

# Trademark Coexistence Agreement: Comparative Analysis between Indonesia and Singaporean Law

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## ABSTRACT

This study investigated the rise in trademark registrations, which, while fostering brand protection and supporting Indonesia's economy—especially SMEs—also heightens the potential for conflicts between brands. Singapore, recognized as an Asian intellectual property hub, has achieved greater success than Indonesia, despite both nations ratifying similar international IP conventions. The findings revealed Singapore's comprehensive trademark protection measures, including strict preventive and repressive approaches, along with specific exceptions for similar marks. A key distinction lies in Singapore's regulation of Trade Coexistence Agreements, allowing similar trademarks to coexist under stringent case-by-case evaluations. With Indonesia's larger volume of registered trademarks, the study concluded that addressing the legal gap surrounding similar trademarks is imperative for the country's economic framework

**Key Words:** Trademark Coexistence Agreement, Intellectual Protection, Marks

## INTISARI

Penelitian ini menyelidiki peningkatan pendaftaran merek dagang, yang meskipun memperkuat perlindungan merek dan mendukung perekonomian Indonesia terutama UMKM juga meningkatkan potensi konflik antar merek. Singapura, yang dikenal sebagai pusat kekayaan intelektual di Asia, telah mencapai kesuksesan yang lebih besar dibandingkan Indonesia, meskipun kedua negara telah meratifikasi konvensi HKI internasional yang serupa. Temuan penelitian ini mengungkap bahwa Singapura menerapkan langkah-langkah perlindungan merek yang komprehensif, termasuk pendekatan preventif dan represif yang ketat, serta pengecualian khusus untuk merek yang serupa. Perbedaan utama terletak pada regulasi Singapura mengenai *Trade Coexistence Agreements*, yang memungkinkan merek dagang serupa untuk berdampingan melalui evaluasi ketat berdasarkan kasus per kasus. Dengan volume merek dagang terdaftar yang lebih besar, penelitian ini menyimpulkan bahwa penting bagi Indonesia untuk mengatasi kesenjangan hukum terkait merek serupa dalam kerangka ekonominya.

**Kata Kunci:** Perjanjian Simpanan Merek Bersama, Hak Kekayaan Intelektual, Merek

## INTRODUCTION

Trademark law exist to foster market competition<sup>1</sup>, serving as a tool for “source significance”<sup>2</sup> enabling consumers to associate a specific trademark with a particular producer.<sup>3</sup> The exclusive rights granted to trademarks benefit producers as they ensure the sales of their product rather than diverting them to competitors with similar characteristics.<sup>4</sup> Notably, its benefits can only be felt if other trademarks do not duplicate it.<sup>5</sup> For high-quality brands, trademarks are a priceless asset, denote enforcement powers of the qualities of a product, which reduces a consumer’s cost of research and can potentially result in a rise in sales (well-known mark).<sup>6</sup>

Consequently, the most crucial role of a trademark is its distinctiveness, which becomes increasingly vital as there is a rise in unregistered marks that overlap with one another, creating confusion. This situation prevents brands from fully reaping the benefits of trademark protection since the public eye cannot distinguish one brand from another. Scherter views that to preserve a trademark’s individuality or uniqueness, all other similar trademarks must be prohibited, even if other brands operate in different industries.<sup>7</sup> Indonesia upholds the *first-to-file* principle, wherein the first mark of its kind to be registered to the “general register of trademarks” are granted rights and protection by the state for a specific period.<sup>8</sup> But in reality, counterfeited trademarks are on the rise,<sup>9</sup> there are still many similar trademarks that exist especially to well-known-marks, due to the lack of clear norms for the application of the “essential similarity” element and criteria for well-known trademarks. This results into numerous trademark disputes revolving around internationally recognized brands.<sup>10</sup>

Trademark disputes can be resolved through litigation and non-litigation procedures. However, in practice, pursuing litigation to resolve trademark disputes leads to high legal costs and inefficiencies. Due to these facts, WIPO recommended the Trade Coexistence Agreement (hereinafter known as “TCA”) as an alternative to the typical dispute resolution form, litigation.<sup>11</sup> The TCA allows already registered trademarks to coexist with other trademarks that share similarities. Meaning that this

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<sup>1</sup> Christopher Buccafusco, Jonathan S. Masur and Mark P McKenna, ‘Competition and Congestion in Trademark Law’ (2022).

<sup>2</sup> *Ibid*

<sup>3</sup> Saidin, *Aspek Hukum Hak Kekayaan Intelektual* (1st edn, Raja Grafindo Persada 2007).

<sup>4</sup> United States Patent and Trademark Office v Booking.com B.V. 591 US\_\_\_\_(2020) [6] (Ginsburg J).

<sup>5</sup> William M. Landes and Richard A. Posner, ‘Trademark Law: An Economic Perspective ’ (2005) 30 *Journal of Law and Economic* 269.

<sup>6</sup> *Ibid*

<sup>7</sup> M. Landas and others, ‘Trademark Law: An Economic Perspective’ 269.

<sup>8</sup> Raden Fajar and others, ‘Efektivitas Prinsip First To File Pada Sistem Pendaftaran Merek Dalm Melindungi Hak Merek’ (2023) 11 *Jurnal Privat Law* 12 <<https://jurnal.uns.ac.id/privatlaw/article/view/47322>> accessed 4 November 2024.

<sup>9</sup> Weriansyah, A., & Ramadani, A. P. (2022). The Analysis of Corporate Crime in Indonesia’s Intellectual Property Laws. *Global Legal Review*, 2(1), 53. <https://doi.org/10.19166/blr.v2i1.5139>

<sup>10</sup> Fajar and others, ‘Efektivitas Prinsip First To File’ 19.

