



International Trademark Registration Through Madrid Protocol as a Solution for Trademark Protection from Indonesia

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Abstract. Nowadays, globalisation has resulted in goods, services, labour, and capital flowing freely between countries in the world. Indonesia itself is not an exception for this global phenomenon. The free flow of trade from and out of Indonesia makes products from Indonesia are vulnerable to being imitated if they are not protected, especially protection for their trademarks. Not only trademarks from Indonesia have to be protected within the country, but they also need to get protection abroad. Efforts to protect trademarks from Indonesia can be carried out through a registration mechanism per country or internationally. This article attempts to explain that international registration can be effectively carried out through Madrid Protocol, which provides a centralized trademark registration in World Intellectual Property Organization (WIPO), instead of registering the trademark in the respective countries where the goods or services is intended to be traded. International trademark registration through Madrid Protocol facilitates trademark owners to obtain protection for their trademarks in all the countries who is a participant of the Madrid Protocol, through single registration which can be done from the country of origin.

Keywords: Trademark · Madrid Protocol · international registration

1 Introduction

A trademark could be a commercially valuable asset for its owner. A company would try to prevent others to use its trademark because by using the trademark, it would obtain certain reputation and inspire trust from consumers, since there is a relationship between a reputation and a trademark used regularly by the company. It is not uncommon for customers to buy certain product because its trademark's reputation is linked to being of high quality or safe for consumption [1]. If a company has put efforts to shape a fine reputation around its trademark, then it would make sense that it should be the one who utilizes the trademark and the reputation it has worked to build.

In providing legal protection for trademark, there are two principles which could be adopted by a state, namely the principle of first to use and first to file. First to use principle means the trademark owner who uses the trademark for the first time will be legally protected without the need to pay registration fees. However, if a dispute arises it will be difficult to prove who uses the trademark first, and the trademark owner

risks spending more resources and bearing the burden of proof [2]. On the other hand, the principle of first to file creates a legal certainty surrounding the legal protection of trademark because through registration the mark is easier to trace, thus minimizing the registration of trademarks that have been registered before. In exchange for this legal certainty, trademark owners would not object the registration fees per class incurred since the risk of burden of proof could be alleviated by the trademark registration certificate [3]. This reason leads trademark registration to becoming an important part of businesses around the world.

With globalisation, it is easier for products from different countries to circulate to other countries around the globe. In this case, while the trademark owners experience difficulties in monitoring their products in another country, their trademarks become easier to be claimed or used by others. This surely causes losses for producers who registered their trademarks but are imitated by other manufacturers [4].

The Intellectual Property protection system is territorial in nature, meaning that the registration process and law enforcement must be carried out separately in each jurisdiction concerned. In the trademark issue, this system is often a challenge in itself for trademark law enforcement. In practice, often a trademark with popular reputation (well-known trademark) is used without permission or even registered by unauthorized parties just because the mark has not been registered in the country. The Protocol Relating to The Madrid Agreement of 1989 (“Madrid Protocol”), which is a refinement of The Madrid Agreement Concerning the International Registration of Marks of 1891 (“The Madrid Agreement”), is an alternative in establishing administrative order in the filing of trademarks internationally [5].

In general, if you want your trademark to be protected legally in another country, you must apply for a separate trademark registration at the trademark or intellectual property office of that country. Once trademark protection is earned in those countries, the owners must go through different steps in the same office to manage their rights (renew, license, or divert). But if the trademark owner is an Indonesian citizen, lives in Indonesia, or has an industrial or commercial establishment in Indonesia, they can use the Madrid Protocol, an international treaty that went into effect in Indonesia on January 2, 2018 [6], which is a more attractive, cost-effective, and user-friendly way to get rights to their trademarks abroad and manage them.

2 Method

This article attempts to explain that international registration can be effectively carried out through Madrid Protocol, which provides a centralized trademark registration in World Intellectual Property Organization (WIPO), instead of registering the trademark in the respective countries where the goods or services is intended to be traded. International trademark registration through Madrid Protocol facilitates trademark owners to obtain protection for their trademarks in all the countries who is a participant of the Madrid Protocol, through single registration which can be done from the country of origin.

