Indonesia for Global Justice

IGJ Briefing Paper

Critical Review Towards Act No.24 Year 2000 on International Agreement:

"Indonesian Law about Power Binding Towards International Agreement and International Trade Agreement"

Key Points:

- **The use of word ' ratification by an act in UUPI has caused misunderstanding towards the process of binding to international agreement.**
- **Regulation Article 10 and Article 11 Verse (1) has no avail to determine correctly the criteria of international agreement categorization and the consequence to the form of ratification.**
- **The role of the government is major in determining the role of house of representative to agree or disagree with the international agreement on foreign loans/grants.**
- **Trade Act as a correction towards International Agreements Act has been failed to achieve, it was because the unclear division and categorization in Act of Trade. At the end, the government gets more power to international agreements. As consequence, check and balance function of House of Representative (DPR) is failed to achieve.**

Introduction

When the people feel disadvantaged about the binding of the State to an international agreement and considered that the international agreement is against the 1945 Constitution (UUD), what has to be done? Is the national law system able to answer the problem?

Such situation had happened in the case of international agreement about ASEAN charter which was legalized with the Act No 38 Year 2008. In that case, the people filed the lawsuit to Constitutional Court (MK) and invoked that the MK would decide that Article 1 verse (5) and Article 2 verse (2) letter (n) which regulate the production bases and single market or as it is known as ASEAN free market is against the the 1945 Constitution (UUD).

In the main petition of its decree, MK rejected the petition of the applicants with the reasons that the provision of ASEAN Free Trade " is not necessarily applicable with the legalization of Act 38/2008 date 6 November 2008."[1] Whereas, in its decree, MK declared that it has authorities to conduct material test towards international agreement of ASEAN Charter since the charter is an annex in Act No. 38 Tahun 2008.[2]

The decree made by MK has left so many questions behind it. The Law and regulation in Indonesia has failed to formulate the role of judicial institutions in positioning international law in the implementation of national law system.

This paper is aimed to answer the question on how national law place international law in it's system; how the national law regulates the involvement of people's representative body in detemining the decree to bound or not to bound with international agreeement and internationl trade agreement as well as with the procedure that has to be done. And also, on how to test the constitutional level of an international agreement.

Background of The Study

a. Indonesian Law about International Law

Indonesia is a country which does not explain explicitly the relation between international law which become parts of national law. In the 1945 Constitution (UUD), the reference in international law is only related to the power in making international agreement which lies in President. Article 11 verse (1) the 1945 Constitution (UUD) completely mentioned: "President with the approval of House of Representative could declare war, make peace, and build agreements with other countries."

Based on the Article 11 of Constitution (UUD) and Act of International Affair , Indonesian law has clearly admitted that international law (including international customary law) is binding to it and is becoming the source of law. However, the regulation above has yet to explain how Indonesia would express its binding (consent to be bound) to a specific international law and what kind of law procedures that should be run in domestic level in relation to such consent.

However, when it is said that international law is the source of national law, where does the place of the former in the hierarchical system of national law[3]. These questions are not easy to answer. In fact,it is not necessarily signifying that the implementation of international law in domestic level run just like the national law does-whereby the judge could directly use the national law as the source of law in deciding a case. In a court decision, it is found that the international law (in the form of international agreementsl) can only be executed when the national law has been established to implement that particular international law.[4]

Even sometimes, the judges utilized the international law "to support their interpretations on national law." and "only use the international law to help filling the gap in the situation when the Indonesian law is void."[5] However, whether or not the mechanism and implementation of law enforcement is available, Indonesia is still responsible for fulfilling its duty to the party or to parties involved in the agreement *(pacta sunt servanda)* since the rule in international custom law oblige so. [6]

Since 2000, with the publication of Act Number 24 Year 2000 about the International Agreement (UUPI) technical provisions have been regulated as well as the procedures about international agreements and also on how Indonesia makes statements which binds to it in detail. Recently, the Act Number 7 Year 2014 about Trade (Act on Trade) has also been regulated. It manage how Indonesia binds itself to international trade agreements.

