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The Politics of Law in the Madrid Protocol Ratification in the form of President Regulation related to Trademark Registration

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Abstract. The implementation of Madrid System in Indonesia since the 1st January in 2018 is expected to have a positive impact in terms of international trademark registration to allow and protect entrepreneurial entities, from individual, legal, and business entities to compete globally. On the other hand, trademark registration originated from Indonesia using the Madrid Protocol System to other countries is still considerably minimal compared to trademark registration from other countries to Indonesia. There are issues point out in this writing, specifically to describe the politics of law in the ratification of Protocol related to the Madrid Agreement Concerning the International Trademark Registration, 1989 and also obstacle adhere after the ratification of the Madrid Protocol in the registration of international trademarks in Indonesia. Result of this study is that the ratification of Protocol related to the Madrid Agreement regarding International Trademark Registration, 1989 conducted by Indonesian government through Republic of Indonesia Presidential Regulation No. 92 in 2017 regarding ratification of Protocol Related to the Madrid Agreement Regarding International Trademark Registration, 1989 contained in State Gazette No.212 in 2017 is already appropriate. However, judging from the timeframe of the Madrid Protocol's formation was formed already since 1989, the ratification in Indonesia is considered delayed, knowing that this ratification is very beneficial for protecting entrepreneurs to expand their business abroad. Obstacles revolve around the implementation of the Madrid Protocol system in Indonesia are due to several reasons; few of them are of lack of encouragement from the entrepreneurial entities to register their brand, thougher application conditions from some countries compared to in Indonesia, and unavailability of online platform to register international trademark.

Keywords. Politics of Law, Madrid Protocol, Regulation

1. Introduction

The era of globalization has been very instrumental in various aspects of life such as technology, trade, health, and others. Globalization encourages the openness of the world without limits, in which countries need to accommodate this by opening up to other countries, in a way of participating in international organizations. There are various world organizations, such as the World Trade Organization (WTO), World Intellectual Property Organization (WIPO), and others. The WTO and WIPO have a connection between in regulating any kind of intellectual property. Intellectual property consists of 7 (seven) categories of rights; copyright,

trademark rights, patent rights, industrial design, integrated circuit layout design, trade secrecy, and protection of plant varieties.

In this writing, the rights to be emphasized revolves around trademark issues. The core from trademark according to Indonesian Law No. 20 in 2016, Article 1 No.1 in regards to Trademark and Geographical Indication, explains that they are signs to distinguish goods and / or services in trading of goods and / or services.

These signs became an identity of the goods and / or services produced by legal subjects or business entities and these identities must be registered in advance to be protected. Trademark registration is territorial, so that protection can only be done in the country where the mark is registered and accepted.

National trademark registration is regulated under Indonesian Law No. 20 of 2016 in regards to Trademark and Geographical Indications. In bigger picture, international trademark registration is regulated under *The Madrid Agreement Concerning International Registration of Trademarks* signed in 1881 (effective since 1892) and *Protocol Related to The Madrid Agreement* 1989 (Madrid Protocol, effective January 1st, 1996).[§]

On October 2nd in 2017, Indonesia was officially the 100th member of the Madrid Union and ratified The Madrid Protocol through Presidential Regulation of the Republic of Indonesia No. 92 of 2017 regarding Accession of The Madrid Protocol.^{**} Membership of Madrid Union was made to align the trademark registration process in Indonesia with the trademark registration process in Indonesia's main trading partner. The Madrid Protocol also provides opportunities for international trademark stakeholders to be able to use global intellectual property mechanisms to support the strengthening of the national economy which generally simplifies the process of trademark registration.^{††}

The registration of Madrid Protocol was seen as a more efficient tool to help domestic businesses register their trademarks internationally at cheaper and more affordable cost and therefore The Madrid Protocol was considered very important to be ratified by Indonesia. From the entrepreneur's side, The Madrid Protocol clearly seen as very beneficial due to its simplicity to register their trademarks internationally. Meanwhile, form the side of the owner of business at the convention, The Madrid Protocol was more considered as a legal protection provider.

