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Ratification of International Convention under Indonesian Law: A Study on CITES 1973 and ASEAN Comprehensive Investment Agreement

Z Zunnuraeni
Master of Law Programme
University of Mataram
Mataram, Indonesia
zunnuraeni17@unram.ac.id

M Y Fathoni
Civil Law Department
University of Mataram
Mataram, Indonesia
myazidfathoni@gmail.com

M Riadhussyah
Faculty of Sharia
Mataram Islamic State University
Mataram, Indonesia
mriadhussyah@uinmataram.ac.id

E S Nurbani*
International Law Department
University of Mataram
Mataram, Indonesia
erlisseptiana@unram.ac.id

Abstract—Indonesian national law has defined two mechanisms in the ratification of international conventions, namely in form of an Act and in form of a Presidential decree. As stipulated in the Constitution of The Republic of Indonesia Year 1945 that: "causing broad and fundamental consequences for the lives of the people related to the burden on state finances, and/or necessitating changes or formation of laws" are the criteria of an international convention that must be ratified in form of an Act. However, some practices in the ratification of international conventions do not under this rule. These study aims are to analyze some of the International conventions which have been ratified not accordance with the criteria that have determined by national law. This study is doctrinal, using the statute approach and conceptual approach. This work focus on analyzes the Convention on International Trade in Endangered Species of International Trade of Wild Flora and Fauna 1973 (CITES 1973) and the ASEAN Comprehensive Agreement. The conclusion of this work affirmed that CITES 1973 and ASEAN Comprehensive Agreement have a fundamental effect on the life of the Indonesian people. Therefore this convention shall ratify in form of an act. However, those two conventions have been ratified in form of a Presidential Decree, which means those ratifications contradict national law.

Keywords—Indonesian practice, ratification, International convention

I. INTRODUCTION

Ratification on the International agreement has legal consequences to the state party in which states are bound to the rights and obligations under the International agreement. Rights and obligations brought by International law affecting municipal law and people's life in a country. Thus, the state will provide and regulate national mechanisms to ratify an international agreement under municipal law.

Indonesia ratifies International agreements through two mechanisms, namely ratification with Law (*Undang-Undang*) and ratification with presidential regulation or decree. According to Article 11 paragraph (2) Constitution 1945 of the Republic of Indonesia, the President in making

an International agreement which causes broad and fundamental impacts in people life, related to the state budget and/or require amendment or establishment of the new law is have under parliamentary approval. Further regulation on ratification of International agreement has been regulated in Law Number 24 of 2000 on International Agreement.

Article 9 Law Number 24 of 2000, emphasizes that International agreements are ratified by Law and Presidential Decree. Furthermore, Article 10 Law Number 24 of 2000 has categorized six materials of an international agreement that should be ratified with Law. An International agreement which beyond category under Article 10 will be ratified with Presidential Decree.

Indonesia has been ratified various International agreements with the act and presidential regulation or decree. However, there are several problems related to the ratification process of the International agreement under Indonesian law. The problems are complex, start with the concept of ratification itself until the International agreement implementation in Indonesia. S.M Noor revealed that there are differences among states in the making of international agreements, economic background, races, culture, religion and especially ideology politic are the main causes which brought problems of implementation of an international agreement which has been ratified [1]. As for, Eddy Pratomo mentioned there main problems related to ratification of the International agreement, namely: first of all, there is no custom definition on the International agreement or International treaty. Secondly, the concept of International agreement within national law. And finally, the legal status of the International agreement under Indonesian law [2].

Citing Eddy Pratomo's work which stated there is no clear concept related to an International agreement in Indonesia practice, it caused two International agreements with similar characteristics, at the same time, treated differently [2]. The same situation occurs in the ratification

mechanism, that International agreements with similar characteristics can be ratified with two different processes, are law and presidential decree/regulation. However, a similar characteristic in this matter is wide and fundamental impacts on Indonesian people as a result of the ratification of those International agreements. Two International agreements which will become the focus of this work are the Convention of International Trade of Endangered Species of Flora and Fauna 1973 (CITES 1973) and ASEAN Comprehensive Investment Agreement. Both agreements were ratified with Presidential Decree and Presidential Regulation. On which, other International agreements that have similar characteristics were ratified by acts.

II. METHODS

This work was normative legal research, a study on laws, regulations, and concepts related to legal issues. The data used in the form of secondary data obtained through library research. The data are relevant regulations, International conventions, court verdict, and previously published research in scientific journals. Then, the data were analyzed qualitatively which used several legal interpretation methods, namely grammatical, systematical and teleological.

III. RESULT AND DISCUSSION

A. *International Convention on International Trade of Endangered Species of Flora and Fauna (CITES) 1973*

CITES 1973 is an environmental multilateral agreement that aimed to ensure International trade on wild species of flora and fauna will not harm their life and presence. CITES 1973 provide framework and mechanisms for state member which has to be fulfilled by making relevant national laws. In the last years, CITES 1973 main focus is to bring their respective national law with international standards [3].

