

The Implementation of International Trademark Registration in Indonesia Post-Ratification of Madrid Protocol

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ABSTRACT

In early October 2017, the Indonesian government, represented by the Directorate General of Intellectual Property of the Ministry of Justice and Human Rights, has officially ratified the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol). The ratification is contained in the Presidential Regulation No. 92 of 2017 on Ratification of Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989. The Presidential Regulation shall be the legal basis of enforcement that regulates the international trademark registration in Indonesia. The concept offered through the international trademark registration system based on the Madrid Protocol is its practicality which passes only one examination, one Language, one currency and it is integrated by the International Bureau administered by WIPO without changing the sovereignty of each member country which ratifies the system. The objective of this paper is to find out how the trademark registration is implemented based on the Madrid Protocol after its ratification in Indonesia and how the system will impact. The results of this paper will be beneficial for the public so that they know the mechanism of the international trademark registration and the impact of this system.

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1. INTRODUCTION

The era development, the rapid current of globalization nowadays is inevitable any more to countries in the world. This condition becomes the trigger of an international trade that can improve a country economy through the creativity that is owned by the people, especially those involved in the business. A nation's trade competitiveness is influenced by the quality of goods and services which are traded internationally. One of the defining criteria of a product quality to be said a product which is believed to have an added value compared to those available in the market is its intellectual property rights (IPR).

The intellectual property rights are rights over property which is obtained from a human intellectualism. It is called human intellectualism because only humans can create things in the field of science and technology. Humans create literary works through their sense of creativity (Sjahputra, 2007: 5). The term 'intellectual' reflects that an object's intellectual property contains human's inventive ability and thinking products. Therefore, any work in the field of science and technology created through a human or humans' mind(s) or inventive ability is basically in the scope of intellectual property rights (IPR).

One of the aspects of IPR is trademarks or marks. Article 1 in Law Number 20 of 2016 on Trademarks and Geographical Indications defines a trademark as a mark which is displayed graphically

as a logo, a name, a word, a letter, a number, an arrangement of colors, either in the forms a two-dimensional and/or 3-dimensional object, a sound, a hologram, or the combination of two or more of the elements to distinguish the goods and/or the service produced by an individual or a legal entity in their goods and/or service trade activities.

As an important component in a goods and service activities, a trademark can make a product or service get the attention from the consumers and through the trademark also a business can survive. A trademark protection system ought to become the magnet for foreign investors to foster foreign trademark registrations. Foreign trademarks are not only a distinctive factor from one product to another, but it also part of marketing strategy to win the market.

In early October 2017, the Indonesian government, represented by the Directorate General of Intellectual Property of the Ministry of Justice and Human Rights, has attempted to facilitate the Indonesian people in general and particularly those who own trademarks to register their marks internationally. Unfortunately, international trademark registration has not been regulated in the Trademark Act No. 15 of 2001. Moreover, the Act has not facilitated the mark owners. Nevertheless, the economic globalization current has a great influence on the trade of goods and services. Therefore, the international trademark protection has become an urgent necessity for entrepreneurs to expand to the foreign market. Consequently, the Indonesian government feel that they need to have a great attention to the intellectual property in order that the people can contribute to the innovation and knowledge-based industries.

This condition encourages the national economic development. In addition, one of the most important aspects in increasing the innovation and creativity competitiveness is the ratification of “Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks” known as “Madrid Protocol”. Another important aspect is by issuing of the Presidential Regulation Number 92 of 2017 on the ratification of Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989.

The paragraph 52 of the 4th point of Act Number 20 of 2016 on Trademarks and Geographic Indications, with regards of the International Trademark Registration, has stated that “further provisions regarding the international trademark registration which is based on the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks are governed by the government.” Based on the paragraph, it is clear that the government has planned to use the Madrid Protocol as a further legal regulation in terms of international trademark registration. This paragraph is to complement the previous Trademark Act Number 15 of 2001. Thus, it is urgent that the government replace the Act number 15 of 2001 with the Act number 20 of 2016. One of the key points of the Act replacement is that the scope of the trademark registration is expanded. In order to get protection either in the domestic or in the international scale. In addition, the rationale for the replacement is to make the latter Act become the legal principle for the implementation of the international trademark registration.