3 Result and Discussion

3.1 Trademark

Trademark is a part of intellectual property, which is generally related to the protection of application of ideas and information that have commercial value. It is a property which can be owned and treated in a similar way to other properties, for example, it can be sold or bought [7].

Law No. 20 of 2016 on Trademark and Geographical Indication (“Law on Trademark and Geographical Indication”) defines trademark in Indonesia. Article 1 of this law defines trademark as graphically displayable marks in the form of images, logos, names, words, letters, numbers, color arrangements, 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 distinguish goods and/or services produced by individuals or legal entities in the course of trading the goods and/or services. This definition indicates that a trademark may be applied to both goods and services in order to distinguish them from other comparable products. Moreover, based on this definition, trademarks can be separated into two classes [8]:

- a. Traditional trademark, in the form of images, logos, names, words, letters, numbers, color arrangement or trademark that takes 2 (two) dimensional form; and
- b. Non-traditional trademark, in the form of sound, 3 (three) dimensional trademarks, or hologram.

The legislation further says that trademark rights are exclusive rights provided by the state to the owner of a registered trademark for a specific period of time to use their own trademark or to grant another party permission to use it. Trademark acts as an identifier to distinguish a particular product created by a particular person(s) or legal entity from other products produced by other persons or legal entities, as a promotional tool, and as a quality guarantee for the product [9]. The following functions are also associated with trademarks:

- a. To maintain healthy business competition;
- b. To protect consumer;
- c. As a means for entrepreneurs to expand their business;
- d. As a means to assess product; and
- e. To introduce a product or its name [10].

Trademark needs to bear a sign capable in distinguishing the product, because trademark registration is related to the grant of rights for monopoly regarding certain name, symbol, or other signs [11]. This grant of exclusive rights would prevent others to use any name, symbol, or other signs similar to the registered trademark, thus certain limitation is needed.

The absolute requirement which must be fulfilled by every person or legal entity who wants to use a trademark so that it would be accepted as a trademark is that the trademark should have enough distinguishing quality [12]. Article 20 of Law No. 20 of

2016 on Trademark and Geographical Indication, for instance, states that a trademark could not be registered if:

- a. It is contrary to state ideology, regulations, morality, religion, decency, or public order;
- b. It is the same as, pertaining to, or only mentions the goods and/or services for which registration is requested;
- c. It contains elements that could mislead the public about the origin, quality, type, size, variety, use of the goods and/or services for which registrations is requested or is the name of a protected plant variety for similar goods and/or services;
- d. It contains information that is not in accordance with the quality, benefit, or efficacy of the goods and/or services;
- e. It has no distinguishing quality; and/or
- f. It is a common name and/or symbol of public property.

Furthermore, in Article 21 it is said that the application for trademark registration is rejected if:

- a. The trademark has similarity in essence with:
 - 1) A trademark which is owned or has been registered by another party for similar goods and/or services;
 - 2) A well-known trademark belonging to another party for similar goods and/or services;
 - 3) A well-known trademark belonging to another party for different goods and/or service which fulfil certain requirements; or
 - 4) A registered geographical indication.
- b. The trademark is or resembles the names or abbreviations of famous people's names, photo, or name of legal entity owned by others, except with written consent from those who are entitled;
- c. The mark is an imitation or resembling a name or abbreviation of a name, flag, sign or symbol or emblem of a country, or a national or international institution, except by written permission from the competent authority;
- d. The trademark is an imitation or resembling a sign or stamp or official seal used by the state or government institution, except with written approval from the authorities;
- e. The trademark is filed by an applicant who does not have a good faith.