A TCA divides the scope of commercial activities and areas of business production of each of its parties, aiming to prevent disputes and delineate the rights related to using similar marks. Its nature is quite rigid, as it sets out how each party may use a certain brand name and logo and often contains geographical restrictions on the goods or services.<sup>12</sup> However, this rigidity allows parties to coexist without any likelihood of confusion.<sup>13</sup> By establishing clear distinctions between the scope of products or services, the TCA prevents public confusion without requiring either party to change their trademarks.<sup>14</sup> Although it is highly efficient, the TCA has yet to receive enough recognition from academics or the courts.<sup>15</sup>

A prominent case that illustrates both the potential and limitations of TCAs is the dispute between an American brand Digi International Inc. and a Singaporean brand, Teraoka Seiko, which both operate in the electronic tool sector.<sup>16</sup> After numerous disputes, the parties finally agreed to resolve it through a TCA. However, Teraoka Seiko sued Digi International for modifying its logo, citing a breach of the agreement, revealing potential limitations of TCAs upon commercial flexibility.<sup>17</sup>

On the other hand, the Apple Corps vs Apple Computer case exemplifies the benefits of a well-constructed TCA. After entering into several disputes, the existing parties had finally reached a settlement through a TCA, allowing Apple Computer the exclusive rights to use its Apple marks “on or in connection with electronic goods, computer software, data processing, and data transmission services”.<sup>18</sup> Whereas Apple Corps is given the exclusive rights to use its own Apple Trademarks “on or in connection with any current or future creative work whose principle contents was music and/or musical performances, regardless of how those works were recorded, or communicated, whether tangible or intangible.”<sup>19</sup> This clear delineation of rights allowed both parties to avoid consumer confusion and continue using their respective trademarks without further conflict.

Indonesia has yet to apply the TCA as a form of alternative to litigation for resolving trademark disputes, though it is becoming increasingly necessary. In Indonesia, Small and Medium-scale

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<sup>12</sup> *Ibid*

<sup>13</sup> Marianna Moss, ‘Trademark Coexistence Agreements: Legitimate Contracts or Tools of Consumer Deception?’ (2005) 18 197 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=916551](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=916551)> accessed 4 November 2024.

<sup>14</sup> WIPO, ‘Trademark Coexistence’

<sup>15</sup> Carin Thomsen, ‘Trademark Co-Existence Agreements in the Perspective of EU Competition Law’ (University of Gothenburg 2012).

<sup>16</sup> Teraoka Seiko Co., Ltd v Digi International Inc [2020] SGIPOS 1

<sup>17</sup> Practical Law Intellectual Property & Technology, ‘Benefits and Risks of Trademark Coexistence Agreements’ (*Reuters*, 2013) <[https://uk.practicallaw.thomsonreuters.com/4-540-5507?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/4-540-5507?transitionType=Default&contextData=(sc.Default))> accessed 4 November 2024.

<sup>18</sup> Apple Corps Ltd v Apple Computer, Inc [2006] EWthoHC 996 (Ch) [1.2].

<sup>19</sup> Apple Corps Ltd v Apple Computer, Inc [2006] EWHC 996 (Ch) [1.3].

Enterprises (herein shall be referred to as “SME”) contributes over 61,07% of Indonesia’s GDP.<sup>20</sup> According to the Directory General of Intellectual Property (herein shall be referred to as “DGIP”), there is a total of 411.458 registered trademarks in Indonesia.<sup>21</sup> However, this number just covers a fraction of the total amount of SMEs that are up to 65.465.497 as of 2019. The lack of awareness regarding the importance of trademarking a brand is a common cause of business failure.<sup>22</sup>

Indonesia’s ratification of the Madrid Protocol in 2017 has further complicated the landscape<sup>23</sup> While the protocol streamlines the process for local brands to trademark their brands internationally (in state member countries). But on the other hand, the protocol leads to a potential influx of international trademarks into the Indonesian market, potentially leads to market saturation and an increase in similar trademarks, particularly affecting local SMEs. In this context, TCAs could serve as a valuable tool to prevent disputes and manage the overlapping use of trademarks.

Indonesia’s statute of Law of The Republic of Indonesia Number 20 of 2016 on Marks and Geographical Indications (herein shall be referred to as “**Law No. 20/2016**”) still has some gaps compared to Singapore’s trademark regulations. According to the World Economic Forum’s Global Competitiveness Report 2019, Singapore is ranked Asia’s best IP Regime, known for its business-friendly approach, boosting business growth.<sup>24</sup> Singapore’s reputation of being reliable in aiding businesses development is mainly due to their IP framework, which effectively protects trademarks and other forms of IP executed by the Intellectual Property Office of Singapore. As of 2020, there are approximately 53,000 trademark classes that were filled in Singapore. Thus, it’s no surprise that Singapore has successfully established itself as an IP hub serving markets in Southeast Asia.

Indonesia could benefit from studying Singapore’s IP framework to enhance its own trademark regime. This research paper shall examine and compare the varying regulations of trademark law and trademark coexistence agreements. This concludes the research question: **To what extent are Indonesia’s regulations upon trademarks addressed and effectively regulated trade coexistence agreements compared to the regulations implemented by Singapore?**

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<sup>20</sup> Sulastris, ‘Peran Penting UMKM Dalam Ancaman Isu Resesi’ (*Kementerian Keuangan Republik Indonesia*, 2022) <<https://www.djkn.kemenkeu.go.id/kpkn-balikpapan/baca-artikel/15677/Peran-Penting-UMKM-dalam-Ancaman-Isu-Resesi.html>> accessed 4 November 2024.

<sup>21</sup> ‘Laporan Tahunan Direktorat Jenderal Kekayaan Intelektual’ (2020).

<sup>22</sup> Rieke Caroline, ‘Knowing the Difference between Intellectual Property, Copyright and Trademark’ (<https://www.hukumonline.com/klinik/a/merek-terkenal-yang-tidak-terdaftar-cl5892/>, 2019) <<https://www.thejakartapost.com/life/2019/11/21/knowing-the-difference-between-intellectual-property-copyright-and-trademark.html>> accessed 4 November 2024.

<sup>23</sup> Fathan Qorib, ‘Indonesia Jadi Anggota Protokol Madrid, Pendaftaran Merek Diperluas’ (*Hukumonline*, 2017) <<https://www.hukumonline.com/berita/a/indonesia-jadi-anggota-protokol-madrid--pendaftaran-merek-diperluas-lt59d335bdce7e1/>> accessed 4 November 2024.

<sup>24</sup> Allesia Eureka and others, ‘Perbandingan Pelaksanaan Trademark Coexistence Agreement Di Indonesia Dan Singapura’ BLS Legal News and Views (2020) 5.

## **METHODOLOGY**

This research paper uses a normative legal approach, deriving information by extracting existing legal principles and doctrines. This research will also be approached in a comparative study to analyze and explore how different jurisdictions and legal systems regulate trademark coexistence agreements. The information that comprises this research is sourced from legislations and regulations (primary resources), as well as journals and articles (secondary resources).

