TRANSNATIONAL BUSINESS LAW JOURNAL
Volume 1, Number 1, February 2020
P-ISSN: 2722-1105 Doi: 10.23920/transbuslj.v1i1.a1
Advance Access Publication Date: 27 February 2020
Publisher: Transnational Business Law Depaertment, Faculty of Law, Universitas Padjadjaran

A REVIEW ON THE IMPLEMENTATION OF INTERNATIONAL TRADE AGREEMENT IN INDONESIA

Huala Adolf[*]

ABSTRACT

The implementation of international trade agreements in Indonesia has been facing various problems in practice. This article describes the current situation where the international trade agreements already signed by the Republic of Indonesia are still facing problems in its implementation. This article suggested that Indonesia should have a permanent national institution in the implementation of international trade agreements.

Keywords: Indonesia, international agreements; implementation; national institution.

I. INTRODUCTION

The status and especially the implementation of international agreement in Indonesia has been, and probably always, an interesting issue for discussion. Theoretically, the issue has led to a number of debates recently among the scholars. Practically, the issue has not been drawn a clear line concerning the practical policy that the Indonesian government has on international agreements.[1]

This article tries to give a little light on the implementation of international agreement especially the international trade or economic agreements. The main reason for this article is that states enter into international agreement with others hoping that the agreement may give benefit to their trade. This benefit would only be felt if the state implements it for the interest of its trade.

The implementation includes how the Indonesian government implement the international agreements it has signed. This article also tries to review the benefit, if any, of

[*] Huala Adolf is head of Transnational Business Law Department at Faculty of Law, Universitas Padjadjaran, email: huala.adolf@gmail.com.

[1] Damos Dumoli Agusman, *Hukum Perjanjian Ingternasional: Kajian Teori dan Praktik Indonesia (transl: Law on International Treaty: Study on Theory and Practice in Indonesia),* Bandung: Refika, 2010, pp. 5 – 18 (describing a number of legal issues arising out from the problems found in the practice of Indonesia on international treaty).

the international trade agreements as it has been initiated. This would include, whether there is a model or standard of implementing agreement in had in Indonesia.

As this article is limited to the implementation of international trade agreements, its conclusion should not be regarded as the representation of the treaty practice in Indonesia. Accordingly, this paper does not intend to provide a comprehensive picture as to how the implementation of international agreements in Indonesia. A thorough, systematic and comprehensive study analyzing other objects of international agreements is needed. Before entering into this issue, this article would take a brief look into the concept of international agreement. Next is the status of international agreement according to Indonesian laws as found in some of its legislations.

The method used is the normative-analytical study. It studies the norms found in the international trade agreements as the main data of this article. The analytical approach used is descriptive analysis by analysing the norms contained in the instrument of international trade agreements. The comparative method is also applied. The study of other international trade instruments is also undertaken.

II. THE CONCEPT OF INTERNATIONAL AGREEMENT

International agreement is one of the most important concepts in international law. It is the instrument used by states to enable them to relate each other's. International agreement is also seen that states are willing consciously to be bound by the provisions contained in it. It has also been stated that the act of state to enter into relations with other states by way of making and signing an international agreement is an act of sovereign state. The act of state signified the act of a sovereign state. The opinion of the Permanent Court of International Justice in *SS Wimbledon* (1925) stated: [2]

> **"**… No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

International law has also been seen as the most important sources of law by the International Court of Justice to apply to a particular dispute involving relations between states. Article 38 of the Statute of the International Court of Justice Provides:[3]

[2] PCIJ, *The S.S. Wimbledon* (1923), 25.
[3] Article 33 of the Statute of the International Court of Justice.

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (Emphasis added).

International agreement also plays important function in providing law in the relation between sovereign states. These include, among others:

1) Regulating the relations between states in an orderly manner;
2) Stating the consent of states to be bound by bilateral, regional or multilateral agreements;
3) Declaring war or peace with other states;
4) Determining the boundary of states;
5) Laying down terms of cooperation with other states in broad field of cooperation and relations including trade, technology, social, territory, defence and security, crimes, etc.