1. Idem hal. 189

2. Decree of MK Number 33/PUU-IX/2011 page. 180-181

3. This aspect has ever been discussed by among others: Aminoto and Agustina Merdekawati, "Prospek Penempatan Perjanjian Internasional Dalam Hierarki Peraturan Perundang-undangan Indonesia", Mimbar Hukum Vol. 27 Number 1 2015

4. Decree of Supreme Court Number 2944 K/Pdt/1983, which prosecuted in the cassation level the case related to implementation of Convention On Recognition And Enforcement Of Foreign Arbitral Awards 1958.

5. Simon Butt, "The Position of International Law Within The Indonesian Legal System", Hal. 9, 27. 28 Emory International Law Review I (2014) can be seen at http://law.emory.edu/eilr/content/volume-28/issue-1/index.html Case that was referred was material test petition UU No.27 year 2004 About Commission of Truth and Reconsiliation

6. Martin Dixon, TEXT BOOK ON INTERNATIONAL LAW, page. 31; Antonio Cassese, INTERNATIONAL LAW, Hal. 183

b. Indonesian Law and It's Binding to International Law

The attachment of a country to international law which comes from international agreements should be declared formally and should follow certain procedures. President of Indonesia is the holder of power in executing international relations and one of its form of power is to establish international agreements with other countries or other international law subjects. However, this power is not unlimited. For certain category of international agreements, approval from House of Representative (DPR) is needed before such agreements binds Indonesia. *Article 11 Verse (2) the 1945 Constitution state "President in making the international agreement which cause greater impact and basic to people's lives and related to country's financial expenses, and or require the change or the formation of Act and regulation must be under the approval of DPR."*

The constitution and regulation in Indonesia, especially in Act No. 24 Year 2000, regulates the power in forming parties who conduct the power to bind Indonesia to International law. The power lies in President's hand or people who are assigned with authority by the Presiden. However for certain categories of international agreement, approval and ratification from DPR is needed to get by the President before such agreements bind the country.

In Article 1 and UUPI Explanation represent the way of binding which are made in the form of ratification, acceptance, approval or accession, as they are contained in Article 11 Vienna Convention. *Yet, International Agreement Act made it's own terminology, which is 'ratification'*. Article 11 Vienna Convention define ratification, acceptance, accession or approval are the form of binding declaration of a country to an international agreement. Thus, UUPI requires that all international agreements which are done in the way of ratification, acceptance, accession or approval are agreements which require ratification .

Whether or not ratification is needed before declaring a binding to an international agreement will depend on the agreement of the parties involved, their own antional law, and whether or not the agreemnt which a country has just signed needs to be ratified or not before the binding is effective. In its national law, a country could require a ratification through parliament, while some countries only need to have approval from their own head of government or president. [7]

In the context of this paper, the difference between international agreement which is ratified only by President and the one which need DPR attestation is a crucial problem that exist in national law system.

Finding of The Research: "UUPI Problems"

a. Ratification or Approval?

There is a difference in using the term in UUPI with the term mentioned in the 1945 Constitution (UUD), especially in describing both DPR's and President's authority in making international agreeements. The 1945 Constitution (UUD), used the term 'approval', UUPI used the term 'attestation'. And when the 1945 Constitution (UUD) described the involvement of DPR in the matter of establishing international agreement which are made by The President with the approval of DPR, UUPI described it with the 'attestation of the Act'.

The difference in using the term approval and ratification has caused problems. The definition of approval in Article 11 the 1945 Constitution (UUD) is meant as a check mechanism of people's representative institutions to government, whether the action of the government by making agreement with a specific international law subject is worth, important, correct, needed, or bring advantages to country and nations. And the form of the agreement statement has not been mentioned. Meanwhile, the definition of 'ratification' alone in Article 1.2 International Agreement Act is *"legal actional to bind one self to an international agreement in the form of ratificationn, accession, acceptance and approval."*

In UUPI, the ratification is done with two ways: through an Act by DPR RI and through a president decree (now is named president regulation). Thus, by using the definition of word 'ratification', in the phrase of ' ratification with the law" will mean: a legal action to bind one-self to an international agreement with the act. By this, it means the role of DPR which supposed to be approving or rejecting the action of government which is going to bind the country to a specific international agreement **has changed its role to be the maker of consent to be bound through a specific act.**

Whereas the authority to declare binding to an international agreement is the job of of the government by depositing or exchanging something which is called as ratification instrument, and not with the act. The provision of UUPI can be suspectedly born out of the inaccuracy in alocating and determining which area should the national law be applied on- in this case national administration law and state law in one hand , and which area the international law can be applied at, in the other hand.