## **FINDINGS**

### **1.1 General Overview Regarding The Definition and Classification of Trademarks**

#### **1.1.1 Definition and Types of Trademarks in Indonesia**

Indonesia's first regime regulating trademark protection was first formed by ratifying the Paris Convention. Through several developments, Indonesia's most current and comprehensive statute now adheres to the standards of other international conventions such as the TRIPS Agreement, known as The Law of The Republic of Indonesia Number 20 of 2016 On Marks and Geographical Indications (herein and after known as "**The Trademark Law**"). According to the first article of the trademark law:

*"Mark means any sign capable of being represented graphically in the form of drawings, logos, names, words, letters, numerals, colors arrangement, in 2 (two) and/or 3 (three) dimensional shape, sounds, holograms, or combination of 2 (two) or more of those elements to distinguish goods and/or services produced by a person or legal entity in trading goods and/or services."*

Article 1 no. 1 indicates that the scope of the trademark has been expanded to protect both conventional and non-conventional trademarks. Examples of non-conventional aspects of trademark include visible and non-visible elements like two-or three-dimensional forms, sounds and holograms, and or combinations of such features. Furthermore, in line with Article 1 no. 2. acceptable trademarks are unique and can carve a brand's individuality that is registered by a person or several persons or a legal entity. The purpose is to ensure a trademark is distinguishable from other similar brands. This would indicate that Indonesia's set of standards for a trademark governs that a trademark cannot be too simple, such as only having a straight line, and cannot be overly complicated so that it's visually incomprehensible. Besides trademarks, this statute also acknowledges and addresses service marks, collective marks, and well-known marks by WIPO.

#### **1.1.2 Definition and types of Trademarks in Singapore**

Different from the Indonesian statute, the Singapore trademark statute does not directly define trademarks, however, according to the Intellectual Property of Singapore Office, a trademark must meet the conditions of

*(i) the sign must be capable of being represented graphically, and*  
*(ii) the sign must be capable of distinguishing the goods or services dealt with or provided in the course of trade by a person from those provided by another person. The definition of "sign" is an open or inclusive definition, in that the definition merely lists some examples of what may constitute a sign.*

Intellectual Property Office of Singapore (herein and after known as “IPOS”) and DGIP, in general, indicate that the two regimes have an aligned definition regarding trademarks due to Indonesia based its trademark regime on the Singapore Treaty on trademarks. However, Singapore's definition set an indirectly higher standard based upon the jurisprudence Case C-273/000 by the ECJ that ruled, graphics of a trademark must be presented in a way that is “clear, precise, self-contained, easily accessible, intelligible, durable, and objective”.

Since IPOS acknowledges the potential confusion that trademarks might cause, the Trademark Act emphasizes that a trademark must be precisely represented to allow thorough examination prior to registration. This regime also highlights a trademark must satisfy other stakeholders. Firstly, a trademark should fulfill the public's expectations, as it must clearly reflect the nature of the mark sought for registration. The trademarks must be self-contained, easily accessible, and intelligible. Secondly, trademarks should meet the standards of current, and prospective competitors, ensuring transparency and accessibility for fair competition. Finally, IPOS addressed the most important aspect of a trademark is its originality. To guarantee originality, the regime asserted a trademark must be unambiguously unique and avoid any visual resemblance to other marks. This is achievable if a mark graphically represents purely itself, maintaining its distinct identity in the market.

<b>DIFFERENCES OF ELEMENTS OF A TRADEMARK</b>	
<b>SINGAPORE</b>	<b>INDONESIA</b>
Shape marks	Two-dimensional shapes and three-dimensional shapes
Pictorial, figurative or word marks incorporating color	Logos
Colors	Color arrangement
Sound	Sounds
Scent	Letters
Moving marks	Numerals
Holograms	Holograms
	Words
	Letters
	Name

Figure 1. Types of Marks in Singapore and Indonesia

As seen here, Indonesia does not regulate non-traditional marks, such as scent marks, nor does it regulate moving marks. However, Singapore also does not regulate some of Indonesia's elements, such as names and numerals.

## **1.2 General Overview Regarding The Registration Process of Trademarks**

The main distinction between trademarks and any other forms of intellectual property is the requirement of registration. An inventor of a copyrightable item automatically owns the copyright to their invention, this differs from trademarks that require the inventor of a brand to register it to claim ownership over it.<sup>25</sup> The regulations over trademarks differ by each country. However, both Indonesia and Singapore implement the *first-to-file* system. Nonetheless, there are still varying differences in how both countries regulate trademark registration.

### **1.2.1 Registration Process of a Trademark in Indonesia**

A crucial aspect of The Indonesian trademark regime is that it upholds the first-to-file principle, meaning that the party who registers the trademark first shall obtain legal protection, and can claim exclusive economic rights. Consequently, brands that have used trademarks for the first time but

<sup>25</sup>Rieke Caroline, 'Knowing the Difference between Intellectual Property, Copyright and Trademark'







system is followed by an announcement period lasting for 2 (two) months, giving room for third parties to file an opposition. If an opposition is submitted, the trademark applicant shall go through a substantive examination generally completed in 5 (five) months and be officialized with an issued trademark certificate.

Moreover, the trademark law has created a system for international marks that wish to register their trademark under Indonesian Law. Priority rights shall only be recognized by applicants who originated from countries that are members of the Paris Convention for the Protection of Industrial Property. It is noteworthy to elaborate further that the registration of international brands must follow the Madrid Protocol. Trademark applications shall only be acknowledged as a priority if the application is filed within not later than 6 (six) months from the filing date.

### 1.2.2 Registration Process of a Trademark in Singapore

The Trademark Act set a few key features that affect the registration process in Singapore. Firstly, identical to Indonesia, the registration of a trademark is territorial. Thus, a registered trademark from a different country is not automatically transferable to Singapore. Secondly, Singapore is also a party to the Madrid Protocol and can internationally register its local trademarks to its counterparts and vice versa. Thirdly, Singapore also follows the first-to-file principle; thus, it is crucial to register trademarks to receive legal protection quickly. According to Article 4 Section 1, a registered trademark is a form of property right which can only be obtained through registering for a trademark under this act.