The international instrument laying down the principles and norms of international agreement or treaty is found in the Vienna Convention on the Law of Treaties (VCLT) of 1969. VCLT is the result of the work of International Law Commission (ILC). VCLT embodies most of its provisions, which came from the practice of states on treaty.[4]

As of early January 2018, 116 states have ratified VCLT. Fifteen states have signed but not ratified.[5] Indonesia does not ratify the convention. Since its provisions have been a reflection of states practice, most of its provisions have been regarded as customary international law on treaty that states must follow the provisions contained in it.[6]

VCLT consists of a preamble, 8 parts and 85 articles. The preamble provides four basic principles in the law of treaties. They are the principle of consent, good faith, *pacta sunt servanda* and peaceful settlement of disputes. These principles seem to follow the principles

[4] Shabtain Rosenne, "Vienna Convention on the Law of Treaties," 7 *EPIL* 1984, hlm. 526. (Prof. Rosenne added also the importance of case law and doctrine); Rudolf Bernhardt, "Treaties", 7 *EPIL* 1984, p. 459. (Prof. Bernhardt also opined, not all of the provisions under the VCLT are provisions derived from customary practice of states! These include the treaties and third states, or procedure with regard to the "alleged invalidity or suspension of treaties").
[5] Article 33 of the Statute of the International Court of Justice.
[6] Shabtain Rosenne, "Vienna Convention on the Law of Treaties," 7 *EPIL* 1984, hlm. 527.

universally recognized in contract law in the world. Every legal system in the world recognizes these four basic principles on contract.[7] Paragraph 4 and 5 of the Preamble states:

4. Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized;
5. Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law;

The most important principle is consent. Consent is the willingness of the states to be bound by the provisions of the treaty. As stated above, the consent also signifies the readiness of states to have its sovereignty confined to a certain degree. The confinement is mutual and reciprocity. In it, although the sovereignty of a state is confined, this confinement or limitation of sovereignty also affects the other states parties to the international agreement or treaty.

The principle of *pacta sunt servanda*, that treaties must be observed, is a universally recognized fundamental principle.[8] As Prof. Bernhardt put it, "without the fundamental principle *pacta sunt servanda*, the international legal order would not deserve to be described."[9] This principle is further regulated in article 26 VCLT. Article 26 provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

The term treaty or agreement under the VCLT is defined as follows:

> "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." (Article 2: 1a VCLT).

The definition of treaty under the VCLT is specifically confined to the treaty made by states. The definition shows two main characteristics: *first*, the parties to the treaty are states. *Second*, the treaty is governed by international law. The characteristic of state as party is meant to demonstrate that the provisions of VCLT are specifically regulating the treaty signed or concluded by states. This characteristic does not mean other subjects of international law such as international organizations or multinational corporations cannot sign an international treaty or agreement.

---

[7] See for example, Huala Adolf, *Dasar-dasar Hukum Kontrak Internasional (Principles of International Contract Law)*, Bandung: Refika, 2018, chapter I; see also the UNIDROIT Principles on International Contract (2016 version), principles I.
[8] Shabtain Rosenne, "Vienna Convention on the Law of Treaties," 7 *EPIL* 1984, p. 527.
[9] Rudolf Bernardt, "Treaties," 7 *EPIL* 1984, hlm. 463.

The second characteristic, governed by international law, is making a distinction between treaty and other 'agreements' not subject to international law. The later for example is international contract. This agreement is subject to or governed by national law (of a state). This for instance the agreement signed between states and foreign investors. International contracts signed between a foreign private company and a state in the construction of a road or the sale of aircraft for state's official use, is examples of international contract subject to national (contract) law. The national law chosen is based upon the agreement or the consent of the parties.

The instrument regulating the international contract for instance is the Vienna Convention on the Sale of Goods of 1980. This is a hard-law convention already ratified by major trading nations in the world. The most important soft law agreement as an instrument regulating the international contract is the UNIDROIT Principles on International Contract. All of these instruments are regulating the international commercial transaction between parties including states.

VCLT and its 85 articles do not specifically oblige the states parties to implement the provisions of VCLT in its national territory. This mainly because the VCLT is a codification of customary international law derived from a long practice of states on concluding treaties. Some others stated that VCLT is the international law about treaty.[10]

The VCLT however states that state cannot use its national law as a reason for failing the implementation of the provisions of international agreements. The reason is because there are one or more provisions under the international agreement or treaty has a different law or rules with its national law. Article 27 VCLT provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. …"

III. STATUS OF THE INTERNATIONAL AGREEMENT IN INDONESIA

1. The Constitution of 1945

The Constitution of the Republic of Indonesia (RoI) does not indicate the status of the international agreement in the domestic law. The only provision that states the words 'international agreement' is Article 11 of the 1945 Constitution. It states that the President with the consent of the People's Representative declares war, make peace and treaty with other States.[11]

[10] Shabtain Rosenne, "Vienna Convention on the Law of Treaties," 7 *EPIL* 1984, hlm. 527.
[11] Article 11 para. 1 of the 1945 Constitution (as amended in 1999, 2000, 2001 and 2002).