Moreover, from the point of view of the government officials participated in the convention, The Madrid Protocol was also seen as beneficial considering its power to boost foreign exchange cash, spur the growth of domestic trademark applications as effect of trademark applications globally, as well as a preventive measure to protect intellectual property rights against piracy or counterfeiting efforts.

Judging from these advantages, The Indonesian Government sought to ratify this protocol through Presidential Regulation No. 92 of 2017 regarding Ratification of the Protocol Related to The Madrid Agreement Concerning The International Registration of Trademark, 1989. However, based on the data recorded, initial registration of international brands from Indonesia abroad was very minimal at 18 (eighteen) applications, compared to international brands applications from other countries to reach 3,432 (three thousand four hundred thirty-two) applications. There were pros and cons around the ratification of The Madrid Protocol and thus brought up the necessity to review the politics of law from government and how far its implementation since it was ratified by the government.

2. Problem identification

Problem formulation from this research summarized into 2 questions:

- A. How is the politics of the law in ratification of The Protocol Related to the Madrid Agreement Concerning International Trademark Registration, 1989?

- B. What are the obstacles towards the implementation after the ratification of The Protocol Related to the Madrid Agreement concerning the International Trademark Registration, 1989 in registering international trademarks in Indonesia?

3. Methods

This research uses normative juridical and empirical methods to analyse the problem identification. Normative juridical methods in research focused on examining the application of rules or norms in positive law^{††} while empirical methods is used to examine primary data^{§§}. Primary data is obtained directly from the source^{***} in this case obtained by the writer through conducting an interview with the General Directorate of Intellectual Property.

4. Discussion

4.1 Politics of Law in The Ratification of *Protocol Related to The Madrid Agreement Concerning International Trademark Registration, 1989*

The definition of politics of law can be seen from the perspective of etymology and terminology. In the etymological perspective, the politics of law is a Dutch translation of "*recht politik*" which means policy and thus it can be considered as legal policy, while policy in Indonesian dictionary means a series of concepts and principles in implementation of a work, leadership, and way to act. From above narrative, politics of law can be interpreted as series of concepts and principles which outline and underlie the implementation of leadership efforts, and how to act in the field of law.^{†††}

Padmo Wahjono describes politics of law as a basic policy that determines the direction, configuration, and content of the regulation about to be agreed upon,^{†††} and in his other article entitled "*Investigating the Process of Legislations Establishment*" Padmo Wahjono enhanced the definition of the politics of law into policy used by government officials in creating a criteria to legalize something. The policy mentioned can be related to the formation, application, and the law enforcement itself.^{§§§}

According to Soedarto, politics of law is a policy of one state through authorized state agencies to set the desired regulations, which expected to be used to express aspirations from the society and to achieve what is aspired.^{****} William Zevenbergen describes politics of law as an attempt to answer questions and decide which regulations are appropriate to be made as law, when the law and regulation themselves are form of politics of law.^{††††} T. M. Radhie also describes the definition of politics of law as a statement from the state authorities regarding law in force in their territory and also direction of the law development.^{††††}

Based on above definitions of politics of law, writer attempts to conclude the meaning of politics of law itself as a statement of will in a form of policy from the state authorities through their authorized bodies to determine direction, form, and content of the applicable law to achieve aspirations from the society. Based on this understanding, writer attempts to elaborate on the politics of law on the formation of The Madrid Protocol.

The Madrid Protocol is an international agreement agreed upon by WIPO member countries in 1989 as the legal basis for the establishment of The Madrid System for The International Registration of Trademarks.^{§§§§} Furthermore, the Madrid Protocol's accession by the Government of The Republic of Indonesia through the Ministry of Law and Human Rights was conducted on October 2nd, 2017 and in force on January 2nd, 2018 through Presidential Decree of the Republic of Indonesia No. 92 of 2017 regarding Ratification of The Protocol Related to the Madrid Agreement Concerning the International Registration of Trademark, 1989 which contained in The State Gazette No.212 of 2017. Indonesia was the 100th member country to implement The Madrid Protocol. As a member of The Madrid Protocol, the

Indonesian government was required to make some adjustments towards The Madrid Protocol provisions into Indonesian trademark regulations, especially to accommodate provisions related to international trademark registration and on November 26th, 2016 the government officially revoked the preceding 2001 Trademark Law.^{*****} With the emergence of The Madrid Protocol through Presidential Decree of the Republic of Indonesia No. 92 of 2017 Regarding Ratification of The Protocol Related to The Madrid Agreement Concerning International Registration of Trademark, 1989, the trademark registration for trademark holders throughout Indonesia is finally in force.

