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Judicial Review of the Law on Ratification of Treaty (A Study on Judicial Review Case of the Law on Ratification towards ASEAN Charter)

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Abstract
The ratification of Treaty regulated in Law Number 24 Year 2000, consists of internal and external ratification.Both kinds of ratification caused ambiguity on the understanding of ratification, i.e.: does the internal ratification which marked by the enactment of Law on Ratification Towards Treaty is an instrument to bind Indonesia to an Treaty?This article will analyze two problems. First, is the binding of Indonesia towards Treaty conducted by the Law on ratification or with ratification instrument? Second, can the Law on ratification towards Treaty judicial be reviewed in Constitution Court?Those two problems will be examined and analyzed by studying judicial review towards Law Number 38 Year 2008 on Ratification of ASEAN Charter.
Keywords: Treaty, Ratification

A. Introduction

In the current international society, Treaty plays a very important role in regulating inter-states life and fellowship. Each state underline their cooperation, arrange various activities, settle various problems for the well being of society life through Treaty. In this world marked with inter-dependencies, there is no state without agreement with other state and there is no state which is not regulatedby agreement in its international life[1],including Republic of Indonesia.

The rapid dynamic of international society relationship caused by the improvement of information technology and communication technology resulted in the acceleration of globalization which cause the international law rapid development in accordance with the dynamic of international society.[2]

By 2013 there are around 3918 Treatys made by Indonesia and other countries, including with other international law subject.[3]Since 2000, Indonesia has made around 100 Treatys, mostly are economic, investment, and trade agreements. [4] This is demonstrating Indonesia's participation in international fellowship and contribution in maintaining world order as stated by fourth article of Constitution of Republic Indonesia (UUDN RI).

Since the independence, Indonesian law has generally regulated on Treaty. Three previous Constitutions of Republic Indonesia, i.e.:1945 Constitution of Republic of Indonesia, 1949 Constitution of United States of Indonesia, and 1950 Temporary Constitution of Republic Indonesia contains article on Treaty. But such rapid dynamic of national political arrangement did not seem to influence national law development on Treaty. This is probably because law on Treaty is not law necessary and not a priority in law development in Indonesia yet[5]. After reformation 1998, the spirit of change encourages the building of a more democratic national political arrangement.Since that change, Indonesian constitution went through four series of change, i.e.: change in 1999, 2000, 2001, and 2002, and still undergoes perfecting process[6].

Nevertheless, 1945 Constitution of Republic of Indonesia already went through four changes, while

[1] Boer Mauna, Hukum Internasional, Pengertian, Peranan Dan FungsiDalam Era Dinamika Global (Bandung, Alumni, 2001) page.82
[2] Directorate of Economic, Social, and Cultural Agreement, General Directorate of Law and Treaty, Ministry of Foreign Affairs, PerjanjianInternasional Dalam Teori dan Praktek di Indonesia (KompilasiPermasalahan), for internal users only, 2008 page. 35
[3] Data in Treaty Room, Ministry of Foreign Affairs of Republic of Indonesia.
[4]Damos Dumoli Agusman, Hukum Perjanjian Internasional, KajianTeori dan Praktiki Indonesia, (Bandung, RefikaAditama, 2010), page. 4
[5] Ibid,page. 7
[6] JimlyAsshiddiqie, Setengah Abad JimlyAsshiddiqie, Konstitusi Dan Semangat Kebangsaan, (Jakarta, without publisher, 2006), page. 27

articles that regulates international agrement have not yet undergo significant change.

Constitution is the highest law in national political arrangement, therefore the making of Treaty which is one of state's activities should be based on requirements in constitution. Constitution also has function as foundation in making basic laws of a nation, therefore Treaty making is a part inside constitutional system[1].