Article 11 of the Constitution is only a description or confirmation that the President has the power to declare war and peace and the (international) treaty. It does not state or regulate further the status of the international treaty or the place of international treaty within the Indonesian national law.[12]

The lack of clarity on the part of article 11 Constitution raised problem in practice. In 1960, on the initiative of the President, a letter was sent to the speaker of the Parliament dated 22 August 1960. The letter number 2826/Hk/1960 content a "guidance" concerning the process of the ratification of an international agreement.

The letter stated, the ratification of an international agreement might be made by issuing the law or the presidential decision. When an international agreement or treaty is considered important, the instrument of ratification would be made by law. This process would require the parliament's approval. When the international treaty is considered less important, the ratification could be made by presidential decision. This process would not require the parliament's approval.

The guidance contained in the letter was also not clear. First, the letter was self-proposition of the president. It was made on the initiative of the president. Second, the letter does not have any legal status under the Indonesian law. Third, what or when an international treaty is considered important or less important is not clear. It does not provide a clear yardstick whatsoever what criteria for a treaty to be important and not important.

2. Law No 24 of 2009 concerning Flag, Language, Coat of Arms and National Anthem

Another legislation that is worth mentioning and has to a certain degree connection with the international agreement is the Law No 24 of 2009 concerning Flag, Language, Coat of Arms and National Anthem ('Law').[13]

Article 31 para. (1) of the Law requires the Indonesian language to be used in the Memorandum of Understanding or agreement involving state institutions, government offices of the Republic of Indonesia, private parties in Indonesia and Indonesian citizen.

The explanatory notes of Article 31 para. (1) of the Law further explains that the term 'agreement' includes international agreement, that is every agreement with public nature

[12] Damos Dumoli Agusman, *Op.cit*., p. 8. (Dr. Agusman stated, the simple provision under Article 11 of the Indonesian Constitution raised a number of questions in practice. These include the definition of international treaty according to Indonesian law, the legal meaning of the approval of the Parliament, the form of the approval of the Parliament, the meaning of "making" treaty with other states).

[13] In the Indonesian language: *Undang-Undang Nomor 24 Tahun 2009 Tentang Bendera, Bahasa, dan Lambang Negara, Serta Lagu Kebangsaan*.

governed by international law, and is concluded by the government, State, international organization, and other subjects of international law. It is also further stated that the international agreement must be written in the Indonesian language, other language(s) of other States, and or English.

Under articles above the Law requires the existence of the international agreement or treaty to be written in Indonesian language. Consequently, when government is to ratify international agreement, the agreement must be translated into Indonesian language to make in enforceable under the law or recognized by the Law. This suggests that the instrument of ratification of law is not complete without the translation of the treaty or agreement into Indonesian language.

3. The Law No 37 of 1999 on Foreign Relations

The law on foreign relations is the law regulating the relations of the Republic of Indonesia with foreign states. The law consists of IX chapters and 40 articles. There are 3 (three) main articles concerning the law on treaty.

Article 1 para. 3 concerns definition of the international treaties:

> *"International Treaties are agreements in any form or denomination that are governed by international law and concluded in writing by the Government of the Republic of Indonesia with one or more states, international organizations, or other international legal subjects, and invest the Government of the Republic of Indonesia with rights and obligations that are of a public law nature."*

The definition is broad than the one in the VCLT. The term international treaty includes the subjects of international law capable of concluding treaties. They are states, international organizations or any other international legal subjects. The definition would seem to cover any international agreements with subjects of international law.

Chapter III of the Law titles conclusion and ratification of international treaties. This part has 3 articles. Article 13 requires the consultation with the foreign ministry in concluding treaties. It states that State and government institutions that are planning to conclude international treaties shall first consult with the foreign minister on said plans.

Article 14 regulates full powers. It states, government officials or institutions who are to sign international treaties concluded between the Government of the Republic of Indonesia and other Governments, international organizations, or other international legal subjects, must first receive Full Powers from the Minister.

4. The Law No 24 of 2000 on International Agreement

Indonesia however since 2004 has enacted the Law on International Agreement.[14] The Law is similar in a greater extent, with those of the provisions of the Vienna Convention on the Law of Treaties.[15] Despite its similarity, the Law again does not clearly state the status of the international agreement in the domestic law.

The only indication or the one of the most important provisions under the Law is Article 10. This article lays down the type of legislation used for the ratification of international agreement. This article provides that the ratification of international agreement must be made by the Law ('Undang-Undang') if it concerns with the issues on:

(1) Political matters, peace, security and the state security,
(2) The changes or which affects the territorial sovereignty or the Indonesian boundaries;
(3) The sovereignty and sovereign rights of Indonesia;
(4) The human rights and the protection of the environment;
(5) The formation of the new law,
(6) The loan agreement and grant.