It takes three (3) months for the Madrid Protocol to come to effect since its ratification. This means that the system will be applied in Indonesia early of this January. Only then can the local trademark owners start registering their trademarks to their target countries using this system. The foreign trademarks can also be registered in Indonesia after the implementation of the system. However, not many of Indonesian entrepreneurs who are aware of the implementation or the mechanism of the international registration system because of its novelty. Therefore, this paper attempts to contribute to educate people, particularly the entrepreneurs, how the international trademark registration is implemented using this system as well as what the legal consequences are for Indonesian people, particularly the trademark owners who wish to register their trademarks internationally. Registration of trademarks has an urgency for employers, among others, to provide legal protection for their trademarks

so that they are not used by other parties or misused by other parties. Registered trademarks receive legal protection for a period of 10 (ten) years from the Filing Date and the period of protection can be extended.

Actually the Madrid System is very important for large companies that have various brands. With one application they can register with various countries. If we IPR (HKI, red), we are sure that the companies that are related to it will feel safe and will invest. With the existence of the Madrid System, the procedure for registering brands for investors will be easier, in addition to being cheaper in terms of costs. Because in this system, registrants of foreign brands will register their brands in a country through the World Intellectual Property Organization (WIPO), which will then continue registration to the brand registration institutions in each destination country. Without adequate legal tools, investors certainly experience problems in entering. Erna exemplified the case of the Prada brand - one of the well-known brands used for fashion production from Milan, Italy. When the brand rights holders will register with Indonesia, it turns out there are other companies that have registered the trademark.

2. RESEARCH METHOD

The study in this paper is Juridical Normative or doctrinal research, a study that uses literature or secondary data which consist of the primary, secondary, and tertiary legal materials as the main data (Soekanto and Mamudji, 2001:13). The study also uses a statute approach. The researchers opt to use this approach since it is suitable to be applied in the research method. It is necessary that people understand the implementation of trademark registration system since Indonesia has just ratified an international treaty on the international trademark registration which is contained in Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol). Meanwhile, in order to support the literature data, the researchers use a field study which involves an interview with the spokespeople from the Directorate General of Intellectual Property in Jakarta.

3. DISCUSSION

The international registration of marks also known as Madrid system is based on two international treaties which are the Madrid Concerning the International Registration of Marks (Agreement) and the Protocol Relating to Madrid Agreement (Protocol). The Madrid system administration is overseen by World Intellectual Property Organization (WIPO) as the International Bureau. The roles of the bureau are to manage the international records and publish WIPO Gazette of International Marks. Every member of Paris Convention can join either the Agreement or Protocol or both. Countries that have become members of the Agreement or Protocol form an organization which is called the Madrid Union.

Basically, the Madrid System is a collection of rights over trademarks in many countries which are centrally managed. The system provides a mechanism to obtain trademark protection in many countries more effectively compared to registering a specific brand to obtain the protection in respective countries separately. The system does not change the sovereignty of each member.

The Madrid system facilitates the trademark owners to obtain their trademark protection in many countries only with one application and procedure. The registration can also be done in the trademark owners' countries. The registration is then forwarded to the target countries through the mediation of WIPO acting as the International bureau. Using this way, a trademark owner who wish to register his or her mark(s) to several countries is required only to make one trademark registration application through the trademark office in one country. The trademark office will then send the application to each of the target countries.