Indonesia ratifies CITES 1973 with the Presidential Decree Number 43 the Year 1978 which was formed on 15th December 1978. To implement various terms within CITES 1973, Indonesia has to create new regulations in the form of law, government regulation, or ministerial decrees. However, Indonesia already had special law which is CITES 1973 implementing regulation namely Law Number 5 of 1990 on Conservation of Bioresources and Ecosystem. Related to the protection of bioresources and ecosystems in the sea, Indonesia also had Law Number 45 of 2009 on Ocean and Fishery Affairs. As the biggest archipelago state in the world, Indonesia put more attention on the species and ecosystem in the ocean, which has been protected under the regulation of Appendix I and II CITES 1973 i.e. sharks. The implementing regulation of sharks protection as mandated by Appendix I and II in Indonesia are Ministry of Ocean and Fisheries Affairs Decree Number 18/Kepmen-Kp/2013 on Determination of Full Protection Status for Whale Shark (*Rhinocodon Thypus*) and Ministry of Ocean and Fisheries Affairs Regulation Number 48/Permen-Kp/2016 on Second Amendment of Ministry of Ocean and Fisheries Affairs Number 59/Permen-Kp/2014 on Export Prohibition of Oceanic Whitetip Shark (*Carcharhinus Longimanus*) and Scalloped Hammerhead Shark (*Sphyrna* Spp) from Indonesia's territorial [4].

B. *ASEAN Comprehensive Investment Agreement 2009 (ACIA)*

ASEAN Comprehensive Investment Agreement is a multilateral agreement between ASEAN state members to regulate investment in the area. The agreement was signed on February 26th, 2009 in Cha-am, Thailand, and entered into force on March, 29th 2012. Article 1 stated that the aims of the agreement were : (a) progressive liberalization of the investment regimes of Member States; (b) enhanced protection to investors of all Member States and their investments; (c) improvement of transparency and predictability of investments rules, regulations and procedures conducive to increased investment among the Member States; (d) joint promotion of the region as an integrated investments area; (e) cooperation to create favorable conditions for investments by investors of member states in the territory of the other Member States.

Refer to ACIA's aims above, in principle, the agreement expected will support liberalization and investment protection that will come to the ASEAN region. This matter is understood as reminding that investment could drive and elevate the economic growth in a state. Economic development experts have discussed the relationship between foreign capital and development, they said that developing states could utilize foreign capital as a booster for economic development.[5] Reminding all ASEAN state member is developing countries, investment in the area become crucial.

According to Article 3 ACIA, there were several liberalized fields, namely: (a) manufacturing; (b) agriculture; (c) fishery; (d) forestry; (e) mining and quarrying; (f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and (g) any other sectors, as may be agreed upon by all Member States. Ratify ACIA means Indonesia has to open foreign investment to all liberalized fields above.

Liberalized sectors according to ACIA will have a direct impact on Indonesian people, on which one of which is agriculture. Until today, most Indonesian people are farmers. BPS (Centre of Statistic Beaureau) notes on Indonesia jobs per-August 2019 mentioned 3 mainstream groups in Indonesia jobs, were agricultural (27,33%), commerce (18.8%), processing industry (14,96%).[6] Although there is a decrease in the number of Indonesian farmers, agriculture remains to become a pedestal for the middle-down class in Indonesia.

However, most Indonesian farmers are categorized as peri-urban agriculture who control less than 0,5 hectare [7]. FAO has defined peri-urban agriculture as "..... farm units close to town that operate farms to grow plants, raise chickens and other livestock, as well as embrace other activities such as fish farming" [7].

Liberalization of the agricultural sector became pros and cons among scholars. The pros supporter believe that technology application in the rice field sector will intensify rice production massively in a very short time, as the answer of increasing need for food in the world [8]. Otherwise, the

cons supporter says that liberalization can harm several groups of a farmer, especially the peri-urban agriculture or small-scale farmers. Musjitari mentioned that “liberalization opened the opportunity for Trans-National Corporation (TNC) from developed countries to take over agricultural production to provide world food. TNC grows in developing countries with modern technology and high efficiency. Liberalization makes food a commodity that can generate profits for big corporations” [9].

Citing Stiglitz [10], Ach Faidy Suja’ie and Nian Riawati mentioned that agricultural liberalization ensures competition between local and foreign farmers become uncontrollable, farmers and multinational company (MNESs) since one-third of International trade occurred within the transnational company [8].

Scholars view above in line with the Alliance of Indonesian Farmer’s view (Aliansi Petani Indonesia/API). There were several ratified International agreements by Indonesia consider has negative impacts on the farmers. API mentioned that ASEAN Free Trade Area and ASEAN+3 caused the increasing number of agricultural products thus prejudice local farmers. Similarly, ACIA also will cause domination by major industries and obstruct farmers’ welfare [11]. API is one of the applicants in the case of Law Number 24 of 2000 on International Agreement judicial review. Free trade and liberalization of agricultural investment are a threat, this became API’s argument of their request to the Constitutional Court.