Other subject matters ratified by the Presidential Decree does not require the consent of the People's Representative.[16] There is no reported cases however what would happen when the government ratified an international government by presidential decree because the government considered that the said international agreement does not cover six subject matters above. But according to the Parliament, the object of the international agreement or treaty is indeed subject to the six subject matters above.

5. Law No 12 of 2011 on the Formation of Law

The Law No 12 of 2011 on the Formation of the Law[17] is an important piece of legislation elaborating the state law in Indonesian legal system. The Law however does not either

[14] State Gazette of Year 2000 No. 185 and Additional State Gazette No. 4012.
[15] Despite Indonesia is a non-signatory state or the non-ratifying state of the Vienna Convention of the Law of Treaty of 1969.
[16] With the enactment of the Law No 10 of 2004 on the Formation of the Law (State Gazette No 53 of 2004; Additional State Gazette No 4389) which was amended and revoked by Law No 12 of 2011, the Presidential Decree has no longer been recognized. The only regulation which has the same status with it is the Government Regulation ('Peraturan Pemerintah') (*Cf.*, Article 7 of the Law No 10 of 2004 and Article 7 of the Law No 12 of 2011).
[17] The title of the Law is 'Undang-Undang tentang Pembentukan Peraturan Perundang-Undangan.'

mention about the status or the position of the international agreement within the Indonesian domestic law.[18]

Article 10 of the Law No 12 of 2011 merely reaffirms the content of Article 10 of the Law No 24 of 2000 on the International Agreement (below). The explanatory note of Article 10 however defines international agreement as the international agreement which has substantial and fundamental impact on the life of the people and which affects the burden of the state's finance and or the agreement which requires the amendment of the formation of the Law with the consent of the People's Representative.

It is quite interesting to see that the Law No 12 of 2011 lays down the hierarchy of law in Indonesia. On the basis of the hierarchy, the law recognized as enforceable at law and therefore binds all person and legal subjects, include:[19]

1) *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (The 1945 Constitution);
2) *Ketetapan Majelis Permusyawaratan Rakyat* (the Decision of the People's Consultative Assembly);
3) *Undang-Undang* (Law);
4) *Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang* (the Law/Government Regulations Replacing the Law);
5) *Peraturan Pemerintah* (Government Regulation);
6) *Peraturan Presiden* (Presidential Regulation);
7) *Peraturan Daerah Provinsi* (Provincial Regulation); and
8) *Peraturan Daerah Kabupaten/Kota* (Local/Municipality/City Regulations).

By way of interpretation, the instrument of ratification of international agreement as stipulated in Law No 12 of 2011 above is the Law or the Presidential Decree or decision. Seen the status of the legal instrument used, the status of international agreement seems to be below its status of the Constitution or the Decision of the People's Consultative Assembly. This interpretation seems to be unsatisfactory because the object of the law is not the product of the president agreed by the Parliament in case of the law. Or, it is not either the product of the president alone in case of the international agreement ratified by presidential decision.

Still, the hierarchy of laws under the Law No 22 of 2011 above is silent about the status of international agreement of treaty under Indonesian legal system. The absence of this

[18] Law No. 12 of 2011, State Gazette No. 82 of 2011; Additional State Gazette No. 5234.
[19] Article 7 of Law No. 12 of 2011.

status sometimes create problem before the court when provisions of international agreement is contested. It is widely recognized that the judges of the national court would only consider the laws recognized under by the national legal system and of course they must be written in Indonesian language.

6. Law No 7 of 2014 On Trade

On March 2014, the Government of the RoI promulgated the Law No 7 on Trade (The Law).[20] The Law is significant because, for the first time since its independence, Indonesia has clear legal policy relating to its trade.

The Law consists of 29 Chapters and 122 Articles. The Law contains legal provisions concerning trade-related issues, including among others, the domestic trade, the foreign trade, the trade in the border areas, standardization, trade through electronic system, the safeguard measures, the small and middle business, etc.

The Law however does not make any reference to a specific international agreement that Indonesia has been the member. One controversial provision under the Law that worth's commenting is Article 85. This article empowers the government to *cancel* the international agreement it has signed.[21] This article provides as follows:

1) The Government with the approval of the Parliament may, when the national interest is at stake, review and cancel the international trade agreements.
2) The Government may, when the national interest is at stake, review and cancel international trade agreements promulgated by Presidential Decree.
3) Further provisions concerning the procedures for the review and cancellation of international trade agreements as referred to in paragraph (1) and paragraph (2) will be stipulated in Government Regulation.