The registration process of a trademark in Singapore most likely will take a year illustrated in the table below

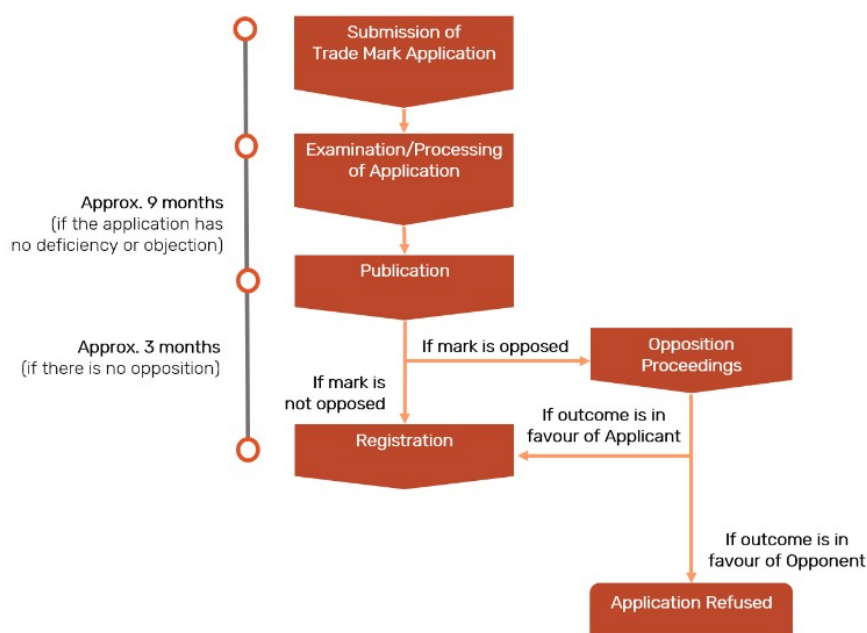


Figure 3. Illustration Process of Trademark Registration by IPOS

The procedure for application checking is quite extensive (9 months), where the office performs an in-depth review of the application to ensure that it is complete, complies with the provisions and all necessary fees had been paid. Afterward, the office shall examine to search for possible conflicting marks, geographical names, and conformances of international classifications of goods and services. If a potential conflict is found, the application will be automatically rejected, notably the applicant is given the choice to amend the application. If no potential conflicts are found/ or a conflict has been resolved, the office shall ensure that the mark does not fit any form of mark that are illegal (ex: devoid marks). Lastly, the successful marks who are at the last step of registration shall be publishing the application in the Trade Marks Journal. During this period, oppositions derived from other parties are welcomed for 2 (two) months, if the applicant receives an objection they must immediately submit a counter-statement to resolve the issue. After possible disputes are solved, a certificate shall be issued marking its success in trademark registration.<sup>27</sup>

Although the regulations regarding trademark registration in Indonesia are roughly similar to the those in Singapore, the comprehensive and detailed investigation process carried out by the IPOS is the main factor in providing strong intellectual property protection of registered trademarks- an area where Indonesia currently falls short. This suggests that Indonesia must enhance its trademark examination procedures to better safeguard already existing trademarks, and reduce trademark-related crimes such as infringements.

### 1.3 The Time Period of Trademark Protection

#### 1.3.1 Time period of trademark protection in Indonesia and Singapore

Country	Duration of Trademark	Period To Apply for Renewal	Duration of Renewal
Indonesia	10 years	6 months before expiration	10 years
Singapore	10 years	6 months before expiration	10 Years

Figure 4. Illustration of Time Period of Trademark Protection

In Indonesia, after a trademark application has been accepted, an existing mark enjoys the legal protection of 10 (ten) years as of the filing date. To add on, the mark may also be renewed for the same period with the following criteria. However, in cases where a mark is in the form of a company logo, or legal entity, the procedural of renewal only requires the mark owner to submit a

<sup>27</sup> 'Business Solutions in Singapore | Hawksford' <<https://www.hawksford.com/guideme/singapore>> accessed 4 November 2024.

payment of a prescribed fee within a period of 6 (six months), before the expiration of trademark protection. Singapore has an identical framework for the duration of trademark protection, lasting for about 10 (ten) years, followed by a prescribed fee for a renewal that must be made 6 months prior to the expiration of trademark protection.

## 1.4 Total Registered Trademarks

### 1.4.1 Total Registered Trademarks in Indonesia



Figure 5: Bar Chart of Trademarks Registered in Indonesia<sup>28</sup>

The diagram above depicts the number of registered trademarks in Indonesia from 2015 to 2021 based on data from the Directorate General of Intellectual Property (herein and after known as “DGIP”). Over the six-year period, the number of trademarks has shown a steady increase, totaling 312,870 registered trademarks, nearly doubling in size. This depicts that Indonesian entrepreneurs are slowly gaining awareness of the importance of trademark protection. Consequently, both the DGIP alongside the Indonesian economy must prepare for the surge in trademarks and the flaws that comes with it such as a rise in trademarks similarity.

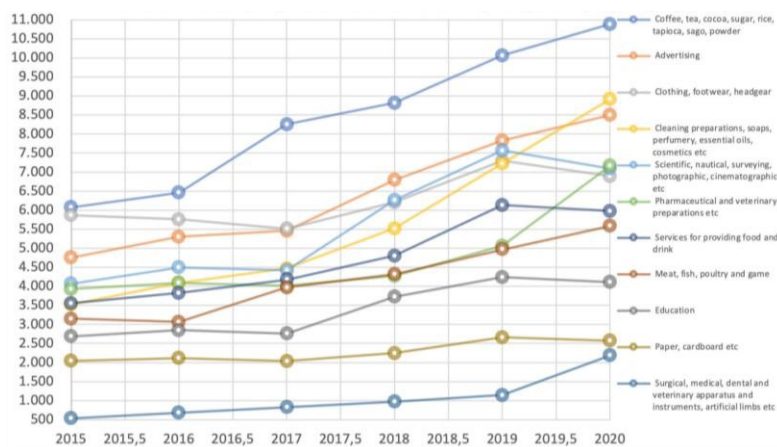


Figure 7: Bar Chart of Trademarks Registered in Indonesia<sup>29</sup>

<sup>28</sup>Directorate General Intellectual Property, ‘Laporan Tahunan Direktorat Jendral Kekayaan Intelektual’ (2021).

<sup>29</sup>Directorate General Intellectual Property, ‘Laporan Tahunan Direktorat Jendral Kekayaan Intelektual’ (2020).