From Sunaryati Hartono's point of view, politics of law is a tool or means and steps that can be used by the government to create the desired national legal system and achieve greater good in realizing the aspirations of the Indonesian people.^{††††} According to Sunaryati Hartono, factors that will determine politics of law are not solely determined by what we aspire to or simply depend on the will of lawmakers, practitioners or mere theorists, but they are also determined by current circumstances, development of law in other country, as well as the development of international law. The difference between the politics of law in a particular country and with others is what later led to what is called the National Politics of Law.^{‡‡‡‡} This is in line with what happened with The Madrid Protocol. From the history of Madrid's development of the protocol itself, it was formed in 1989, until later can be adopted by several countries.

Based on an interview with Mr. Agung Indriyanto, Trademark Inspector at the Directorate General of Intellectual Property of Indonesia, the ratification The Madrid Protocol provides benefits for the Indonesian society to facilitate Indonesian brand owners who have international vision, to easily register their trademarks abroad and serve another purpose in improving the service quality of The Directorate General of Intellectual Property itself. This notion was bound by The Republic of Indonesia's obligation to complete these tasks within 18 months and the only system easiest used by brand owners to register their brand overseas is The Madrid Protocol system due to its wide coverage. The Madrid Protocol System can presently reach 120 countries. Moreover, the convenience of domestic brand owners will also be enjoyed by foreign brand owners to register their brand in Indonesia as well. This principle comes from the government with purpose to facilitate the simplicity in doing business, in terms of the conveniences offered from the outside and inside of the country. The Madrid System increases the ease of doing business in Indonesia and cuts a lot of the complexity associated with trademark registration procedures. The needs of this simplicity is triggered by the process of business practice itself, because Intellectual Property Rights will be the first one to protect business owners when it comes to patent, brand, or design ownership.

Domestically, these efforts are helping local entrepreneurs to trade their services / goods internationally. Entrepreneurs with vision to export their services / goods as their business practice have found it easy to register their trademarks because in practice many exporters carry out export activities without trademarks. While the existence of the brand is to add value compared to a product without a label.^{§§§§}

Abdul Hakim Garuda Nusantara, defines politics of law as a legal policy intended to be implemented or carried out nationally by a particular government official which includes:

- a. consistent implementation of existing legal provisions;
- b. development of regulations focusing both in renewing and creating new regulations;
- c. affirmation of the law enforcement functions and development of their members; and
- d. enhancement of public legal awareness to the perception of elite policy makers.^{*****}

Satjipto Rahardjo defines politics of law as an activity of choosing and means to be used to achieve certain social and legal goals in the society.^{†††††} According to Satjipto Rahardjo on

the study of politics of law, several fundamental questions arose: (a) what goals are to be achieved through the existing system? ; (b) what methods and which are considered the best way to achieve that goal? ; (c) when and in what ways should the law be changed? ; and (d) can a standard and established pattern be formulated to assist in deciding the process of selecting goals and ways to achieve those objectives?***** For this reason, the writer tries to answer some of Satjipto Rahardjo's questions, linked with The Madrid Protocol.