The description above shows that the various legislation, including the Constitution, do not mention anything about the status of international agreements within the Indonesian legal system. It may therefore worth noting the practice of law, in particular the application and implementation of international agreement in the domestic court in Indonesia. Similarly, it is also essential to find out the laws used in the implementation of international agreement in

[20] State Gazette No 45 of 2014.
[21] The term 'cancel' is the translation of the original text in Indonesian language for 'membatalkan.' The Original text of Article 85 para. (1) reads as follows:
"(1) Pemerintah dengan persetujuan Dewan Perwakilan Rakyat dapat meninjau kembali dan *membatalkan* perjanjian Perdagangan internasional yang persetujuannya dilakukan dengan undang-undang berdasarkan pertimbangan kepentingan nasional." (Emphasis added).

Indonesia. The laws are confined to the laws on arbitration and economic (trade) matters. This approach will hopefully give a better picture about the implementation of international agreement in Indonesia.[22]

IV. INTERNATIONAL TRADE AGREEMENTS

1. Ratification of the WTO Agreement of 1994

Another example worth citing is the implementation of the Agreement Establishing the World Trade Organization (the WTO Agreement). Indonesia ratified the WTO Agreement by enacting the Law No 7 of 1994.[23]

The WTO Agreement requires its Member among others to "... ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements."[24]

As a realization of its obligation under Article XVI para 4 of the WTO Agreement above, the Indonesian government has issued and enacted a series of laws. They include:

a. On Intellectual Property Rights Laws

In the field of intellectual property laws, some laws have been promulgated replacing the old laws and, to a certain degree, setting up new law. These endeavours are the implementation of the Annex of the WTO Agreement on intellectual property rights, namely Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights. They are, among others:

(1) Law No 30 of 2000 concerning Trade Secrets;
(2) Law No. 31 of 2000 concerning Industrial Design, replacing Article 17 of the Law No 5 of 1984 on Industry;
(3) Law No 32 of 2000 concerning Design and Integrated Circuits;
(4) Law No. 14 of 2001 regarding Patents replacing Laws No 6 of 1989 and No 13 of 1997 on Patents;
(5) Law No. 15 of 2001 regarding Trademarks replacing Laws No 19 of 1992 and 14 of 1997; and

[22] This approach is practical in nature. The theoretical approaches on international agreement such as the theories of transformation or incorporation, as well as the theories of dualist or monolist approaches in international agreement are not discussed in this paper.
[23] In the official language of Bahasa Indonesia: UU No. 7 Tahun 1994 tentang Pengesahan Agreement Establishing the World Trade Organization (Persetujuan Pembentukan Organisasi Perdagangan Dunia).
[24] Article XVI para. 4 the WTO Agreement.

(6) Law No. 19 of 2002 regarding Copyrights replacing Laws No 6 of 1982, No 7 of 1987 and No. 12 of 1997.

b. On Investment Laws

Indonesia has enacted various laws on investment as its implementation of the ratification of the WTO Agreement, especially Annex 1A, in particular Agreement on Trade-Related Investment Measures (TRIMs Agreement). They include in part:

(1) Law No 25 of 2007 on Investment

This Law No 25 of 2007 replaces the old law on investment, namely Law No 1 of 1967 on Foreign Investment Law and Law No 8 of 1968 on Domestic Investment. These old laws on investment, as its titles suggest, differentiated between the foreign and domestic laws, the policy which is not in tune with the non-discriminatory principle under the TRIMs Agreement.

(2) Various Investment-related Laws

There are numerous laws regarding investment issued by President in the form of Presidential Regulations, for example:

(a) Presidential Regulation No.76/2007 concerning Criteria and Requirements for (List of) Closed and Open Business Sectors for Investment with Certain Condition;

(b) Presidential Regulation No. 111/2007, Amendment to Presidential Regulation No.77 /2007 concerning List of Closed and Open Business Sectors for Investment with Certain Condition by Presidential Decree No. 36/2010 concerning (with List of) Closed and Open Business Sectors for Investment with Certain Condition;

(c) Government Regulation No. 42/2007 concerning on Franchise, etc.

In addition, there are numerous regulations issued by various government agencies, including Ministry of Trade, Ministry of Industry, various regulations of the Local, Provincial or Regional Authorities and a range of regulations issued by the Head of the Investment Coordinating Board (BKPM or *Badan Koordinasi Penanaman* Modal).[25]

The later, notable among these are:

(a) The Head of BKPM Regulation No. 12/2009 concerning Guidance and Procedure for Applying the Investment License;

[25] The potential problem of these numerous laws issued by numerous agencies is that it may create over-lapping provisions and over-lapping or conflicting power between KPM and the local government agencies.