The rising of ratification Act then bring some questions, does the Act means that the international agreement is becoming part of national law? This problem is not easy to address.

b. Problematic Qualifications

The ratification of International Agreement in UUPI is divided into two category, through Act/Law and through President Decree, or currently its is called President Regulation. This has caused a crucial problem.

In UUPI, there is irrelevancy between the qualification of international agreement which needs DPR approval as

7. Indonesia mengesahkan Perjanjian Indonesia–Jepang Untuk Kemitraan Ekonomi 2007 (Agreement Between Japan And The Republic Of Indonesia For An Economic Partnership 2007) with President Decree No. 36 Year 2008, while Japan was on the way to ratifiy throught the parliament (Diet).

mentioned in Article 11 (2) the 1945 Constitution (UUD) with the qualification mentioned in Artile 10 UUPI.

It is hard to deny that the substance of agreement as mentioned in Article 10 UUPI is related, generally, with crucial aspects. Matters related to politics, peace, defence, security, as well as sovereignty and sovereign rights of a country are related to the existence of the country in international community and they are also fundamental.

Rationality of international agreement which needs DPR approval as mentioned in Article 10 UUPI is; if one of or combination of the following elements are included in the agreements, they are: **(1)** international agreement which the material is fundamental for the existence and sustainability of the country; **(2)** international agreement with constitutional material; **(3)** international agreement which the material are related directly to portofolio of legislation function of DPR and President. In other words, the material of the agreement is similar to material of the act.

After fourteen years, the types of issues inserted in Article 10 UUPI is not sufficient. Besides, the condition of the agreement substance which has to be ratified by DPR as it is said in Article 10 UUPI does not differentiate between strategic issues and non-strategic issues, nor between main issues or additional issues. The provision in Article 10 UUPI has also neglected the wide spectrum of each issues.

For instance, international trade issue which is not included in the article 10 UUPI can bring wide and fundamental impact and is not limited to procedural aspects. Even further, the subtances of international agreement can give impact to country's finance and they require regulation change, thus this type of agreement should obtain DPR's approval before the government decided to bind to the agreement.

The ratification of an agreement with President Decree is also problematic. As mentioned above, the Article 11 Verse (1) UUPI and from the explanation of the article, it is known that the international agreement which the ratification is only done by the President through president decree is "procedural and require short time implementation without having to influence the national act regulation." Thus, the explanation of UUPI refer to agreement with such characteristic: ***"the main agreement which is related to cooperation in science and technology, economy, technic, trade, culture, trade ship, double tax avoidance, and investment, as well as technical ratification."***

Thus, in a priori, based on the explanation of Article 11 verse (10 and in relation with Article 10 above, it can be interpreted that the material qualification in Article 11 verse (10 UUPI is not fundamental to the survival of the country, or it does not contain the material constitution or at least regulation material.

Thus, the international agreement material in the category article 10 UUPI can also be a material with technical/procedural, need immediate implementation, and the material of the agreement does not influence the national act regulations.

On the contrary, the category of agreement in Article 11 verse 1 can also be fundamental to the survival of a country; and contain constitutional material or at least regulation material. Also, the contain does not always have to be technical/procedural; and also it does not have alwasy to be implemented immediately, and can also influence the national act regulation.

c. Material Test on International Agreement or Material Test Ratification of International Agreement?