Either the Madrid Agreement or the Madrid Protocol is essentially a one-door system of international trademark registration. The reason why Indonesia ratified the Madrid Protocol only and

not the Madrid Agreement is because the first is the improvement of the latter. The Madrid Agreement still contains some weaknesses as stated by Syafrinaldi in a Business Law Journal Volume 28 No 2 in 2009 on the Urgency of the Harmonization of Trademark Act and the Madrid Protocol. He said that the concept offered by the Madrid Protocol is actually similar as that offered by the Madrid Agreement with regard of the international trademark registration. However, there has decreasing interest of the countries to ratify the Madrid Agreement since they consider that the Madrid Protocol is created to improve the Madrid Agreement. Conceptually, the Madrid Protocol acts as a trademark application to obtain legal protection in many countries. Therefore, it indirectly offers a certainty to the trademark owners to obtain protection for their trademarks in many countries by making the registration application directly in the trademark registration office in their own countries or in their own regions.

Trias Palupi, in her article which is entitled “The Importance of Ratifying the Madrid Protocol in Overcoming the Free Trade in the Era of Globalization” added that the Madrid Agreement is not ratified by big countries like the U.S., Japan, Australia, and England. This is because the Madrid Agreement has some weaknesses like (1) the requirement concerning the basic registration provision in which the international trademark registration application has to complete first the registration of the same mark in the country of origin. The registration will serve as the basic registration. The goods or service descriptions contained in the international trademark registration should not be broader than what is described in the trademark registration in the country where the basic registration took place; (2) the 12-month period to carry out substantive examination in the Madrid Agreement cannot be prolonged. Due to this condition, most countries consider the time limit too short and it gives them more problems. They, therefore, do not have interest in ratifying the agreement; (3) there are provisions which regulate the amount of the basic fee and the complementary fee; (4) the countries involved in the registration are obliged to use French as the lingua franca; (5) the Central Attack system in the registration is considered disadvantageous.

The improvement of Madrid Agreement, which is the Madrid Protocol, has strong points as pointed out by Agung Indriyanto in his book “The Legal Aspect of Trademark Registration” (2017:212). He mentioned that the Madrid Protocol is created to improve the Madrid Agreement. The differences cover several aspects which can be seen below:

1. The Treaty Membership

The membership both for the Madrid Agreement and the Madrid Protocol are open to members of Paris Convention. However, countries which are not members of the Madrid Agreement can become members of the Madrid Protocol. Moreover, the membership for the Madrid Protocol is also open to inter-government organization, like European Union providing that one of the members of the organization is a member of the Paris Convention and the organization can serve as an office for regional trademark registration. Thus, the membership requirement of the Madrid Protocol is more flexible compared to that of the Madrid Agreement.

2. The Lingua Franca

The flexibility of the Madrid Protocol can be seen the lingua franca which is used in the trademark registration application. The international application through the Madrid Agreement is supposed to use French as stated in the content of the treaty. Meanwhile, the Madrid Protocol frees the members to register using either English, French, or Spanish.

3. The Trademark Used as the Basis of the International Application

Any international application in the Madrid system requires a definite trademark from the country of origin to be used as the basis of the application. In the Madrid Agreement, the trademark pre-requisite has to be previously registered in its country of origin. On contrary, the Madrid Protocol expands this provision so that a trademark which is used as the basis of

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the application can be an already registered trademark or one whose registration is still being processed in the country of origin.

4. Substantive Examination Period

In the Madrid Agreement, the notification of the substantive examination result in the target country must be delivered to the applicant in no less than 12 months after the date of the notification of the international registration forwarded to a certain country. Meanwhile, using the Madrid Protocol the trademark registration office of the target country can choose how long it will take for them to issue the result of the substantive examination within 12 to 18 months after the date of the notification of the international registration to a certain country. The time limit can be lengthened in case of rejection possibility from the opposition after the last 18 months.