(b) The Head of BKPM Regulation No. 13/2009 concerning Guidance and Procedure for Controlling the Implementation of Investment,

(c) The Head of BKPM Regulation No. 14/2009 concerning Information Services and Electronic Investment Licensing System (SPIPISE), etc.

The analysis above demonstrates, the implementation of the WTO Agreement is obligatory since there is a clear and mandatory obligation imposed upon its Members. The implementation is accordingly an automatic measure that a Member must exercise as the consequence of its membership.

2. The Ratification of the ASEAN Charter

This measure seems to be difficult. The decision of the Constitutional Court No 33/PUU-IX/2011 concerning ("*Permohonan Pengujian Undang-Undang Nomor 38 Tahun 2008 tentang Pengesahan* Charter of the Association of Southeast Asian Nations (*Piagam Perhimpunan Bangsa-Bangsa Asia Tenggara*)" (the judicial review of the Law No. 38 of 2008 concerning the ratification of the ASEAN Charter) has shown that to review the international agreement might not be difficult. An interesting position of the Constitutional Court was shown in its legal consideration about Article 5 para 2 of the ASEAN Charter.

The applicant argued that the decision of the RoI to ratify the ASEAN Charter is breaching the Constitution. Article 5 (2) which states: "Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership."

The Constitutional Court rejected the application. The main legal consideration of Constitutional Court is follows, among others:

1. That substantially, the ASEAN *Charter* contains the macro policy in trade which is agreed upon by member States of ASEAN;
2. The come into force of the macro policy is dependent upon the member States to implement Article 5 (2) of the ASEAN Charter. It means, when a member State, including Indonesia, has not implemented the provision of Article 5 para. 2, then the Charter has not been effectively in force.[26]

[26] Para. 3.24 of the Decision of the Constitutional Court.

V. COMPREHENSIVE INTERNATIONAL TRADE AGREEMENTS (ITAS)

1. Introduction

The Indonesian government has been vigorously concluding numerous international trade agreements (ITAs) including memorandum of understandings (MoUs) with other countries or other regional organisations. As of 2019, led by the Ministry of Foreign Affairs (MOFA), Indonesia has signed 231 agreements and MoU on trade matters. It consists of 12 free trade agreements or comprehensive economic partnership agreement. They relate to taxation matters, grant, loam, and investment agreements. The other is the 219 agreements including MoUs relating to various trade-related issues. These are agreements on oil and gas, agriculture, infrastructure, creative economy, etc.[27]

At the time of this article written, MOFA is negotiating 344 trade agreements. These include 11 preferential trade agreements (PTAs). A noteworthy PTA is the Preferential Trade Agreement between Republic of Indonesia (RoI) and Mozambique. Others are 63 Free Trade Area/Comprehensive Economic Partnership Agreements; 12 investment agreements; and 258 other economic agreements.[28]

The important ITAs must get the approval from the parliament.[29] To get such approval, firstly, the parliament usually would call the government to give insight the content and reasons for the conclusion of a particular trade agreement. The second step is to get insight from the public concerning the agreement. This step is to provide the members of parliament the input or opinion from the public including the academicians and private business actors particularly the Indonesian Chamber of Commerce. The parliament seeks to get the public opinion concerning the content and potential benefit of a trade agreement with the other states.

The political consideration concerning the status of foreign states parties to the agreement sometimes become more important for the parliament. The parliament sometimes is eager to see the trade balance between the foreign state's parties with Indonesia. They also would like to see the possible benefit that the market of foreign state parties to the agreement would boost Indonesia's goods and services. They would like also happy to inquire the possible benefit for Indonesia when the goods or services provided by the foreign state parties to the agreement imported to Indonesia's market.

---

[27] The Ministry of Foreign Affairs, the Directorate General of Law and International Treaty of the Republic of Indonesia (2019).
[28] *Ibid*.
[29] Article 10 Law No. 24 of 2000 on International Treaty.

The third step is the decision of the parliament: whether the approval is given or not. The approval of the parliament would mean that the instrument of the ratification of the ITAs would be made by the Law. The rejection of the Parliament would mean the proposed trade agreement would end.

2. Review of Comprehensive ITAs

a. Problem Ahead

The decision of the government to enter into various ITAs might suggest that the policy and intention of the government to make benefit to the Indonesian trade and economy. The ITAs usually contain provisions that provide better treatment and more access for the party's goods and services to other territory and market of the other parties.

There might be a hidden problem ahead. Many ITAs that the government has signed might possibly raise difficulties. *Firstly*, the government might find it difficult in controlling and evaluating the operation and implication of the ITAs.