In the case of lawsuit Act of Ratification ASEAN Charter, in the main petition, MK rejected the petition of the applicant with the reason that ASEAN Free Trade provision " is not necessarily aplicable with the ratification of Act UU 38/2008 dated on 6 November 2008."[8] Yet, Whereas, in its decree, MK declared that it has authorities to conduct material test towards international agreement of ASEAN Charter since the charter is an annex in Act No. 38 Year 2008.[9]

It is important to remember that once Indonesia is bound to an international agreement, the international law is then applied and the country must abide by the provisions, including cancellation provisions. It is not national law which is applicable. If the approval which is made in the formal form, or in this case the Act, the things that is being tested is the Act and not the agreement. In other words, it is the approval that needs to be tested not the agreement because testing the international agreement is not the task and authority of MK, and not the authority of national law.

The action of ratification is the action of national law, thus the thing that needs to be tested by MK is the action of national law itself. Meanwhile, the substance of international agreement and the provisions of binding or not binding to it belongs to international law. Thus, MK what should conduct in relation with material test is by stating that the approval which is made in the form of Act UU No. 38 Year 2008 whether or not it is against or is not against the 1945 Constitution (UUD). If MK declares that it is against the constitution, then MK decision should be the backgroung for the government to step back from the international agreement and follow the provision of cancellation from the agreement as stipulated by the international law. [10]

d. The problems of foreign debt agreement

The ratification or approval of international agreement pertaining grant/loan from overseas should also be noted. There are Acts which need to be viewed in relation with that matter, namely UU Number 17 Year 2003 About Country Financial (

8. Idem page. 189.
9. Decree of MK Number 33/PUU-IX/2011 page. 180-181
10. For further discussion about MK decree, materials to read are as follows: Damos Dumoli Agusman, "Keputusan Mahkamah Konstitusi tentang Piagam ASEAN: Arti Penting bagi Nasib Perjanjian Lainnya", Opinio Jurist Vol.13 Year 2013.

Act of Country Financial) and UU Number 1 Year 2004 About Country Treasury (Act of Country Treasury).

In the explanation of Article 10 UUPI: "***The mechanism of loan or grant from overseas and all of the approval by DPR will be regulated under specific acts."*** However, this explanation is not adhered. Instead of regulating it in a specific act, matters related to the mechanism, procedures of grant and loan from overseas and the approval by DPR, are merely regulated under government regulation.

Government regulation, PP Number 10 Year 2011 About Code of Conduct About Procurement Loand and Grant Acceptance from Overseas has created a new classification about a new type of international agreement which needs DPR approval and other type of international agreement which does not need approval from DPR.

Besides that, this PP is also regulating that DPR's approval to loan and grant from overseas is not manifested in a separate formal form of approval, but it is part of approval for State Budget by DPR.

Thus, as long as it is pertaining DPR approval on overseas loan/ grant, the PP about Code of Conduct About Procurement Loand and Grant Acceptance from Overseas will make different rules as compared to Article 11 verse (2) the 1945 Constitution (UUD), to UUPI, and to Act of Country Financial. It has shown that the role of government is large in determining the role of DPR to agree or to disagree at international agreement related to loan/grant from overseas.

e. The Problem of Free Trade Agreement and The Existence of Trade Act

The released of Trade Act, UU No.7 Year 2014, confirmed the great possible implications of international agreement issues, strategically and fundamentally, and vice versa. It will depend on the matters which are under the agreements and it is also dynamic in nature.

Trade Act has also changed the criteria of approval and procedure of binding to international agreement as it is regulated earlier by UUPI. With Trade Act, the authority of DPR is getting stronger and the procedural flow for ratification is getting longer and it is limited only to international trade agreement.

Since the birth of Trade Act, international trade act will never be included in the category of international trade agreement which does not need ratification. In 60 working day, DPR must discuss whether the agreement proposed by the government should be ratified with Act or with President Decree. However, if after 60 day the DPR is not making any decision, the government will decide if such agreement require DPR aproval for ratification.

Even so, the potential for problem is wide open. An agreement which has been signed by the government could not be sent by the President if the latter think the agreement does not belong to trade agreement, while DPR could think otherwise. If such thing happen, the position of government will be more dominant in deciding whether or not an agreement is considered trade.

If president ratify the agreeement with president decree and put it in depository, Indonesia will directly be binding to such agreement. DPR cannot ask for any cancellation unless to follow the cancellation procedure in that agreement or in Viena Convention 1969.