In 1945 Constitution,[2]before or after the amandment, Treaty only regulated in one article, i.e.: Article 11. Article 11 of 1945 Constitution before amandment is a single article without verse, which stated: "*President with the approval of People's Representative Council* (DPR) *declare war, make peace, and agreement with other country.*"

Whereas after the amandment Article 11 changed and added with three verses, i.e.:

(1) President with the approval of People's Representative Council declares war, make peace, and agreement with other country.
(2) President, in making other Treaty that result in wide and profound impact for society life related with the state's financial burden, and/or oblige change or drafting Constitution, must with the approval of People's Representative Council;
(3) Further requirement on Treaty is regulated by Laws.

The interesting part of this Article 11 of post-amandment 1945 Constitution is a sentence in verse (2), i.e.: "other Treaty". No formal explanation on what is meant by "other Treaty". There are different interpretation among law experts therefore the experts assessed that there is law needs to decide what is meantby the sentence or that term[3]. I WayanParthiana argued that verse (2) in article 11 of 1945 Constitution caused by the drafters' interpretation towards verse (1) as a facultative verse, especially the practice under Old Order and New Order, where President free to decide whether an agreement need an approval from People's Representative Council or not[4].Furthermore JimlyAsshiddiqie[5], interpreted "other Treaty" in verse (2) as Treaty that related with long term loan, or loan aid from Indonesia to other country, or organization overseas. Both are related with state's financial, that in the end will be burden for entire people. According to DamosDumoliAgusman[6], the meaning of "other Treaty" in Article 11, verse (2) of Constitution of Republic of Indonesia is agreements conducted not with state, which is outside the scope as meant by verse (1), for example an agreement with international organization.

Article 11, verse (1) of 1945 Constitution has been elaborated in Law number 24 Year 2000 on Treaty, especially the one related to People's Representative Council's approval[7].Nevertheless, this elaboration is limited only on the making of agreement with other country. There is no laws that elaborate matters on war and peace yet until this moment.

Therefore there are two categories of Treaty that needs DPR approval through Law, i.e.: Treaty which its materials regulated by Article 10 of Law number 24 Year 2000 and Treaty as regulated by Article 11 verse (2) of 1945 Constitution.

Basic laws of Indonesia, especialy on the level of norm is not intended to touch the matters of ratification problems (international dimension), on the contrary it only limited to national regulation on agreement.This approach is reflected in Article 11 of 1945: "*President with the approval of DPR makes agreement with other country"*, and the complete absence of any ratification at all caused interpretation complication on external and internal ratification.

In the beginning, the term of "approval" has been conducted consistently in practice, therefore the used sentence to reflect this "approval" is always stressed on approving laws, therefore the title of the law is generally sounds as following:

Law of Republic of Indonesia Number 4 Year 1951 on Approving Loan Agreement between Netherland Kingdom Government and United States of Indonesia Government.

In the course of development, Law Number 24 Year 2000 on Treaty adopted ratificiation terminology and unfortunately translated it into "authorization".This law, by definition, only regulates on authorization in external procedure perspective, i.e.: law act to bind to an Treaty in the formin the form of ratification, accession,

[1] Harjono, , Perjanjian Internasional Dalam Sistem UUD 1945, paper in ,Status Perjanjian Internasional Dalam Tata Perundang Undangan Nasional, Problem Collection (for internal only), Directorate of Economic and Socio-Cultural Agreement, Directorate of Treaty Law, Ministry of Foreign Affairs, 2009, page.13
[2] After the ammandment, 1945 Constitution is called Constitution of Republic of Indonesia (UUDN RI)
[3] Haryono, Op.Cit, h. 18
[4] I Wayan Parthiana, Kajian Akademis (TeoridanPraktis) atas Undang-Undang Tentang Perjanjian Internasional berdasarkan Hukum Perjanjian Internasional, Journal of International Law LPHI JurnalHukumInternasional LPHI UI, Vol 5 N0. 3, 2008, h. 473
[5] JimlyAsshiddiqie, PengantarHukum Tata Negara, (Jakarta, RajawaliPers, 2010, hlm. 189.
[6] Damos Dumolui Agusman, Op.Cit h. 16
[7] LookArticle 10 Law Number 24 Year 2000

acceptance, and approval[1]. This law act marked by the issuing of notification or instrument of ratification. Nevertheless, accidentally this Law use the same terminology: "authorization" to explain law act which in reality categorized as internal legislation. It can be seen from Article 9 Law Number 24 Year 2000 which sounds as following:

Article 9

(1) Treaty authorization by government of Republic of Indonesia is implemented in accordance with the requirements of the Treaty;
(2) Treaty authorization as meant by article (1) is impelemented with Law or Presidential Decree (now Presidential Regulation)

The meaning of autorization in Article 9 Law Number 24 Year 2000 is no longer precisely as meant by definition in Article 1 Verse 2 Law Number 24 Year 2000 and accidentally led public and experts in Indonesia that as though the binding of Indonesia to Treaty conducted by Law or Presidential Decree (now Presidential Regulation) not with instrumentratification/accession/acceptance/approval which issued by Minister of Foreign Affairs[2].

The tendency to this thought is reflected in Dr Haryono's opinion[3], which stated:

Laws are part of national law meanwhile agreement with other country is an inter-state agreement which is outside the field of state's internal affair. If a bilateral agreement authorized by Laws, isn't this meant that the will of other country was subordinated into other country internal mechanism since it is depends on the authorization of Laws.

If we study Article 9 Law Number 24 Year 2000 as it sounds literally without relate it to the definition of "authorization" then the view of public and experts who said as if Indonesia binding to Treaty is conducted by Laws or Presidential Decreeand not with instrument of ratification from Minister of Foreign Affairs, then it is can be justified, because this article is indeed strongly stated that the authorization of Treaty is implemented with Laws or Presidential Decree.WayanParthiana[4]also indicated the possibility of this mistake and questioned the terminology of "authorization" in Article 9 Law Number 24 Year 2000 on Treaty, does that also meant to include authorization as external act for binding to agreement?

On the other side, Law of Indonesia went through essential development in interpreting ratification. As exlained above, the terminology of ratification previously known only as external procedure, but in the development there is complication, because this ratification also interpreted as internal procedure, and furthermore it was no longer differed between external ratification and internal ratification.According to Damos Dumoli[5]this complication happened because the form of "DPR approval" meant by Article 11 UUDN RI put into shaped in the form of Law, which the function "to authorize" is mixed with terminology as translation of ratification. This impact an understanding towards ratification in Indonesia as an acculturation from the understanding of "authorization" which is known in study of legislations of Indonesia with understading towards ratification taken from Treaty law.

In essence, the terminology of "authorization" used in law studies is very different with the meaning of ratification. "Authorization" has commonly used in various Laws, but not meant to ratify but meant to authorize something, for example to authorize a bill of law into law (Look at Article 20 verse (4)), authorize institution regulation, authorize Governmental Regulation (PP) or authorize Government Regulation in Lieu of Law (Perpu).

As elaborated above, in relation to Treaty internal ratification, the mening of "authorization" is still used as legislation terminology, i.e.: to authorize "approval" by DPR to government towards Treaty, not to authorize the international government. This construction is reflected in that law formulation whic is meant to "give DPR approval" that authorized with Law, thefore the date when the authorizing Laws put into effect is differentfrom the date of the impelementation the agreement[6].

In Presidential Letters Number 2826/HK/1960 which before the formulation of Law Number 2000 was used as a guide in making and authorizing Treaty, is actually correct in self limiting to national poltical arrangementon "giving DPR approval", therefore in the letters there is no mentioning on terminology of authorization/ratification, but "to obtain approval".