5. Central Attack

The treatment for the registration or the international application in case of loss of rights over the trademark in the country of origin (Central Attack) is one of the significant differences between the Madrid Agreement and the Madrid Protocol. When the Central Attack occurs, all of the international registration process is automatically void in the Madrid system. The Madrid Agreement leaves no alternative when the registration or the international application is cancelled due to central attack. However, the aborted registration or application due to the central attack in the Madrid Protocol can be transformed into a national registration or application in the target country and the original date of registration of the registration is still valid.

6. Fees

The Madrid Agreement does provide freedom for the member country to collect individual fee and only let fee components consisting of supplementary fee and complementary fee. This provision is considered to be disadvantageous for countries having a higher national application fee for both supplementary and complementary fees. In contrast, the provision of the Madrid Protocol lets the member country opt to use either the individual, supplementary, or complementary fees. Generally, countries having higher national application fee for the components of supplementary and complementary fees will choose only individual fee.

Several developments of the Madrid Protocol have made it more interesting for countries which have not participated in the Madrid System. Consequently, the Madrid Union (which is the special union established based on the article 19 of Paris Convention consisting of countries that take part in the Madrid Agreement and the Madrid Protocol). Up to this date, the Madrid Agreement member countries are also the member of the Madrid Protocol. The total members of the Madrid Union are 100 members from 113 countries.

The procedure of the registration regulates a trademark owner who is henceforth referred to as the applicant has to go through DJKI as the office of origin if wishing to register the trademark internationally. Any application should be reviewed by DJKI in order to get the permission since DJKI is trademark office of the country of origin that will connect applicants from Indonesia to the foreign trademark offices. DJKI as trademark office of the country of origin, upon receiving of the request from the applicant regarding the application for international registration, will issue the MM2 form, which is the initial form as the basis for the initial application of the International Registration.

After the applicant fill out the MM2 form, he must submit it back to DJKI. Afterwards, DJKI will send the filled-out form to the International Bureau administered by WIPO. And then, WIPO will announce it in the International Registration.

It is important to note that during the international trademark registration, there is a requirement which states that the applicant whose name is found in the trademark registration application has to be

a citizen of country which has ratified the Madrid Protocol. Alternatively, the applicant lives or owns a legal and effective commercial industry in the country which has ratified the Madrid Protocol.

This is supported by Agung Indriyanto who claimed that in registering a trademark internationally, there are three pillar which are the International Bureau, the trademark office of origin, and the applicant. All of the pillars play their own roles. A trademark owner cannot register his trademark internationally without reporting it to the office of origin. Any applicant wishing to register the trademark using the Madrid system must meet objective and subjective requirements. The subjective requirement requires the applicant to be an Indonesian citizen or a person who lives in Indonesia. The objective requirement requires that the trademark has been registered in the country of origin (Indonesia). The trademark does not have to be the basic trademark but a trademark which is included in the application in DJKI. The above explanation is just the initial concept of the international trademark registration mechanism according to the Madrid Protocol.

After all requirements have been fulfilled by the applicant, and the MM2 form has been sent to the International Bureau, the bureau will perform 3 tasks. Agung Indriyanto mentioned that the roles of the International Bureau are (1) formally examine the form whether it has been properly filled out based on the provisions in the Madrid Protocol like the application date and how many applications. The bureau will also examine the clarification of the goods or services being registered whether it complies with the Nice Agreement or not; (2) check the printed date in the international application. It is necessary to note that the international registration must be in line with the date when the international application was received in the office of origin, which means that the date of the initial international trademark registration in the office origin will become the date of the international registration in the international bureau. According to this provision, there is a two-month tolerance upon receiving the international trademark registration application to be registered internationally. If the office of origin exceeds the tolerance, the international bureau will record the registration date as it is found in the application. For example, the date of the application in the office of origin (Indonesia) in DJKI is March 1, 2018, it will become the date of the international registration in the International Bureau although DJKI register the application to the International Bureau on April 10. However, when the office of origin register the application exceeding the time tolerance, which is two months, for example on June 1, 2018, the latter date will be used as the date of the registration of the application by the International Bureau. The writer believes that the date writing is very important since the trademark registration applies a constitutive system or also called first to file which means that whoever gets to register first will not have problems like trademark violation; (3) issue a certificate after every examination on the formality finished and there are no problems found. The formality examination process discussed here according to Agung Indriyanto is a certification stage from the office of origin to the International Bureau. The International Bureau will publish in the WIPO Gazette Website, the official WIPO website all applications that have met all certification processes and register them in the International Registration. The International Bureau will also send a notification to the target country of the applicant. The applicant status will change to a trademark holder he passes all of the international trademark registration stages.