One of the goal to be achieved by The Government of Indonesia as mandated by The 1945 Constitution of The Republic of Indonesia states to promote public welfare and participate in carrying out world order based on social justice and one of the system used as an effort to advance public welfare was by ratifying The Madrid Protocol System. The basic concept of The Madrid Protocol is a trademark application to obtain legal protection in many countries and The Madrid Protocol actually creating a necessity from brand owners to obtain trademarks protection in several countries at once through registration applications directly at the trademark registration office in their country or at the regional level.***** Eventhough it was agreed in an international agreement in 1989, The Madrid Protocol was later ratified by The Government of Indonesia on October 2nd 2017 and effective started on January 2nd, 2018 through Presidential Decree of The Republic of Indonesia No. 92 of 2017 regarding Ratification of The Protocol Related to The Madrid Agreement Concerning The International Registration of Trademark, 1989 which contained in the State Gazette No. 212 of 2017. Through the ratification of The Madrid Protocol, The Government of Indonesia seems convinced that this is the right way to help entrepreneurs to register their trademarks abroad in an effort to improve the welfare of entrepreneurs and improve justice for entrepreneurs in international settings.

4.2 Obstacles in The Implementation of the Protocol Related to the Madrid Agreement of International Trademark Registration, 1989

The current trademark regulation is under Regulation No. 20 of 2016 regarding Trademarks and Geographical Indications. The brand itself has its own peculiarities as a mark or characteristic of a commercialized product and / or service. Trademarks must be registered first if the owner desires to protect his trademark from being used by others and the registration of the mark can be done in Indonesia and / or internationally. National trademark registration is carried out in Indonesia and if approved, the brand registered gets protection in Indonesia. Moreover, at the international setting, international trademark registration can be done with The Madrid Protocol. Indonesia has ratified The Madrid Protocol through Presidential Decree No. 92 of 2017 regarding Ratification of The Protocol Related to The Madrid Agreement Concerning The International Registration of Trademark, 1989. The Madrid Protocol was originally an additional agreement to mitigate Madrid's weaknesses by introducing new innovations on the international brand registration system, thus The Madrid System will progress accordingly and more countries will be joining it.***** The Madrid Agreement and The Madrid Protocol are two different things, but both are administered by the WIPO International Bureau located in Geneva. Following are the differences between The Madrid Agreement and The Madrid Protocol.*****

Category	Madrid Agreement	Madrid Protocol
Basis Trademark	Domestic registration is mandatory	Requests for international registration can be transformed into national registrations with the same priority

Risk	International registration depends on domestic registration within duration of five years with the risk of <i>central attacks</i>	
Inspection Period	Rejection notification must be given within 12 months	Rejection notification for registration within a period of 18 months with renewable term in case of drawback
Cost	Equal cost	Different between individuals
Language	Use of French as the official language and English as the second official language	Use of French, English, and Spanish

Domestic registration is done to obtain basis trademark. While basis trademark is a registered trademark or trademark application that is still in the process of registration at The Directorate General of Intellectual Property. ***** This basis trademark is used as a reference for international trademark registration and thus international registration date will continue to be applicable as long as the basis trademark is approved, used, and extended as desirable by the trademark owner. Approval of basis trademark is quite important in The Madrid Agreement because if the basis trademark were rejected, the registration of trademark to various country destinations will also be rejected. This condition is called *central attack*. *Central attack* is any rejection, withdrawal, or cancellation of an application or registration of a trademark in the country of origin within a period of 5 years from the date of international registration which will lead to withdrawal, rejection, or cancellation of international registration at the same level. §§§§§§§§

Central attack is one of the weaknesses attached to The Madrid Agreement, which is then updated by The Madrid Protocol by implementing transformation system. Definition of Transformation according to Article 26 Paragraph (1) of Regulation No. 22 of 2018 regarding International Trademark Registration Based on Protocol Related to The Madrid Agreement of International Trademark Registration is an action to change the status of international trademark registration to trademark registration in Indonesia due to the protection termination of basic application in the country of origin. Costs incurred to a trademark registrant using The Madrid Agreement are the *basic* and *complementary fee*, with determined amount, whereas in The Madrid Protocol it is known by the existence of *individual fees* and *complementary fees*. *****

Madrid System arrangement has been explicitly regulated in Article 52 of Regulation No. 20 of 2016 regarding Trademarks and Geographical Indications jo. Article 3 Regulation No. 22 of 2018 regarding International Trademark Registration based on The Protocol Related to The Madrid Agreement of International Trademark Registration regulates applications for registration of international trademarks:

1. Application for a trademark is submitted to the international bureau which can be submitted electronically or non-electronically by filling out a form in English;
2. Trademark applications may be originated from and addressed to Indonesia and also otherwise originated from and addressed to other countries;
3. Application for a trademark originated from Indonesia is regulated with below applicant condition, and they must be:
 - a. Indonesian citizens;
 - b. Remains with legal domicile in the territory of Indonesia;

- c. Having real industrial or commercial business activities in Indonesia; or
 - d. Can be submitted through a representative.
4. Trademark application originated from Indonesia must be admitted and registered in Indonesia first before application; and
 5. Requests for international trademarks is based on The Protocol Related to The Madrid Agreement Regarding International Registration of Trademarks and The Government Regulations (in this case The Government Regulation No. 22 of 2018 regarding Registration of International Trademarks Based on The Protocol Related to Madrid's Agreement Regarding International Trademark Registration).

Madrid System requires 2 conditions: subjective and objective. The subjective condition requires an international trademark registrant to be an Indonesian citizen or a subject with legal domicile in Indonesia. While the objective condition requires the international trademark to be registered in the country of origin, in this case Indonesia.^{††††††††} Based on this narrative, subjective and objective conditions are regulated under Indonesian Regulations; The Article 52 paragraph (3) of The Regulation No. 20 of 2016 regarding Trademarks and Geographical Indications regulates the subjective conditions while The Article 52 Paragraph (4) Regulation No. 20 of 2016 regarding Trademarks and Geographical Indications regulates the objective conditions of international trademarks registration using The Madrid System.

The ratification of The Madrid Protocol is interesting due to benefits it provides for person or business entity who wants to register their trademark to various countries. However, on the other hand Indonesia seems to be not ready with this system due to only small number of parties registering their trademark through The Madrid System. Currently, there are only 49 trademarks registrations from Indonesia using The Madrid System, compared to thousands of registrations from abroad.^{††††††††} Indonesia needs to catch up in order not to become a mere market state that only has a few brands that are worthy of going international and that The Madrid System will only bring profits to a country that has a relatively large number of brands and relatively broad marketing.^{§§§§§§§§} The Madrid Protocol can be means to facilitate the access to business for entrepreneurs. As also aligns with the implementation of one of *The Sixth Nawacita Programs* to increase people's productivity and competitiveness in international markets and also as one of the five points of the President's development vision to facilitate the pace of investment.

Entrepreneurs (from individuals, legal, or business entities) are strongly encouraged to register their trademarks in order to get protection, especially for those who have a wide market share in various countries. Obtaining trademark protection in various countries is very much needed to protect the brand itself, especially in the current era of free trade. The Madrid Protocol possess a *request of extend* system to extend the scope of protection in many countries, but a basic trademark must already exist, either in the registration or in application stage.^{*****}

The advantage of The Madrid system is also that it can cut through some complicated stages to register a mark internationally, so that the applicant only needs to come to The International Bureau of The Directorate General of Intellectual Property to register the trademark with the destination countries with one form and only pay once. If the trademark applicant wishes to add a country to register his trademark after another registration to previously registered country, the trademark applicant only needs to apply for additional trademark protection based on the initial registration number without the need to submit an application from the beginning. The period of protection of international trademarks also follows the rule of the basic trademark, so that if the basic trademark period expires, all trademarks registered in other countries will also run out at the same time because the international trademark registration number follows the basic trademark.^{††††††††}

The obstacle to the implementation of The Madrid System in Indonesia is that the entrepreneurs have not been triggered to register their trademarks internationally. In addition, some countries such as United States applies tougher registration conditions than the trademark registration requirements in Indonesia. The classification of goods for trademark registration in the United States must also be absolutely *clear, precise, and specific*. For example, brand registration for clothing, can not only use the word "*clothing*", but it must be clearer about the type of clothing, for example *jacket, tuxedo, sports clothing*, or others. Then, *The International Bureau (IB) of WIPO* will check the formality of the application including cost and classification of the brand based on *The Nice Agreement*, while the destination countries inspect the requested trademark based on their respective trademark laws. In addition, the obstacle revolves around the implementation of The Madrid System is due to the unavailability of *online platform* for international trademark registration, and thus the applicant must visit The International Bureau of the Directorate General of Intellectual Property to register their trademark through The Madrid System to do manual registration. The Directorate General of Intellectual Property continues to make efforts to disseminate information to various cities in Indonesia to encourage entrepreneurs to register their trademarks using The Madrid Protocol System and provide online platform to register trademarks internationally.