But in the course of development, the terminology of authorization which has beenused as standard in the legislation framework is actually also used to interpret ratification known in Treaty law. Thus,in such

[1] Look Article 1 point 2 Law Number 24 Year 2000.
[2]DamosDumoliAgusman, Op. Cit. page. 76
[3] Haryono, Op.Cit. page.16.
[4] WayanParthiana, Op.Cit.page. 477.
[5] DamosDumoli, Loc. Cit, page. 77
[6] Example for this is Law Number 4 Year 1960 on Agreement Approfal for Friendship between Republic of Indonesia and Malay Federation, decided this Law as "approval" Law which is effective since February 1960, but the Friendship Agreement effective in the exchange of approval letters in Jakarta.

ambiguity there are some problems that up until this moment have no academic explanation to put it into practice.

Furthermore, in regards to authorization and implementation of Treaty into Indonesian national law, there are important things need to noticed, i.e.: are the authorization process and implementation process of this Treaty already ensured that the authorized Treaty is not conflictual with constitution i.e.: 1945 Constitution (UUD NRI 1945)? Because until this moment there is no agency or institution with duty to harmonize Treaty with UUD NRI 1945.

According to Hikmahanto Juwana,[1]there are three reasons why Treaty Indonesia wish to follow need to ensured of it's harmony with UUD NRI 1945. **First**, UUD NRI 1945 is the highest norm in the hierarchy of laws in Indonesia. In Article 7 verse (1) Law Number 12 Year 2001 on The Formulation of Rules of Law, mentioned the category and hierarchy as following:

a. 1945 Constitution;
b. MPR Decree or Decree of People's Representative Assembly;
c. Law/Government Regulation in Lieu of Law;
d. Government Regulation;
e. Presidential Regulation;
f. Provincial Regional Regulation; and
g. Provincial Regency/Municipal Regulation.

The hierarchy does not mention the position of Treaty which Indonesia followed, whether through ratification process or not.

Second, ensuring the harmony between Treaty which will be followed with Constitution is an important thing, to ensure Government's same perception in the time leading to participate in Treaty with popular perception. Unifiying perception between Government and people is necessary since Government and people have made consencus presented in Constitution. Therefore, Treaty must be assured in accordance and harmonious with Constitution.

Hikmahanto said, it needs to be understood that Constition must be fictionalized as an agreement between people and government. People as the party with soverignty but also the governed party, meanwhile Government in broad understanding is the party with the mandate to implement soverignty and the party that govern the people.[2]

Constitution is instrument which ensure that government implements it's obligation to the people, toprotect, educate, and help them to achieve welfare. The people have various mechanism to ensure that Government implement the agreement made with the people. In democracy, people can control the government through election, media, and even judicial review on the regulation or law issued by Government.

Third, ensuring the harmony of Treaty Indonesia wish to follow in order to avoid hidden intervention by other country towards Indonesian sovereignty, including Indonesian law sovereignty since Treaty often used as political instrument by one country towards another.

As a result, the problem of Treaty implementation which was preceded by ratification is animportant thing. Therefore it necessary to have law certainty on ratification regulation and Treaty implementation to national law.

B. Problems identification

From the elaborated background there are problems, i.e.:

First,which instrument that cause Indonesia binded to Treaty? Law of ratification towards Treaty or ratification instrument?

Second, can the Law of ratification towards Treaty judicially reviewed in Constitution Court, if it is proven that the Treaty contradicts 1945 Constitution?

C.TREATY CONCEPT AND TREATY RATIFICATION

1. Definition of Treaty

Judicially, Treaty definition regulated in Article 2 verse (1) of The Vienna Covention on The Law of Treaties 1969 which regulates on state to state agreement. Article 2 verse (1) states that Treaty is:

An Treaty conducted 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.

FurtherlyVienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, in Article 2 verse (1) define Treaty as:

[1] HikmahantoJuwana, Kewajiban Memastikan Keselarasan Perjanjian Internasional Dengan Konstitusi, paper presented Recent Issues Of International Law Doctrine ,held by International Law Lecturers Association in cooperation with Diponegoro University, Semarang, 20-21 May 2011, page 1-3.
[2]Ibid, hlm. 2

An Treaty governed by international law and conducted in written form (i) between one or more States and one or more international organizations; or (ii) between international organizations whether that agreement is embodied in a single instrument or in two or more instruments and whatever its particular designation.