Judging from the abovementioned criteria, it can be concluded that if a trademark is likely to result in a loss to society in general, the brand cannot be registered. Meanwhile, if the trademark might cause damage to certain parties, the trademark registration is refused. To simplify, it can be said that a trademark that cannot be registered is a trademark which is not worthy of being a trademark in the first place, while rejected trademarks are trademarks that might cause damage to other parties [13].

3.2 Trademark Registration in Indonesia

In Indonesia, application for trademark registration ranks first in number compared to other fields of intellectual property such as patent and industrial design. This is a typical condition for developing countries which generally do not have sufficient skills in the fields of technology and science compared to developed countries. In addition, it has been recorded that a number of Indonesian products are registered in several countries [14].

Trademark registration falls under the scope of work of Directorate General of Intellectual Property (Direktorat Jenderal Kekakayaan Intelektual/“DJKI”) as the national intellectual property office where trademark registration shall be filed. DJKI explains that trademark protection is provided through registration, meaning protection of the trademark applies to applicants who have applied for trademark registration or who obtained protection first, since in the Indonesian trademark protection system, the first to file system is known [15]. Thus, whoever applies for his trademark first, then the applicant will be recorded first and will receive the date of receipt and registration number first. Applicants will get the date of receipt and registration number if they meet the minimum requirements that have been stipulated in the laws and regulations regarding trademarks. Article 13 paragraph (2) of the Law on Trademark and Geographical Indication has specified minimum requirements to obtain the date of receipt, which are [16]:

- a. The applicant has filled out the application form completely;
- b. The applicant has attached a trademark label; and
- c. The applicant has paid the fee and attached proof of payment of the fee.

The process of trademark registration includes steps as follows:

- a. Determining product classification
- b. Research on registered trademark
- c. Application of trademark registration
- d. Formal examination
- e. Announcement
- f. Substantial examination
- g. Extension of the trademark protection period.

Classification of the products for which the trademark will be registered, whether goods or services, must be determined by the applicant as the first step to take before registering the trademark. Classification of goods and services in trademark registration follows the classification of goods or services based on the latest edition of the Nice Classification which applies to all members of the World Intellectual Property Organization (WIPO). Classification of goods and services related to trademark registration is divided into 45 classes. The Nice Classification is divided into two groups, namely groups of goods and groups of services. The group of goods consists of 34 classes, namely from class 1 to 34. While the service group consists of 11 classes, namely from class 35 to class 45 [17].

In previous section, it is explained that trademark must have a distinguishing quality. There are also several reasons for refusing trademark registration, one of which is the similarity to another trademark that is already registered for the same class. Therefore, it is very important for trademark registration applicant to do research on existing trademark database, to get an overview if there is already a registered trademark or trademark registration process belonging to other party, which has anything that is in principle, partially or entirely, similar with the applicant's trademark [18]. If the applicant's trademark runs the risk of being rejected, it would be wise in terms of financial and time efficiency to alter or make changes to the trademark. This is the reason why new businesses with a long-term plan to grow and expand should consider registering their trademark as early as possible before spending resources on publication and building reputation around the trademark.

Application of trademark registration is submitted by the applicant to the DJKI office in Indonesian language. The application submission must include details of the applicant and/or his attorney, details, and colors of the trademark, as well as the type and class of the goods and services. Application for one trademark which includes two classes or more for goods or services can be submitted together in one application. Alteration or correction of application is only allowed for the change of name or address of the applicant or his attorney [19].

The office of DJKI will conduct formal examination after the application is submitted. This examination is carried out to review the application form, details and identity of the applicant and/or his attorney, and other documents related to the application of trademark registration and carried out within 30 days after the submission of trademark application [20].

Announcement of trademark registration then will be carried out on the official trademark bulletin issued by DJKI from time to time. During the announcement period, anyone is allowed to raise a written objection to DJKI against the application of trademark registration. Such objection could be filed when there is adequate reason and followed by proof. In this event, DJKI will convey any objection to the applicant or his attorney. The applicant or his attorney may file a response against the objection to DJKI. The response should be made in writing within the period informed by the DJKI [21].