The research explains that the international certification issued by the International Bureau indicates that the international application which is sent has changed into an international registration. It also indicates that the applicant has been registered in the WIPO International registration, which means that there has not been a trademark protection. This condition is considered to be one weakness in the system because the registration makes the trademark acknowledged in the target countries, but according to the Madrid Protocol, the final decision whether the trademark is registered and received legal protection in the target country depends on the policy of the target office.

This condition is justified by Agung Indriyanto that as soon as the certification is issued, the International Bureau will issue an International registration, but it has not been protected. The certification needs to be validated in the target country in which the final decision is made.

He then gave an example when an Indonesian trademark owner has registered his trademark. The trademark is registered in the international registration and he has received an international certificate from the international bureau. However, there are different treatments from different countries. For example, his trademark is fully accepted in Singapore, and it is half accepted in South Korea, but it is rejected in Australia. When it happens, the International Bureau will revise and fix the international certificate based on the final decision in the target country as stated earlier. The aspect being fixed or revised is the scope of the trademark protection in relation with the trademark classification.

When a half or full rejection happens, a legal effort which can be done by the trademark owner that has been registered in the International Bureau is filing an appeal to the target country just like in Indonesia. However, in case of a trademark rejection or cancellation or deletion, the trademark owner can file an appeal to the verdict.

The Directorate General of Intellectual Property (DJKI) has ensured that the implementation of the Madrid protocol can be implemented in 2018. In addition to policy infrastructure, there is also the formation of the Madrid Protocol team consisting of several brand examiners who are specifically handling applications for international brands. Applications for international brands via the WIPO Madrid system provide freedom for Indonesia to process up to 18 months. Regarding the filing of a trademark application that allows applicants not to use IPR consultants in destination countries, DGKI claims the treatment will be the same. However, regarding the time the application is needed, the duration cannot be ascertained.

The Madrid Protocol system contains a weakness which is within the first five years the trademark is registered in the target country, it depends so much on the target country. It means that when in the origin country, the trademark is cancelled, it also is automatically cancelled in the target country. The cancellation in the country of origin can be caused by a third-party lawsuit that leads to trademark cancellation or it still in the application process in the country of origin but rejected, or the trademark whose protection period is due in the country of origin and it is not extended can be criteria for a trademark cancellation in the country of origin and in other countries too.

Therefore, in case of Central Attack, which a centralized attack in the form of trademark cancellation in a target country since the it is also cancelled in the country of origin, the system therefore facilitates to transform the international registration into a national registration in the target country.

The transformation mechanism takes three (3) months since the cancellation date, without having to reregister like a new registration, and the application date counts based on the first registration. This registration is without the registration fee. However, according to Agung Indriyanto, in the field practice, the transformation process in target countries of the Madrid protocol varies and it charges a registration fee and there are forms to fill out. Some countries only require filling out the forms and there are some other countries that charge the fee but no form. So, different countries have different policies.

The dependency principle of the Madrid Policy in the country of origin which applies Central Attack in the registration for the first five year following the filing date of the international registration. A trademark afflicted by central attack is permitted to transform its international registration into an individual application which can be done in three (3) months after its international registration is cancelled. The effect of central attack sometimes does not cause some losses in the trademark owner's side but also to the country of origin of the trademark being cancelled.