The author also believes that The Directorate General of Intellectual Property needs to create a platform that contains simulations or examples of how to fill out the forms needed for international trademark registration. Prospective registrants also need to be informed about trademark registration in countries with different or more specific substantive examinations. This is important so that the trademark registrant can better prepare for the registration of the trademark in the destination countries.

5. Closing

5.1 Conclusion

- A. From politics of law perspective, ratification of The Protocol Related to The Madrid Agreement Regarding International Registration of Trademark, 1989 carried out by The Indonesian Government through Presidential Decree of The Republic of Indonesia No. 92 of 2017 regarding Ratification Protocol Related To The Madrid Agreement Regarding The International Registration Of Trademark, 1989 contained in State Gazette No.212 of 2017 is already appropriate. However, judging from the year of agreement of The Madrid Protocol since 1989, the ratification of this protocol is quite delayed from Indonesian Government side. The Madrid Protocol ratification is quite useful to protect entrepreneurs who perform business expansions abroad, as the trademark they register will also be protected in the countries which also ratified The Madrid Protocol.
- B. Implementation of The Madrid Protocol System in Indonesia is facing some obstacles due to several reasons:
 - a. Entrepreneurs (individuals, legal, or business entities) have not been triggered to automatically register their trademarks in various countries. Thus, The Directorate General of Intellectual Property must continue to disseminate information and perform socialization to entrepreneurs so that they are willing to register their trademarks internationally;
 - b. Registration conditions from some countries can sometime be more difficult than trademark registration requirements in Indonesia because the destination countries will examine trademark applications based on their respective trademark law with substantive requirements that are more detailed, specific, and precise; and

- c. The unavailability of online platform for international trademark registration, hence the applicant must go to The International Bureau of The Directorate General of Intellectual Property to manually register their trademark through The Madrid System.

5.2 Suggestion

- A. The writer suggests of a prompt action from the government officials when it comes to legislation establishment in order to meet the community needs and aspirations. In this case is the matter of international agreement ratification which is very beneficial to promote development of the entrepreneur entities and more importantly to the Indonesian welfare.
- B. The needs from the entrepreneurs to easily absorb and utilize The Madrid Protocol, by efforts from the government officials to make more of a practical regulation to tackle the obstacles encountered in implementation of The Madrid Protocol.

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- ***** *Ibid.*, p. 75.
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+++++ *Ibid.*, p. 23.

§§§§§ Data collected from January 2nd 2018 until May 17th 2019. Based on interview with Mr. Agung Indriyanto, Trademark Inspector at the Directorate General of Intellectual Property, May 17th, 2019.

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***** Trias Palupi Kurnianingrum, *Pentingnya Ratifikasi Madrid Protocol Dalam Menghadapi Perdagangan Bebas di Era Globalisasi*, Jurnal Penelitian Politik Vol. 7, No. 2, Tahun 2010, LIPI, p. 22.

International trademark registration consists of 4 (four) kinds of fees: 1) Basic fee as fee paid by the trademark owner in the international trademark registration system; 2) Complementary fee as fee paid to the country of destination for the application for trademark registration if that particular country at the time of accession does not declare to accept individual fee; 3) Supplementary fee as additional costs of complementary fees to destination country if the application for the trademark contains more than three classes of goods and / or services and at the time of accession the country does not declare receiving an individual fee; and 4) Individual fee as determined fee by the cost of registering an international trademark, the amount cannot be exceed the cost of the application for registering a trademark in the country of origin and applicable when the time of accession declares to apply an individual fee. Quoted from Agung Indriyanto, *op.cit.*, p. 226-227.

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