This bar chart illustrates the steady rise in trademark applications in Indonesia, detailing specific classification of goods and services. Approximately 11.000 applications have been submitted for goods such as coffee, tea, cocoa sugar, rice, tapioca, sago and powder, followed by 10.000 applications for services, like advertising. Thus, the large amount of trademark registration may heighten the probability of similar trademarks emerging in Indonesia.

### 1.4.2 Total Registered Trademarks in Singapore

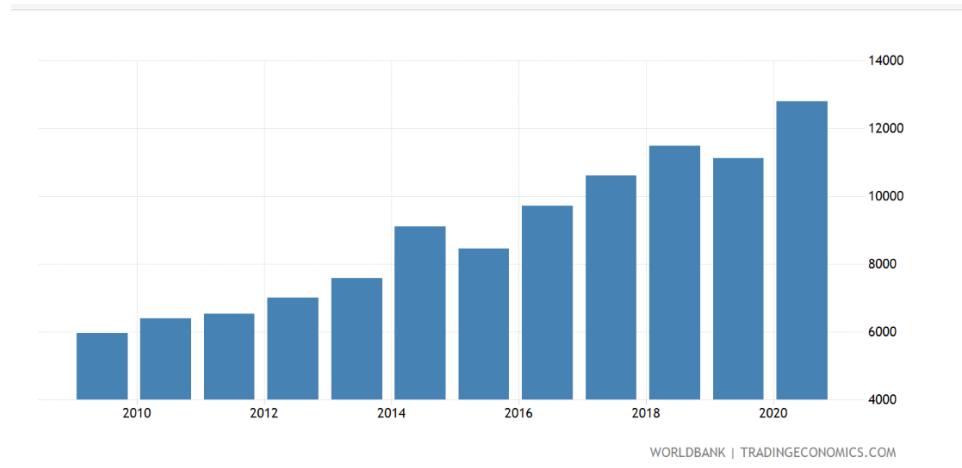


Figure 6: Bar Chart of Trademarks Registered in Singapore<sup>30</sup>

The diagram depicts the total registered trademarks of Singapore over 10 years. Singapore had a steady yet higher growth than Indonesia's regime. This would indicate that entrepreneurs were more prepared to register for trademarks thus a swifter process of adapting. However, an important factor worth noting between Indonesia's and Singapore's Trademark regimes is that Indonesia has a significantly higher number of trademarks compared to Singapore, with a total difference of 710,328. This further highlights the urgency of Indonesia to address and regulate the TCA

## 2.1 General Overview of Trademark Coexistence Law

TCA or delimitation agreements is a form of "prevention" formed by two enterprises, that have similar or identical trademarks in different commercial fields and areas of production. Such an agreement provided a solution so that those two parties could maintain their trademarks without breaching intellectual property law, such as forms of infringement. The terms of a TCA may be based on either the extent of territories of each party or specific fields of use of the goods/ and or services produced by the existing parties.<sup>31</sup>

### 2.1.1 Indonesia

#### 2.1.1.1 Scope of Regulations Regarding Trademark Protection in Indonesia

As enshrined in Article 3 of the Trademark Law, a right on mark can only be obtained by registered trademarks. This is in line with Indonesia's adherence to the first-to-file principle, meaning

<sup>30</sup> 'Singapore - Trademark Applications, Resident, By Count - 2024 Data 2025 Forecast 2004-2021 Historical' <<https://tradingeconomics.com/singapore/trademark-applications-resident-by-count-wb-data.html>> accessed 4 November 2024.

<sup>31</sup> Loc.cit, Trademark Coexistence Agreement

trademark protection is granted solely to marks registered with the DGIP, which have received an official certificate and has been published in the Trademark Gazette by the Minister. Protection is provided through regulations and is enforced through enacting sanctions.<sup>32</sup> This is imperative, owing to the fact that crimes such as trademark counterfeits and forms of piracy are on the rise in Indonesia. Trademark protections for registered trademarks shall be in the form of twofold: firstly, protection as a form of *prevention* and protection as a form of *repression*.<sup>33</sup> Both aim to enforce the function of law to provide justice, order, and certainty.

### 1) Protection in the Form of Prevention

The earliest form of trademark protection is conducted during the application process by the DGIP. The registration process involves a formal examination process, that filters our applications not following the basic requirements of a trademark application such as identification information of applicants, payment of registration fee, and applications under the address of the proxy in Indonesia, specifically entailed in Article 4, Article 5, Article 6, Article 7, Article 9, and Article 10. If such requirements are incomplete, applicants are given a certain timeframe to correct the deficiencies. Should they fail to do so, the Minister may deem the application withdrawn.

Beyond formality checks, applications undergo a substantive review. that shifts the burden of proof to oppositions of a trademark claim. This is in line with the principle of *actori in cambit probatio* within Article 1865 of the Indonesian Civil Code that rules the burden or shall lie with anyone who submits the civil claims. Consequently, this places a larger burden on businesses to prevent trademark conflicts and infringements. prevent forms of trademark collisions and/or trademark infringements. The minister may reject trademarks that conflict Indonesian ideology, laws, public order, or morality.

Furthermore, to prevent public confusion, the DGIP shall examine applications grounds for similarity to existing trademarks, particularly protecting well-known marks by applying stricter scrutiny to ensure no similar marks are registered. The doctrine of “*nearly resembles*” stipulates the grounds of similarity is if a trademark is identical or almost identical with another trademark, particularly regarding the color, sound, image, and order of phrases. Similarity may result in actual confusion or even deception of consumers. Meaning that applications resembling registered geographical indications may be refused. As enshrined in Article 17 (1) of the Ministry of Law and Human Rights Regulation No. 67 of 2016, the assessment of substantial similarity will consider phonetic resemblance, similarity in meaning and visual similarity. In the case of opposition claim is rejected, the opposing party is given the right to submit an appeal.

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<sup>32</sup> Mahrus Ali and others, ‘Protecting Environment through Criminal Sanction Aggravation’ (2022) 7 Journal of Indonesian Legal Studies 191.

<sup>33</sup> Muhammad Shuhufi and Firdayanti, ‘A Comparative Analysis of Trademark Rights Protection’ [2023] Mazahibuna 18.