C. International Agreement Ratification under Indonesian National Law

The most basic rule on ratification of International agreement within Indonesia national law relies on Article 11 paragraph (2) Constitution 1945 of the Republic of Indonesia which stated: When entering into other International agreements that entail broad and fundamental consequences for the existence of the people because of links to the state’s financial burden, and/or because they require amendments to laws or the enactment of new ones, the President needs the approval of the DPR.

Ratification of the International agreement further regulated in Law Number 24 of 2000 on International Agreement, was in Articles 9, 10, and 11. Article 9 mentioned that ratification of an international agreement as require by the International agreement, and the ratification will be conducted in the form of an Act and Presidential Decree. Article 10 stated that there are six substances of International agreement that have to be ratified in the form of Act, namely: a. political issues, peace, and national defense and security, b. change of territory or determination of territorial boundaries, c. state’s sovereignty or sovereign rights, d. human rights and environment, e. enactment of the new law, f. foreign loans and grants. However, Article 11, confirmed that an International agreement that substances beyond the six categories above will be ratified in the form of a Presidential Decree.

According to the regulation in Law Number 24 of 2000 on the International Agreement, there are differences in

ratification practice in Indonesia. Hikmahanto Juwana mentioned that at least three differences between Indonesia’s practice of ratification of the International agreement. First practice, no ratification. Even though the substance of International agreement requires ratification in the form of act/law, as regulated in Law Number 24 of 2000. This occurred because of the International agreement itself using terms of Letter of Intent of Memorandum of Understanding, which does not show itself as an International agreement [12] although it was signed by the states in a multilateral forum. The second practice is the ratification of international agreements even though the agreement itself does not require an instrument of ratification [12]. And the last practice is International agreement needs a ratification instrument [12].

D. Indonesia’s Inconsistency in the Ratification of International Agreement

Inconsistence practice in the ratification process of the International agreement shows in the form of ratification. An International agreement according to its substance should be ratified in the form of an act, however, it was ratified with a presidential decree or presidential regulation. An example is Convention on International Trade in Endangered Species. In principle, this convention regulates the protection of the environment by arranging International trade of endangered species of flora and fauna. This convention also aimed to the enactment of new law thus its substance could be implemented nationally and Internationally. This convention requires ratification, acceptance, or approval by state parties. As regulated in Article XX. This matter in line with Article 10 Law Number 24 of 2000, the convention should be ratified with an act since its substance on the protection of the environment. However, it was ratified by Presidential Decree Number 43 of 1978.

Likewise, when referring to the Article 11 paragraph (2) Constitution 1945 of the Republic of Indonesia, an international agreement which caused broad and fundamental impacts on Indonesian people should be ratified with the approval of house parliamentary or in the form of action, but ratify with the presidential decree or presidential regulation. ACIA is an International agreement that will cause broad and fundamental impacts on the people, especially farmers. ACIA’s substance was not explicitly concluded in Article 10 Law Number 24 of 2000 on an international agreement. However, implicitly the agreement could affect state sovereignty, especially food sovereignty. Food sovereignty is the right of every people, society, and state to access various productive resources and to control food’s system (production, distribution, and consumption) according to their respective ecologic, social, economic, and culture.[13] Meanwhile, liberalization of the agricultural sector detains this matter. Therefore, the importance of ACIA’s substance on Indonesian people and Indonesian food sovereignty, the International agreement should be ratified with parliamentary approval and in the form of an act. However, ACIA was ratified by the Indonesian government with Presidential Regulation Number 49 of 2011.

Related to the ratification issue, Constitutional Court verdict Number 13/PUU-XVI/2018 on the judicial review of Law Number 24 of 2000 in the International Agreement should be considered and obeyed. Applicants, in this case, argue that regulation in Art. 2, Art. 9, Art. 10, and Art. 11 Law Number 24 of 2000 contradicting with the Art. 11 paragraph (2) and Art 28D par (1) Constitution 1945 of the Republic of Indonesia.

Constitutional Court in its verdict on judicial review of Law Number 24 of 2000 stated that Art. 10 Law Number 24 of 2000 contradicting with Constitution 1945 of the Republic of Indonesia and has no legal bindings conditionally as long as it interpreted that type of International agreements as mentioned in the letter and until letter h in the *quo* article require parliamentary approval, therefore only those International agreement that ratifies in the form of the act [11]. According to the Constitutional Court verdict, International agreements which need parliamentary approval in the form of an act are not limited by Article 10 of Law Number 24 of 2000. Criteria to determine whether an international agreement should be validated by the parliamentary are in Art 11 paragraph (2) Constitution 1945 of the Republic of Indonesia.

IV. CONCLUSION

There is inconsistency in the ratification of international agreements by Indonesia with the regulation on it which contained on Constitution 1945 and Law Number 24 of 2000. This matter shows in the ratification of CITES 1973 and ACIA 2009. CITES 1973 is an international agreement on the environment and its implementation needs of the establishment of the new law. Whereas, ACIA 2009 contained substances that has broad and fundamental towards Indonesian people.

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