Substantive examination is the examination of the trademark itself with regard to the Law on Trademark and Geographical Indication, especially Article 6, Article 20 and Article 21 regarding class of goods or services, the requirements of trademark and the refusal of trademark. This examination may result in acceptance and issuance of trademark certificate, partial or total provisional refusal. In the event of partial or total provisional refusal, the applicant or his attorney may file a response to DJKI to conduct re-examination [22].

After the applicant obtain legal protection over his trademark, according to Article 35 of the Law on Trademark and Geographical Indication, the period of the legal protection is 10 years since the date of receipt of the application. The owner of registered trademark or his attorney may apply for extension of the legal protection period within 6 months before the protection period ends. Extension of the legal protection may be granted if relevant requirements are fulfilled and the trademark is still being used on the goods or

services as mentioned in the trademark certificate, also if the goods or services are still produced and traded [23].

The digital era makes it easier for applicants to apply for trademark registration directly and independently, because through the official website of DJKI, applicants can easily apply for trademark registration online [24]. This facility shows one of Indonesian government's efforts to provide easier access to and thus encourage trademark registration.

3.3 Trademark Registration via Madrid Protocol

The Madrid Protocol derives initially from the Madrid Agreement. The Madrid Agreement regulates the norms and methods of trademark application and the effect of the application, the official language used, the terms of protection and their extension, changes to trademark registration, and the possibility of international trademark registration cancellation. According to the agreement, each party in a member country with an existing trademark registration in their country (country of origin) may apply for an international trademark registration with the International Bureau or World Intellectual Property Organization (WIPO) via the trademark office in their country of origin. Regarding what is meant by "country of origin," it is the applicant's country of domicile, the country of which he or she is a citizen, or the country where the applicant conducts real and effective industrial and commercial activity [25].

Despite the existence of an international registration system based on the Madrid Agreement for more than 100 (one hundred) years, but its members only consist of 56 countries. This is because there are some arrangements in the Madrid Agreement that make it unpopular, including [26]:

- a. Requirements regarding basic registration;
- b. A period of 12 (twelve) months to conduct substantive examinations;
- c. Provisions on fees, basic fees and complimentary fees, the amount of which have been determined;
- d. Obligation to use French; and
- e. Central Attack System.

Eventually, on June 27, 1989, at a Diplomatic Conference convened in Madrid, the Madrid Protocol was signed as an amendment to the Madrid Agreement. The Madrid Protocol is an addendum to the Madrid Agreement that introduces new improvements to the worldwide trademark registration system in order for the Madrid System to expand and attract other nations. Regarding [27], enhancements are done as follows:

- a. Conditions regarding trademark registration as the basis for the application for international trademark registration (basic registration);
- b. Conditions regarding registration fees of international trademark;
- c. Terms regarding the choice of use language;
- d. Terms regarding time limit of the completion of application of international trademark registration for destination countries; and

- e. When compared to the Madrid Agreement, the Madrid Protocol is more flexible, thus making it more attractive to countries that have not yet entered into the Madrid Agreement.

From the points as mentioned above, it can be concluded that the purpose of the Madrid Protocol is to create a friendlier system for international trademark registration, to encourage more countries to join as its members, to provide legal protection for more businesses regarding their trademark abroad, and consequently encourage the growth of businesses internationally.

Along with globalization, free flowing of products around the world, and increasing number of international transactions, the issues of legal protection and service regarding intellectual property system is also becoming increasingly complex, both in terms of regulation as well as implementation and other problems growing in the society. It is common to hear about a national trademark that is not protected in its export destination country. This problem occurs because a lot of exporters do not register its trademark in the export destination countries. There are still many obstacles for the national businesses to register their trademarks abroad, among others, the obstacle concerns procedure which is quite complicated and demands a high cost. Without the Madrid Protocol, in order to register their trademarks abroad, the applicants must apply for registration in each export destination countries through each of their national intellectual property offices. This mechanism of trademark registration could be very burdensome for the applicant because it requires a high cost [28].