Article 70 jo. 71 mandates the government must take affirmative actions to prevent infringements of registered trademarks, specifically in cases where geographical indications have been supervised and promoted by both the central as well as regional governments. The Trademark Law provides equal opportunity regardless of its origins, forged as priority rights under the National Treatment (NT) and Most Favorite Nation (MFN) principles set out in the TRIPS, The Paris Convention and GATT.<sup>34</sup> Of course this is to ensure that the Indonesian government treats foreign and domestic trademark application equally. This is also in line with the mandate given by WTO, wherein The Minister of IP is obligated to give unbiased treatment to all existing members of the WTO.<sup>35</sup>

## 2) Protection in The Form of Repression

Remedies provided for parties whom suffer from Trademark infringement may be conducted through civil actions such as claims for damages and cessation of the unlawful act by the infringer, filled to with the commercial court and criminal sanctions. When an infringement is confirmed, the DGIP may impose sanctions such as fines or imprisonment as enshrined in Article 100 of the Trademark Law. To curb the release of counterfeit goods into the market, the Trademark Law established several regulations. This includes Article 100 which sets the ground in which any party who uses similar or identical marks as registered brand owners, shall be considered an act of infringement.

Lucky Setiawati had also voiced out that parties that trade goods that are a product of a breach in article 100 and are aware of it, may also be punished.<sup>36</sup> In such cases of infringement of any mark or geographical indication, parties that are found guilty shall be punished with up to 5 (five) years of imprisonment or fines of Rp2,000,000,000.00 (two billion rupiahs). An example case of this is the case of the Adidas Brand with the registered case of No. 111/Brand/2011/PN. Niaga. Jkt. Pst, suing Zul Achyar BH Bustama, for actions of infringing the iconic Adidas 3-Stripe logo. The court had found Bustama to be guilty of infringing Adidas's mark on the grounds that it had illegally used similar marks that caused confusion.<sup>37</sup>

### 2.1.1.2 Regulations upon the Trademark Coexistence Agreement in Indonesia

<sup>34</sup> Rahmi Jened, *Hukum Merek (Trademark Law) : Dalam Era Global & Integrasi Ekonomi* (1st edn, Prenadamedia Group 2015).

<sup>35</sup> Ni Ketut Supasti Dharmawan, 'Keberadaan Dan Implikasi Prinsip MFN Dan NT Dalam Pengaturan Hak Kekayaan Intelektual Di Indonesia' (2014) 3 *Jurnal Magister Hukum Udayana* (Udayana Master Law Journal).

<sup>36</sup> Lucky Setiawan, 'Perlindungan Merek Terkenal Yang Tidak Terdaftar Di Indonesia'

(<https://www.hukumonline.com/klinik/a/merek-terkenal-yang-tidak-terdaftar-cl5892/>, 2019)

<<https://www.hukumonline.com/klinik/a/merek-terkenal-yang-tidak-terdaftar-cl5892/>> accessed 4 November 2024. Shuhufi and others, 'A Comparative Analysis of Trademark Rights Protection: Perspectives from Islamic Law and Positive Law in Indonesia' 21.



Currently, Indonesia has yet to have a *lex specialis* that addresses nor permits trademark coexistence agreements. The closest mechanism available under Indonesian law is the license agreement. According to Article 1 point 13, A license agreement permits trademark owners to authorize third parties to use their registered trademarks, either fully or partially, for a range of goods and/or services for a defined period of time. The license agreement aims to drive the commercialization of intellectual property in the form of royalty and increase its brand awareness.<sup>38</sup> However, the issue remains that license agreements do not resolve trademark owners over similar marks, highlighting a gap that TCAs might otherwise fill.

Despite this gap, TCAs remain unrecognized within the Indonesian legal system. While there is no form of prohibition on letters of consent, such absence does not entail that the minister will register a trademark application that submits a TCA. Since the rejection of a trademark application is limited to Article 21 of the trademark law mandates that similar marks to existing trademarks shall be denied, without any form of exceptions, leaving no room for coexistence agreements to form any grounds of approval. From another perspective, TCAs also are not recognized as valid agreements under Indonesian Civil Law, as it does not fulfil the requirement stipulated in Article 1320 of the Civil Code, namely the requirement of a lawful cause. Consequently, the Ministry of Law and Human Rights has yet to recognised TCAs as a legitimate exception for permitting similar trademarks.

Article 93 of the Trademark Law further limits the available remedies for trademark infringement outside of court litigation to arbitration or alternative dispute resolution mechanisms as enshrined in Law no. 30 1999 regarding dispute settlement. To add one, below is a graph showing the trend in registered trademarks in Indonesia. As discussed in *supra*, given Indonesia's substantial volume of trademarks, specifically owned by SME's in Indonesia, the likelihood of similar or identical trademarks is high. Traditional dispute resolutions can be costly and lengthy, which may hinder actual trademark owners who suffered a loss due to infringement from receiving justice and impede trademark owners from achieving timely settlements.

Such conditions underscore the need for a new framework that may accommodate TCA's as a proactive solution for resolving trademark disputes and reduce reliance on formal dispute resolution processes that are unnecessary. Such a framework would provide significant support for SMEs and facilitate efficient, collaborative solutions for managing overlapping trademark interests in Indonesia. If Indonesia does not address these pressing issues, the Indonesian legal system is in risk of exacerbating the challenges associated with similar trademarks, potentially leading to more significant legal and commercial conflicts.

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<sup>38</sup> Agung Sujatmiko, 'Perjanjian Lisensi Merek Terkenal' (2012) 22 *Mimbar Hukum* - Fakultas Hukum Universitas Gadjah Mada 254.



## 2.1.2 Singapore

### 2.1.2.1 Protection for Trade Marks in Singapore

The form of protection given to registered trademarks is twofold: prevention and repression as applied in Indonesia. Singapore was once categorized as “the piracy capital of the world” by J. Leahy in 1984.<sup>39</sup> Since then, Singapore has conducted extensive work to develop its IP Regime. Interestingly, in less than three decades, Singapore experienced rapid economic growth and is now regarded as one of the best IP Regimes in Asia.<sup>40</sup> Indonesia had also changed, such as ratifying its legislative frameworks to meet the standards of the TRIPS Agreement; however, until now, Indonesia has not experienced such positive outcomes. Below is a comparison between the protection scheme of Singapore’s trademarks and Indonesia’s.