Secondly, the main problem on the issue of the implementation of the agreement is the issue of understanding the provisions of the agreement. The issue is the actors who would implement the agreement is the business, companies, and as the Indonesia is concerned, the small and medium scale business. These people are not lawyers. They need to be better informed about the provisions in the agreement. More importantly is how they could make best use of it.

Similarly, it might not be easy to evaluate the potential benefit or possible loss in the operation and implementation of the ITAs signed. Also, important what measures the government could provide in case the Indonesian business face problems in the implementation of the ITAs.

Thirdly, the problem of harmonization of the laws and regulations. The signing and ratifying the ITAs would mean that the government has the obligation to adopt the provisions of the ITAs into national laws. The problem with various ITAs with different parties embodying different provisions would mean the adoption of the provisions of ITAs into national laws would not be easy. It would need to make some adjustments, adoption of amendments to the existing laws and regulations. Different laws or regulations to be applied to different under the different ITAs would also mean the provisions of handling the request of special treatment under certain ITAs would face complexities in practice.

b. Example: RI-CEPA Comprehensive Trade Agreement 2019

One of the comprehensive trade agreements RI has signed and at the time of this article is written, is the *Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States (RI-EFTA CEPA).* The initiative to negotiate the RI CEPA was launched in 2010. The negotiation stated in 2011 and concluded in 2018. It awaits the approval of the Parliament.

RI-EFTA CEPA consists of 12 Chapters, 17 Annexes and 17 Appendices The sectors under the RI EFTA CEPA cover 14 (fourteen) agreements. They are trade in goods, trade in services, investment, intellectual property rights, Trade Facilitation, Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT), trade remedies, government procurement, competition, Protection of Intellectual Property (IPR), competition, trade and sustainable development and cooperation, institutional provisions and dispute settlement.

RI-EFTA CEPA tries to push the flow of trade between the two parties by among other lowering tariff from both parties. With the decrease in tariff, it is expected the flow of trade in goods, services including investment would increase economic development to both parties. The RI-EFTA CEPA also contains the provisions with regard to the support to the parties' economy especially their small and medium scale economy.

The objects of the agreement covered under the RI-EFTA CEPA suggested that the issue to be implemented by the two parties are broad. It might possibly affect not a single ministry of the state. They may cover some offices or ministries in it. The included the Ministry of Trade, Ministry of Law, Ministry of Finance, etc. This shows the multi-departments of a state may involve and be affected by these comprehensive provisions

3. **RI Policy on Implementation of ITAs**

a. Institution under the Ministry of Trade

Once the ITAs has been negotiated and concluded, another important issue, the real issue would embark: the issue of implementation. This issue is relevant or even important in this present context. The initial policy the government enter into negotiation on ITAs would seem to push its trade with other countries.

The problem with the implementation is that there is as far as the writer is concerned no standard of treatment or policy for the implementation of the ITAs in Indonesia. This

would possibly seem to suggest that it is difficult to measure the benefit Indonesia would have or will obtain in joining ITAs.

The only available mechanism is trying to see each function and purpose of the ministries or its lower level staff in joining the ITAs. Therefore, the issue of policy might be answered by indicating the laws or regulations in particular the institution implementing the ITAs. In the absence of these, the practice of the government in implementing the ITAs would become an important guidance concerning the Indonesia's policy.

As far as the law and regulations are concerned, also as already indicated in the previous description in this article (above), the law and regulations do not provide a satisfactory guidance concerning the appointment of a certain department in exercising or implementing or reviewing the ITAs.

The attention is now focused on the institutions under the Ministry of Trade whose function would be the administering of ITAs. The Ministry of Trade of the RoI consisted of a number of two directorates and three directorate generals whose functions are exercising trade matters. These institutions include directorate for domestic trade and the directorate for foreign trade. Each directorate has the function to manage the apt implementation of trade with domestic and foreign markets.

The three directorate generals are the directorate general for the trade negotiation of international trade; the directorate general for the development of national export; and the directorate general for consumer protection and market order ("*tertib niaga*").

The directorate general whose function to negotiate international trade is the directorate general for the negotiation of international trade. The other functions are the following:

1) to formulate the policy on the cooperation and negotiation on goods, services and investment in the bilateral, regional and multilateral forum;
2) to implement the policy of cooperation and negotiation on trade in goods, services and investment for all facilitation on bilateral, regional and multilateral forum;
3) to evaluate and report the cooperation and negotiation on trade in goods, services and investment and trade techniques either in the bilateral or multilateral forum;
4) to give technical guidance and to educate the implementation of the agreement;

5) to exercise administrative matters of the directorate general for the negotiation of international trade.[30]

On the basis of the functions of above, in particular the function number 2) above, the directorate general for international trade negotiation seemed to be the right institution in the implementation including the evaluation of the ITAs.

b. ITAs- Mandated Institution

Another method of implementation is by way of the mandate of the ITAs. For instance, the Agreement on Trade Facilitation of 2013 requires the state parties to set up a National Committee on Trade Facilitation (NCTF). Alternatively, the state party may appoint an existing institution to facilitate the coordination between various offices or institutions (in the home state) for the purpose of a better coordination in the implementation of the ATF.