Therefore, the handling should be simultaneous when Central Attack occurs which means that there must be a transformation from an international trademark registration to a national trademark registration. The transformation from an international registration to a national registration depends on the applicant who will file the application because the cancellation takes place in the country of origin. Therefore, in order that the registration is still in the target country, he must transform the registration into a national registration.

The mechanism of the national registration itself depends on the last status of the international registration. It is simple when the last status is already registered in the target country, but it is cancelled in the country of origin, the registration is automatically cancelled. In order to avoid this problem, a trademark owner must go to the target country to seek help from the local agent to keep the international registration valid and available while attempting to finish the national registration in the target country.

However, when the last status is still in the examination in the target country and the trademark is cancelled in the country of origin, the last decision after that will become the reason for the transformation application. It is important to not that the transformation can be automatically used by the applicant. It can be used only by the applicant whose trademark is cancelled in the country of origin. The owner has to inform the trademark office of the country of origin since it is the obligation of the owner to watch the trademark status in five-year time. If the registered trademark is cancelled, deleted, or rejected within five-year period, the International Bureau will notify the target country. Only after the notification arrives can the transformation process begin. If DJKI does not inform the International Bureau, there won't be any transformation process. This is one of the weaknesses of the Madrid Protocol in terms of the transformation process. This condition can be overcome when the owner keeps checking the trademark being internationally registered to keep it available and valid for five years.

Indonesia is not ready for Protocol Madrid, this could potentially reduce Indonesia's competitiveness in the field of International trade (Nurhayati, 2008: 511). Unpreparedness of Indonesia in competition will have an impact on the country's economy (Novianti, 2016: 209). The Madrid system will bring in profits to country that has a relatively large number of marks and a good marketing. The Madrid system will prejudice for the country that have few marks that are eligible to be international marks. The countries that are not ready to become actors in this system will generally fall in the flow of trade globalization. This condition is further aggravated by the low level of the economy, so that marks owners can not afford to simply register the marks (Hidayati, 2017: 181).

The ratification of the Madrid Protocol will certainly give impacts in Indonesia. In one side, it gives positive impacts like its practicality in the international trademark registration because it uses only one examination, one language, one fee, and it is integrated with a system administered by WIPO. It has become a businessperson's dream to be able to market his product in the international market. Therefore, such mechanism is considered to be a golden opportunity since it is easy and cheap during the application process. The applicant does not have to come the country where the trademark will be registered. It also offers the same protection as that of the conventional method. Despite its positive impacts, there are negative aspect of the system which can be said to be disadvantageous, that is the central attack. The handling of this problem must be simultaneous in order to cut the expenses that are spent. Besides that, there is also a rejection of the trademark in the target country. When it happens, the owner can file an appeal over the rejection. The country which is not ready with the system will become the market state. It will only become a consumer and it cannot compete with products coming from other countries.

4. CONCLUSION

The globalization era guarantees that everything is done with sophistication. The trademark registration system also has developed that it makes use of the internet and is online-based. For example, people used to go places using taxis they stopped on the street. Now, they just order the taxi online using their smartphones from anywhere or homes.

This condition also happens to the trademark registration. Nowadays, the trademark protection over someone's creation is not only in the national scope but it is also in the international scope. Many trademark owners wish to expand their business abroad. However, the process was not efficient and cost a lot of money and time. Therefore, they cancel registering their trademarks. It is expected that through the amendment of the Trademark and Geographic Indication Act in which there are discussions about international trademark registration based on the Madrid Protocol. The protocol accommodates trademark owners in Indonesia who wish to register their trademarks abroad. This paper also gives description to people especially local trademark owners about the implementation of the Madrid Protocol system which is now applied in Indonesia. Therefore, the local business people can be interested to expand their business abroad. Since it is still novelty, there are positive and negative impacts of the protocol. We have to be optimistic and look forward and believe that the system will be beneficial for the communities.

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