#### 1) Not Registering a Trademark Forms of Protection

Even though Singapore utilizes the first-to-file principle, unlike Indonesia, Singapore’s legal system is based on the common law system. This consequently results in registering a trademark not being compulsory. Individuals, firms, or any other legal entity that owns a trademark and utilizes it in connection with its products (goods/and or services) acquire common law rights of that mark by its use and built-up reputation. However, unregistered trademarks can only rely on “passing off” to protect marks against infringements or unauthorized use by other parties. The decisions upon traders will solely rely on past precedents and are not protected by the trademark act. This can be very risky for new entrepreneurs as they will have to prove their reputation and goodwill or the use of the trademark in the court of Singapore.

#### 2) Protection In the Form of Prevention

However, traders who have successfully registered their trademarks will receive more secure forms of protection from the very strict registration process that filters later trademarks that are similar or identical to already registered ones. A strict registration process declines any applicant with similar marks, preventing possible collisions that may lead to trademark counterfeits and any other form of infringement. This allows registered trademarks to enjoy the benefit of a statutory monopoly in the form of having its registration as proof of his right to the mark and enable him to sue other parties for trademark infringements.

Singapore, in general, has two forms of refusals of an applicant's registrations, namely absolute grounds for refusal and relative grounds for refusal. Below is a diagram of the absolute grounds of refusals.

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<sup>39</sup>Lee Kuan Yew School of Public Policy and Microsoft, The Development of Singapore’s Intellectual Property Rights Regime (2014) 3 <[https://lkyspp.nus.edu.sg/docs/default-source/case-studies/lkwms\\_series01\\_sg\\_ip.pdf?sfvrsn=5135960b\\_2](https://lkyspp.nus.edu.sg/docs/default-source/case-studies/lkwms_series01_sg_ip.pdf?sfvrsn=5135960b_2)>.

<sup>40</sup> *Ibid*

Descriptive Marks	Marks that use words that are descriptive of the quality, quantity, value, intended purpose, or geographical origin of their goods/and or services. Examples of these are using words such as (“super”) for quality, (“five tons”) for quantity, (“cheap) for value, and ( “whiter”) for intended purposes.
Marks ‘common to the trade’	Marks that use common words, that in consequence have become an indicator or a sign of a specific product in the field. An example of this is “escalator”, a word that has become customary in the industry.
Marks contrary to public policy or morality	Marks that contain meanings of morality or public decency. Examples of these are marks containing slurs.
Deceptive Marks	Marks are constructed with the intention and attempt to deceive the public eye. Usually misrepresented or create claims about the nature, quality, or geographical origins of goods/ and or services
Marks that are identical to earlier marks	These are marks that are similar or identical to an earlier mark that has already been registered as a trademark that is protected in Singapore. More specifically, marks that are identical or similar to goods and or services are applying for the same geographical indication as the already registered mark
Shapes with certain	Trademarks that consist of Shapes which result from the nature of the goods themselves Shapes of goods that are necessary to obtain a technical result Shapes that give substantial value to the goods

Figure 7. Illustration of Absolute Grounds of Refusal<sup>41</sup>

Nonetheless, there are certain exceptions to be made for specific applicants. Firstly, the element of good faith makes an amazing exception and is proven through its continuous use in good faith. Furthermore, the application shall be accepted if the applicant's predecessor applied before the 15th of January 1999 or before the geographical indication in question is protected in its country of origin. A trademark cannot be refused if it has geographical indications that have already ceased to be protected or fallen into disuse. The Minister may also establish rules for specific signs that either allow its registration with certain prescribed conditions or refuse such marks from being registered.

The relative grounds for refusal of mark registration is a far less strict form of refusal. Article 8 of the Trade Mark Act mainly concerns trademarks that are similar to trademarks already registered, since it may confuse the market. Conditions that cause trademarks to be rejected are due to, (1) identical with earlier trademarks and are to be registered for goods and or services that have already

<sup>41</sup>IPOS, ‘Trade Mark Infopack’ (2022).

been protected; (2) marks that are similar to earlier trademarks and are to be registered for goods and or services that have already been protected. Moreover, specifically, there are conditions set for applicants that register their mark before the 1st of July 2004 that may be refused, if such marks are similar to an earlier trademark and are to be registered to different market segments of goods and or services. Such conditions include the degree of customary/ fame an earlier trademark has, a connection between the market segments of the two trademarks, the degree of likely hood confusion of the public because of such trademarks existing, and the degree of damage to the already registered mark. Lastly, different from Indonesia, to help applicants ensure that their marks aren't similar, IPOS has created a website, where applicants may upload their marks alongside their classifications. This mechanism is missing in Indonesia and should be applied.

### 3) Protection In the Form of Repression

The proprietor of a registered trademark has the exclusive rights to use the trademark and to authorize other parties from using it. However, such traders own the right to obtain relief from parties committing infringements over their trademarks. Acts of infringement are defined as when a person infringes a registered trademark without acquiring any consent from the trademark owner thus resulting in the formation of a trademark that is identical or similar to its predecessor. Well-known marks are highly targeted as they are popular. Due to that, the act establishes the rights of well-known marks well marks. The act of infringing well-known marks is indicated if it first is registered without the consent of the proprietor of the well-known mark and if the establishment of that mark confuses, such as the association of the infringed mark to the well-known one, and any other form of damages rooted from it.

In the case of a proprietor experiencing infringement, he may file for protest to the court against the party commencing acts of infringement. The court may grant the proprietor with types of relief such as an injunction, damages, and an account of profits that take into account the form of profits generated from the action of infringement. More specifically, in cases of counterfeit trademarks, the claimant is entitled to any damages and an account of any profits caused by the infringement, and statutory damages that are not exceeding \$100,000 for each type of goods and services that were counterfeited and not exceeding \$1 million in the aggregate, unless the claimant proves that the claimant's actual loss from counterfeit products exceeds \$1 million.

#### **2.1.2.2 Regulations upon the Trademark Coexistence Agreement in Singapore**

The Trade Mark Act does not regulate TCA directly, however, it is addressed in the act under the provisions of Article 8(9). Article 8 addresses relative grounds to refuse an application, which mostly comprises applications that are identical to an already registered trademark. However, the court may create an exception stipulated in Article 8(9) if the proprietor of the registered trademark submits a consent form for the registration. The evaluation of TCA will be evaluated on a case-by-case basis.