Indonesia also became a member of the Madrid Protocol in 2017, marked by the ratification of the Madrid Protocol through Presidential Regulation No. 92 of 2017. This allows anyone in Indonesia to apply for international trademark registration through national office, in this case that means DJKI, and to utilize the system of the Madrid Protocol.

3.4 Advantages and Disadvantages in Registering Trademark from Indonesia Through Madrid Protocol

By the number of countries joining as member of the Madrid Protocol, it can be concluded that the Madrid Protocol succeeded in improving the system of international trademark registration compared to effectiveness of the Madrid Agreement. However, there are still advantages and disadvantages what we can compare while registering trademark through the Madrid Protocol.

There are few advantages of the Madrid Protocol according to Agnieszka Przygoda, which are [29]:

- a. Single application

This is the primary benefit of this approach, as trademark owners no longer need to file for registration in each of their destination nations individually. This method is time-efficient because applicants need to submit only one application for one or more countries of destination. In addition, the applicants are not required to submit trademark applications in the native languages of each specified country, pay for translations, or employ a representative in each country.

b. Cost-effective

In fact, the most significant advantage of the Madrid System is the inexpensive cost of filing an international filing program by submitting a single application. This filing technique is typically selected by international corporations seeking worldwide legal protection for their trademarks.

c. Centralised administration

The owner of a trademark can change, renew, or expand their portfolio of global trademarks with a single request. For instance, a single request suffices to transfer or renew the international registration in several destination countries, or to nominate a new WIPO representative. An international registration is valid for ten years and can be renewed for an additional ten years by submitting a single request directly to WIPO. The holder of an international registration is notified six months prior to the expiration date of the legal protection period that the international registration is due to be renewed.

For the trademark owners, this system is an effective procedure because with only one international application, the same level of legal protection could be obtained in many countries. The Madrid Protocol sets out a definitive period for notification of rejection in each destination country. This is distinct advantage for the trademark owners because of a certain time period guaranteed for the completion of their applications, if within 12 months or 18 months there is no rejection notification, then the trademark is registered automatically [30].

Small and medium-sized businesses believe the cost-effective benefits of the Madrid System to be significant (SMEs). Eighty percent of Madrid System users are classified as SMEs with a small portfolio, i.e. only one or two IP rights. However, the Madrid Protocol's benefits are not limited to the lower costs and more efficient procedures that emerge from centralized registration and management of intellectual property. Madrid Protocol also offers an early brand presence overseas, as this is a method for swiftly gaining an international reputation and constructing a positive reputation for your trademark internationally. Gaining an early brand presence on a worldwide scale offers additional economic benefits from the perspective of corporate strategy, such as enhanced franchising prospects and the option of partnering with international entrepreneurs to optimize and integrate the global supply chain [31].

However, there is still space for improvement because the Madrid Protocol has a number of shortcomings. There are a few restrictions of the Madrid System that must be considered when filing the international registration, however these limitations do not always apply and everything must be evaluated on a case-by-case basis. These limits include [32]:

a. Central attack

During the first five years following the date of the international registration, the protection resulting from the international registration cannot be relied upon if any basic application or registration upon which the international registration was based is refused, invalidated, revoked, or otherwise challenged. In effect, any third party that wishes to contest the international registration in all designated countries should attack the basic application or basic registration ("home mark"). The international

registration will be canceled if the basic registration is canceled after five years as a result of an action that commenced during the five-year period.

b. “Home Mark” requirement

In order to use the Madrid System, in addition to holding trademark application or registration in a Protocol member country, it is necessary to have one of three specified links with the same Protocol member country. These links include being a national of a Protocol member country, being domiciled in a Protocol member country, or having a real and effective industrial or commercial establishment in a Protocol member country. Trademark registration in Indonesia was discussed in the previous section. A person or organization that does not have any of those links is going to have a tough time complying with the need of a “home mark.” For instance, an international registration cannot be given to a party that does not have a commercial establishment, domicile, or nationality in a nation that is a participant in the Madrid Protocol. This is one of the requirements for receiving an international registration.