Trade Act provide less understanding about the definition and scope of international trade agreement for example agreements related to tariff reduction and elimination or import limitation and liberation.

Free trade regime has developed widely and included investment aspects, property rights, State-owned company role, and business competition, dispute settlement mechanism, etc. Thus, in formal way, this type of agreement is no more using the term international trade agreement but economic partnership agreement for example Trans-Pacific Economic Partnership Agreement.

In the ASEAN context, free trade agreement is not made in one single comprehensive agreement, but it is arranged in some series of agreement which include many items. It is not only about tariff and reduction/elimination goods and trade barriers but also related to investment, dispute mechanism, financial service, people free movement, etc which all of the elements are put together as an integrated foundation for the running of free trade and the implementation of ASEAN economic community.

Those deals are not made in one single document agreement which entitle ASEAN Free Trade Agreement, for example, instead it is made in some steps and in titles which does not use free trade terms or trade, the titles depend on the contain of the agreement.

According to the data gathered from ASEAN website,[11] since the implementation of Trade Act, Indonesia has binded itself to:

1) ASEAN Agreement on Customs, March 2012, valid from November 2014, the attestation is done with Perpres (President Decree) No. 137 Year 2014, November 2014;

2) **ASEAN Agreement on the Movement of Natural Persons,** November 2012, effective in June 2016, attestation is done with Perpres No. 53 Year 2015, July 2015;

3) **Protocol to Amend the ASEAN Comprehensive Investment Agreement,** August 2014, effective in September 2016, attestation is done with Perpres No. 92 Year 2015, October 2015.

And also, Indonesia has signed the following agreements which

11. http://agreement.asean.org/ accessed on 28-2-2017

require ratification or approval as the form of self-binding :

1) Protocol 7 Customs Transit System, February 2015, is not applicable yet;

2) Protocol to Implement the Sixth Package of Commitments on Financial Services under the ASEAN Framework Agreement on Services, March 2015, effective in June 2015;

3) Protocol to Implement the Eighth Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, December 2013, effective in December 2016;

4) ASEAN Agreement on Medical Device Directive, November 2014, effective in January 2015;

5) Protocol to Implement the Ninth Package of Commitments on Air Transport Services under the ASEAN Framework Agreement on Services, November 2015, is not applicable yet;

6) Protocol to Implement the Ninth Package of Commitments under the ASEAN Framework Agreement on Services, November 2015, effetive in May 2016;

7) Protocol on the Legal Framework to Implement the ASEAN Single Window, September 2015, is not applicable yet.

If we look at those agreement at a glance, they will not look like trade agreements. However, if we dig deeper and pay attention to the content and rules and also the substance, check the foundation of them and expected results, then those all agreements are meant to create a free trade block of ASEAN with production base and single market or as it is called as ASEAN Economic Community. Even, the government views them not as trade agreements but as regular international agreeemnts which the former should be abide by the Act of International Trade regulated in Article 10 junto Article 11 verse (1) UUPI. Seven of international trade which have been signed by Indonesia- which will also be ratified- are also treated and viewed as the above ASEAN agreements.

It means that the understanding towards the international trade agreement as it is reffered in Trade Act is still narrowed . The government discretion is also large in determining which agreements considered as international trade and which are not.

Such existing understanding happened due to the nature of the Act itself whereby it does not formulate to reach variety of agreements since it is made to create the ASEAN free trade. As a consequence, DPR has yet to play its role to check the action of government when the latter binds itself to international trade in terms of implementing ASEAN free trade.

The aim to insert the category provision of international trade and ratification procedure of international trade into Act Trade is to correct the situation whereby The Act of International Trade has failed to achieve.

f. Cancellation of International Trade Agreement

Article 85 of Trade Act contain the cancelation of trade agreement. However, the action of cancellation can be done prior to reconsideration. The Trade Act, however fail to explain the definition of cancellation, both in its body and articles.