The Registrar plays a crucial role in evaluating the TCA, according to Chapter 7.1.2.1 of the Trade Marks Work Manual, if the examiner is not satisfied with the letter of consent, the application shall be rejected. In order for the consent form to be persuasive, it must contain specific reasons why should the marks co-exist and expressly address the details of the application, such as the specification of goods and/ or services, to avoid such marks being analogous to one another and causing confusion in the market. Lastly, there are limitations to the co-existence agreement stipulated in Chapter 7.2.3.2, due to the territorial nature of trademarks, TCAs that have persuasive values are only if the subject party and the cited party are registered in Singapore. In conclusion, Singapore does address the Trademark Coexistence Agreement under the form of consent agreements, however, there are no specific regulations upon it since will be assessed on a case-by-case system. However, the essence of the trademark coexistence agreement is its capability of making each party distinguishable from one another.

## **2.3 Possible Advantages and Disadvantages of Trademark Coexistence Agreement in Indonesia**

### **2.3.1 Possible Advantages of Trademark Coexistence Agreement**

The TCA could provide a critical alternative in preventing consumer confusion, particularly in high-demand sectors such as coffee, tea, and other high-demand sectors. By enabling businesses to coexist within specific parameters, TCAs help maintain healthy competition and ensure that similar trademarks operate differently so it does not lead to confusion in densely populated sectors. This approach could allow SMEs to carve out distinct market spaces peacefully, without having to exhaust dispute resolution mechanisms as mentioned in Article 93 of the Trademark Law, ultimately preserving market diversity and consumer choice.

To further emphasize, TCAs offer a sense of legal certainty that can enhance business confidence, especially among SMEs. For many small enterprises, the risk of trademark disputes presents significant financial barriers and is lengthy. Additionally, TCAs would likely prevent many disputes between similar brands from escalating into court. This proactive conflict-prevention mechanism, would relieve resources within the judicial system, and provide businesses with faster and less costly solutions for trademark management. If implemented correctly by the DGIP, TCAs may provide structured, legal framework that reduces this uncertainty, promoting *ease of doing business* for new entrants and established SMEs, thereby fostering confidence to innovate and expand brand identity that falls within the agreed scope of the TCA.

Another advantage of TCAs is enhanced consumer clarity. By setting explicit boundaries on brand usage and even set limitations of geographical scope, TCAs may allow consumers to identify and differentiate brands, even those with similar names or logos. Setting geographical scope may be particularly beneficial for SMEs that only operate within certain regions. Finally, TCAs may address the unique challenges faced by family-owned brands, that often use the founder's family name as its brand name. Allowing such brands to coexist without overlapping each other, over preservation of their family legacy. This clarity forms dual benefit as it prevents confusion but also

protects trademark owners from potential reputational harm due to mistaken brand identities. Thus, the TCAs hopefully provide and promote transparent consumer experience.

Nonetheless, the application of TCAs remains the fact needs to adhere to Indonesia's first-to-file principle, that prioritizes trademark rights for those who register their marks first. The mechanism of TCAs must respect this principle by giving full control to the registered trademark the right to approve or deny coexistence request such as TCAs draft, thus affirming their right of marks as established in Article 3 of the Trademark Law. This direct mechanism empowers the registered owner to make effective decisions about coexistence without resorting to court litigation, streamlining trademark conflict management while maintaining the integrity of Indonesia's first-to-file system.

### **2.3.2 Possible Disadvantages of a Trademark Coexistence Agreement**

There are two primary types of disadvantages associated with the TCA: internal and external. First, as demonstrated in the Digi International case, a significant limitation of a TCA lies in its inflexibility, which can constrain the ability to mitigate future disputes. In a TCA, the parties must specify the scope of their commercial activities and other elements, such as the enterprise's mark, based on their current activities and plans. However, since businesses often evolve—whether by launching new products or making other changes—regulating future activities becomes unfeasible, and it can be challenging for companies to determine which activities might infringe upon the TCA. Thus, in regulating the TCA, the DGIP should encourage parties to periodically renew their agreements as needed to address this issue effectively.

To add on, this rigidity also restricts commercial flexibility, potentially inhibiting business expansion into new product segments and can stifle their creative potential. This also potentially restricts the brands from ever licensing their marks and reaping any commercial benefit, since prospective buyers or licensees may not be interested in a brand that is subject to contractual restrictions on use and expansions.

On another note, the external setbacks of the TCA for practitioners lies in ensuring it prevents consumer confusion. Allowing similar marks to coexist may lead to consumer confusion, which undermines the intent of trademarks to serve as clear indicators of origin. The Trademark Law specifically emphasizes on consumer protection, where trademarks are intended to shield the public from confusion and misrepresentation. Article 20 (e) prohibits marks that lack of distinctiveness or if they carry resemblance to registered marks. Whereas Article 21 rules that trademarks application resembling a registered trademark or well-known trademark shall be denied. The act of consciously registering similar trademarks is viewed as an act of bad faith, as this may lead to consumer confusion. Hence, granting the TCA may promote the act one brand to leverage the success of another.

Furthermore, there are also concerns for consumer protection in allowing the TCA. There is a recurring view that trademarks are viewed as property, where the validity of a TCA hinges on mutual consent between parties. However, if trademarks are seen as serving a broader public function, the existence of a TCA could jeopardize the legitimacy of trademarks in protecting consumers. The use of a TCA may inadvertently dilute a brand, particularly if it permits the coexistence of a well-known mark with less established or lower-quality brands, thereby undermining the mark's role as a quality proxy and increasing the burden on consumers to verify product quality independently.

Thus, while TCAs offer flexibility for businesses, they pose a risk to the public interest by potentially weakening trademark distinctiveness. It would be advisable for the DGIP to implement stricter guidelines or periodic reviews of TCAs to uphold consumer protection, ensuring that these agreements do not compromise the public's trust or impede fair competition.

## **Conclusion**

The TCA agreement had already been registered in several territories from Singapore to Europe, due to the surge in demand of each economy. Indonesia previously had also experienced a surge in the amount of Trademarks. Considering the fact that SMEs play a vital role in the economy, The DGIP should take note of Singapore's approach to becoming a business-friendly IP regime. Although the TCA is not flawless, The DGIP cannot ignore the obvious gap of the Indonesian Trademark Regime over similar and or identical marks. The TCA serves as a preventive solution for traders with similar marks, that are cost-efficient, and streamlined. Nonetheless, Indonesia should cover in detail the requirements of the agreement, to ensure that the TCA ensures a differentiation between traders and to reduce confusion of consumers.

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