Article 23.2 ATF provides:

"Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement"

("Setiap Anggota wajib membentuk dan/atau mempertahankan suatu komite nasional fasilitasi perdagangan atau menunjuk mekanisme yang telah ada untuk memfasilitasi koordinasi dalam negeri dan penerapan ketentuan Persetujuan ini").

The government of Indonesia applied the mandate by issuing the Letter of Decision of the Coordinating Minister on Economy No 199 of 2018 dated 1 May 2018. The letter set up a national committee on trade facilitation (*Komite Nasional on Trade Facilitation*).

The institution mandated by the ITAs is rarely found. The ATF is possibly one of the few examples of the agreement found. The RI-EFTA CEPA above is silence about this institution. Most of the provisions contain substantive matters of the object of the agreement.

One acceptable reason for the absence of the national mention in the ITAs is quite plausible. The national institution implementing the agreement is a matter of national constitution. It is the constitutional matters of a state. It is the state's sovereign rights to appoint a certain national institution body to do or not to do certain state's function within or outside its territory.

[30] http://ditjenppi.kemendag.go.id/ [Website of the Ministry of Trade, 04 March 2020].

VI. CONCLUDING REMARKS

The article above showed the recent legislation and practice on the signing and concluding ITAs. Some laws do not directly relate to the ITAs. Others do relate with ITAs such as Law No 7 of 2015 particularly on the international cooperation. However, all the laws elaborated do not clearly indicate the provisions as to how the ITAs to be implemented or even evaluated.

The RI's policy towards ITAs has been a rather impressive in the light of the amount of the ITAs signed. This article argues, the success of the ITAs and its benefit for Indonesia economy do not depend on the number or the amount of ITAs are signed or concluded. Instead, the success and benefit of ITAs is whether the implementation of the ITAs would have been felt by the economy or trade.

The recent practice of the government of Indonesia suggested that there is no standard or mechanism to implement the ITAs. The practice showed the implementation and evaluation of the ITAs would be suited to be handled by the Directorate General for International Trade Negotiation. The status of the Directorate General is under the Ministry of Trade.

Since the issue of trade is not the authority of ministry of trade alone, the position of the directorate general seemed to be not appropriate when dealing with cross-sectoral ministries. The issue of trade, as shown above, would also relate to the issue and authority of other ministries such as ministry of finance, ministry of law, and others. The institution tasked for the implementation and evaluation of ITAs is therefore needed. In the light of amount of ITAs already signed or ratified by the government, it is hight time for the government to set up a special institution or office especially formed to handle the issue of implementation and evaluation of ITAs.

Since ITAs might affect or concerns other ministries, the special institution or office should be set up by the coordinating minister on economy. In addition, since the issue of implementation and evaluation is the issue of law or legal norms, the said or proposed institution should primarily led or consists of a senior lawyer, a legal practitioner, a member or official of the Indonesian chamber of commerce and a representation of the trade or economy related ministries.

This institution must have the power vested by the Coordinating Minister. With this power the institution should have the status similar or above the status of ministers. The instrument establishing this office must be supported and made by law, not for instance by

the Letter of Decision of the Coordinating Minister on Economy as for example the instrument establishing the national committee on trade facilitation.

Such special office should also have a permanent status. This status is needed to ensure the sustainability of the implementation and evaluation the ITAs. With these statuses, the task of this office would be quite gigantic in the light of the amount of the ITAs the government has already signed.

REFERENCES

Bernhardt, Rudolf, "Treaties", 7 *EPIL* 1984.

Damos Dumoli Agusman, *Hukum Perjanjian Ingternasional: Kajian Teori dan Praktik Indonesia (transl: Law on International Treaty: Study on Theory and Practice in Indonesia),* Bandung: Refika, 2010.

Huala Adolf, *Dasar-dasar Hukum Kontrak Internasional (Principles of International Contract Law)*, Bandung: Refika, cet 4., 2018.

Huala Adolf, *Hukum Perdagangan Internasional*, Jakarta: Rajawali Pers, cet 7., 2016

Keeton, George W., and Georg Schwarzenberger, *A Manual of International Law*, London: Stevens and Sons, 1967.

Rosenne, Shabtain, "Vienna Convention on the Law of Treaties," 7 *EPIL* 1984.