points of sale is valid and legal. This argument is also supported by the existence of Article 1.1 TRIPs, which states that "Members are free to determine the appropriate method to apply the provisions of this Agreement in their own legal systems and practices." With the existence of this legal umbrella, it can be assumed that there is flexibility given to Members to interpret blanks where terms are not specified in the TRIPs.¹⁹ For example, in the context of patentable subject matter under Article 27, Members have flexibility in determining what is new, inventive, and utility. Likewise, Members have flexibility in determining what is justified under Article 20.²⁰

Using jurisprudence as an example, in the decision regarding the Plain Packaging Act policy that was enforced in Australia, the Court Panel decided that this provision did not conflict with the provisions in the TRIPs Agreement related to brands, as well as

¹⁷ Doha Declarations 2001, World Trade Organization, p. 25.

¹⁸ McGrady, Benn. (2012). "Revisiting TRIPs and Trademarks: The Case of Tobacco", Available online from: <https://ssrn.com/abstract=2144269> or <http://dx.doi.org/10.2139/ssrn.2144269>. [Accessed on August 10, 2022].

¹⁹ Nuno Pires De Carvalho. (2010). *The TRIPs Regime of Patent Rights*. Kluwer Law International: Belanda, p. 63

²⁰ Benn McGrady, *Op. Cit*, p.3.

the Agreement on Technical Barriers to Trade (“TBT”) and the General Agreement on Tariffs and Trade (“GATT”). Then, the panel also considered that there are no other policy alternatives that can effectively make an equal contribution to this policy in improving public health by reducing the use and adverse effects of tobacco products, so this policy can remain in effect.

With this rationalization, it can be concluded that the provisions prohibiting the display of cigarette packs at points of sale are legal and do not violate regulations regarding the protection of trademark rights in the TRIPs Agreement which are strengthened by the existence of a basis of urgency related to health.

CLOSING REMARKS

Basically, the legal theory of trademark protection as well as IPR in general needs to be protected on the basis of natural rights or natural law theory (*lex naturalis*) which are actually owned by the owner of the right. Meanwhile, the theory of utilitarianism is a theory which in this case can be used to override the protection of brand rights with public health as an interest that is more profitable for many parties. Furthermore, that the implementation of the Trademark Law in principle does not violate the WHO FCTC or TRIPS Agreement, in which the concept of the Prohibition of Displaying Cigarette Packs at Points of Sale as set forth in the DKI Jakarta Governor's Call Number 8 of 2021 is valid and can be strengthened by the existence of a basis of urgency related to Health.

REFERENCES

Books

- Hidayah, Khoirul. (2017). *Hukum HKI Hak Kekayaan Intelektual*, Malang: Setara Press.
- Lindsey, Tim., et. al. (2011). *Hak Kekayaan Intelektual Suatu Pengantar*. Bandung; PT. Alumni.
- Nuno Pires De Carvalho. (2010). *The TRIPS Regime of Patent Rights*. Kluwer Law International: Belanda.
- Soekanto, Soerjono & Mamudji, Sri. (2003). *Penelitian Hukum Normatif suatu Tinjauan Singkat*. Jakarta: UI press.
- Soemitro, Ronny Hanitjo. (1990). *Metodelogi Penulisan Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia.

Journal

- Cameng, Desak Ketut Juniari & Arifin. (2020). “Analisis Penerapan Kebijakan Earmarking Tax dari Dana Bagi Hasil Cukai Hasil Tembakau terhadap Kesehatan Masyarakat”, *Simposium Nasional Keuangan Negara*.

- Dharmawan, Ni Ketut Supasti. (2014). "Relevansi Hak Kekayaan Intelektual Dengan Hak Asasi Manusia Generasi Kedua". *Jurnal Dinamika Hukum*, 14(3).
- McGrady, Benn. (2012). "Revisiting TRIPS and Trademarks: The Case of Tobacco", Available online from: <https://ssrn.com/abstract=2144269> atau <http://dx.doi.org/10.2139/ssrn.2144269>.
- Suwan-in, Nattapong. "The Controversy of Trade in Tobacco and Protection of Public Health, A Study of Tobacco Control Measures and Impacts on Trademark Practice: The Stricter, The Better?", *Indonesian Journal of International Law*, 11(4).
- van Mourik, Dirk-Jan A. et. al. (2018). "Support for a point-of-sale cigarette display ban among smokers: findings from the international tobacco control (ITC) Netherlands survey". *BMC Public Health*, 18(740).
- van Rijn, MJ. Letter from the state secretary for Public Health Welfare and Sport (Originally Dutch: Brief van de staatssecretaris van Volksgezondheid Welzijn en Sport)", 2017, Available online from: <https://www.rijksoverheid.nl/ministeries/ministerie-van-volksgezondheid-welzijn-en-sport/documenten/kamerstukken/2017/07/05/kamerbrief-over-tabak-en-rookwaren>.

Laws and Regulation

Doha Declarations 2001, World Trade Organization.

Law Number 11 of 2020 concerning Job Creation.

Law Number 20 of 2016 concerning Trademarks and Geographical Indications.

Other Resources

- Besar. (2016), "Utilitarianisme dan Tujuan Perkembangan Hukum Multimedia di Indonesia", Rubric of Faculty Members Binus University, Universitas Bina Nusantara, Available online from: <https://business-law.binus.ac.id/2016/06/30/utilitarianisme-dan-tujuan-perkembangan-hukum-multimedia-di-indonesia/>
- Castro, Carla Frade de Paula. (2020). Intellectual Property, Public Health and Tobacco: a new orientation for developing countries at the WTO?. Brazil: Universidade de Brasília, hlm. 13, Available online from: https://bdm.unb.br/bitstream/10483/28539/1/2020_CarlaFradeDePaulaCastro_tcc.pdf.
- WHO Framework Convention on Tobacco Control, "History of the WHO FCFC Process". annex 1, hlm. 30, Available online from: <http://www.who.int/>, [Accessed on May 13, 2022].