c. Restriction in the change of ownership

According to the World Intellectual Property Organization (WIPO), in order to be eligible to own the international registration, a new owner (the transferee) must either be a national of a Contracting Party (a member of the Madrid Protocol) or have a business or domicile in a Contracting Party (member) of the Madrid Protocol. This criterion would be troublesome if a trademark owner wanted to transfer the ownership to a national of a country which is not a member of the Madrid Protocol.

d. Country specific limitations

Prior to designate those nations through the Madrid System, it is important to take into consideration the various restrictions on international registration that are peculiar to certain countries. As a result, those who are interested in applying for the position should always be sure to examine the local requirements on a case-by-case basis. For instance, the Nice Classification might be broken down into several separate subcategories in several nations.

There are also few other technical difficulties regarding the Madrid Protocol [33]:

- a. Trademark research in the destination countries and obtaining information about standards and trademark systems in the destination countries are not very easy, because the applicant does not directly contact a local intellectual property consultant.
- b. The priority date of the application may be shifted if the Mark Office of the country of origin is late to send it to WIPO in the period of 2 months since the date of receipt in Indonesia. If it is not fulfilled then priority date is replaced with receipt date of files at WIPO.
- c. A description of the goods or services must be included within the scope of basic application, some country of origin imposes more specific conditions so that the legal protection of the trademark in such countries are more limited.
- d. This system is relatively expensive, especially for Indonesian SMEs because the applicant is required to pay basic fee, supplementary fee, complementary fee/individual fee in Swiss Franc currency.

The Madrid system will bring benefits to the member countries that have relatively large number of trademarks and with relatively broad marketing. For countries that only have a few trademarks worth to be registered internationally, the mechanism in this system might detrimental because such countries will only become a market state. While the countries that are not ready to act on this system will generally be plunged into the flow of trade globalization. This condition could be further exacerbated by the low economic level, so that trademark owners do not have the capability even to register the trademarks of their products [34].

Another legal problem is the conditions for registering a trademark through the Madrid Protocol. There are conditions that need to be fulfilled by the applicants before applying for their international trademarks, among them is the requirement that applicants need to already have a registered trademark in Indonesia under DJKI or at least are already in the process of submitting the application for trademark registration. This is a problem for SMEs because a lot of trademarks for the product, whether goods or services offered by SMEs are still not registered. The low awareness of SMEs regarding trademark registration may cause disputes in the future. For example, in the case of Gayo Coffee and Toraja Coffee. The trademark Gayo Coffee and Toraja Coffee are already registered by Dutch and Japanese entrepreneurs, so that farmers in Indonesia could not export both types of commodities using the name of Gayo or Toraja coffee [35].

4 Conclusion

The Madrid Protocol is an attempt at the improvement of international trademark registration system, stemming from the earlier Madrid Agreement. It has succeeded more than the Madrid Agreement in appealing more countries as its members. This success, along with globalization, result in the rising amount of international trademark registration. However, the Madrid Protocol itself and its consequences still have several disadvantages, along with their visible advantages.

The Madrid Protocol has made international trademark registration easier than it ever was with its single application system. However, it also poses several obstacles and limitations against its applicants, mostly related to the administrative requirements needed by the international trademark registration system.

As a consequence of utilizing the Madrid Protocol, it is easier for many countries to register their trademark in other countries. This means more businesses gain legal protection over their trademarks abroad, which then leads to the encouragement of product export. This might be a good progress for the economy of the exporting countries. However, some other countries with businesses that have less power to export their products and register their trademarks internationally, especially the SMEs in countries like Indonesia, might face a more difficult business competition, or simply become market states which consume more than they produce. To raise the awareness of trademark registration, both national and international, it is necessary to put some efforts that can penetrate the smallest parts of society, especially SMEs which are abundant in Indonesia and could support Indonesian national economy.

Statutes

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