International agreements means international accord which involve provisions about the requirement of agreement. Cancellation of agreement is thus, part of the agreement too as it has been codified in Vienna Convention to which Indonesia binds itself under customary international law. The arrangement about cancellation of an agreement is not the domain or national law jurisdiction, but it is under international law.[12] Thus, it is peculiar that national law of Indonesia regulates the provisions about cancellation of international trade- outside the provisions which have been regulated in international agreement.

If the binding to international trade bring disadvantage to Indonesia's nationa interest, the country could withdraw from the accord by following the mechanism regulated in Vinna convention 1969. This provisions is also applicable to trade agreements with bilateral nature. By withdrawal from a bilateral agreeements, the partnership will then get terminated (termination).

This provision can only be applied if the term cancellation of agreeement is defined as withdrawal from agreement (withdrawal). It should also need to understand that the withdrawal is an internal procedure for Indonesia to withdrwa from an enacted agreement.

g. Principle of People Sovereignty

International Agreements Act has failed to formulate the limitation of President's power or government in binding the country to an international agreement. It happened because the qualification and classification of international agreement which functioned as the base of people's representative institutions involvement to control over government action in binding the country to a problematic international agreement. Trade Act which regulate the role of DPR in controlling the government in making and in binding to an international agreement has to experience the same faith. It is because the formulation of definition and understanding towards an international agreement as mentioned in the Trade Act is still narrow and the government discretion is so large especially in determining which one is the international trade agreement and which one is not.

Besides that, the power of judiciary which in this case is represented by the MA and MK is also a problematic case, especially in looking at the relation in international law with

12. See also another oppinion from Huala Adolf, "Pembatalan Perjanjian Internasional", KOMPAS, 18 June 2014; Sefriani, "Pengakhiran Sepihak Perjanjian Perdagangan Internasional", Padjajaran Law Journal Vol.2 Number 1 Year 2015

national law and how the international law is implemented in national scope.

In resolving the case on the constitutional test of ratified acts,what MK test is the norms of international agreement instead of the ratification action. It happened only because the norms are attached in the sheets of ratification. The decree of the courts is the reflection of the incompleteness of the law and the provisions of the act. It also reflect the flaw in managing the relations between national and international law and in giving comprehensive understanding about the essence behind the binding action taken by a country to an agreement- including the procedures and formalities which are following the action.

The Impact of Policies and Recommendation

The phrase " ratification of international agreement with Act should no longer exist" instead the phrase that should be known is ' approval of international trade by DPR' as it has been stipulated in the 1945 Constitution (UUD). The use of term 'approval' should be defined that DPIR could accept or reject the action from government to bind the country to such international agreement.

The 1945 Constitution (UUD) is not determining in what form exactly an approval should be given. The approval or the ratification of DPR do no have to be declared in the form of an act or a regulation. It can be in other form as long as it could reflect the will of DPR comprehensively and it is made under the applicable procedures.

Should the Act of Agreement use the terminology stipulated in Constitution- which is "DPR Approval", the logical peculiarity can be prevented. By this, it assumed that the agreements are not made in the form of an act. MK in its decree for the case of Act Material Test Petition Number 38 Year 2008 about The Ratification of Charter of the Association of Southeast Asian Nations declared that it is important to reconsider the form of international agreement ratification with Act.

In relation with international agreement cancellation, the provisionss may be applied if the term cancellation is defined as withdrawal from an agreement. It should also be understood that the procedure for withdrawal is in line with internal procedure in Indonesia.

In the context of ASEAN Charter lawsuit, what MK should do in the material test is to declare whether or not the agreement which is implemented in the form of UU No. 38 Year 2008 is against or is not against the Constitution. Should MK declared that it is against the constitution, thus the government should make the decree as foundation and reason to withdraw from such agreement and to follow applicable international law procedure in retreating from such agreement.***

Author :
Irfan Hutagalung, SH., LLM. (Senior Researcher of IGJ)

Editor Briefing :
Rachmi Hertanti (Executive Director of IGJ)

Published by :
Indonesia for Global Justice (IGJ)
Jl.Duren Tiga Raya No.9, Pancoran, Jakarta Selatan
Email: igj@igj.or.id / Website: www.igj.or.id

INDONESIA
FOR GLOBAL JUSTICE