Both kind of definitions on Treaty contain the same element or qualification, i.e.: (a)an Treaty; (b) conducted by international law subjects; (c) in written form; (d) governed by international law (e) under any name.[1]But in accordance to each name, the scope gets narrower. It can be said that both definitions of Treaty is separation from Treaty definition based on law subjects that can make or bind to an agreement.[2]

The terminology of "treaty" used in Vienna Convention 1969 refers to Treaty generally and not only refers to narrow definition of treatyas a kind of Treaty.[3] In this case, Treaty law as regulated in Vienna Convention 1969 or Vienna Convention 1986applies to all kinds of international law which able to fulfill the element of Treaty definition.

On this international law Schwarzenberger[4]said:

Treaties are agreements between subjects of international law creating binding obligations in international law. They may be bilateral (i.e. concluded between two contracting parties) or multilateral (i.e. concluded between more than two contracting parties)

According to Schwarzenberger, each Treaty must have four basic elements, i.e.:
1. Capacity of the parties involved in making Treaty in accordance with international law;
2. The parties need to conduct their acts in accordance with international law;
3. Agreement among all parties;
4. The parties involved must have intention and aim for law obligation.[5]

Meanwhile, MochtarKusumaatmadja[6]define Treaty as following:
Treaty is agreement among international citizens aims for causing certain law impacts.

Well known international law expert such as Oppenheim-Lauterpachhave slightly different view on Treaty. He said: *'agreement of contractual charter between states creating legal rights and obligations between the parties"*[7]

From the structure aspect, Treaty can be differed into two kinds, i.e.: *treaty contract* and*law making treaties.*[8]

Treaty contract is agreements like contract or agreement in civil code that cause the rights and obligations only among the parties who made the agreement, for example teritorial agreement and trade agreement. Meanwhilelaw making treaties are areement that lay down the requirements or regulations for international citizens as a whole.[9]

Viewed from the object, we can classify treaty (read: Treaty) containing political matters and treaty containing economic matters.[10]Recently there is also international treaty containing cultural matters.

In addition, Treaty viewed from its validity can be classified into self executing treatyandnon self executing treaty. It means that if the Treaty is effective after ratified by the authorized party, it is calledself executing treaty. On the contrary, if such Treaty is effective after there is law or regulation which change the Laws in the country, then it is called as non self executing treaty.[11]

Subsequently, there will be deeper elaboration on each element or qualification from Treaty as mentioned above as following:

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[1]Alina Kaczorowska, Public International Law, third revised edition, (London: Old Bailey Press, 2005), page. 232, Compare this with Wayan Parthiana, Hukum Perjanjian Internasional Bagian I, (Bandung, MandarMadju, 2002), page 14.
[2]Ibid, page 15.
[3]ILC Draft Articles with Commentaries, Second Session of 18th, 1966 Yearbook of the International Law Commssion, Vol II, page 189; quoted from Eddy Pratomo, Hukum Perjanjian Internasional, Pengertian, Status Hukum Dan Ratifikasi, (Bandung: Alumni, 2011), page 45. See also Alina Kaczorowska, Op Cit. page. 231.
[4] Schwarzenberger, George, A Manual of International Law, Vol I Fourth Edition, (London: Institute of World Affair, 1960), Page. 26
[5] Ibid, page 140.
[6]MochtarKusumaatmadja, Pengantar Hukum Internasional, (Bandung: PT Alumni, 2003), page. 117.
[7]Quoted from Eddy Suryono, ,Praktek Ratifikasi Perjanjian Internasional di Indonesia, (Bandung: RemajaKarya, 1984), Page. 4
[8] Ibid.
[9]Yudha Bhakti, ,Hukum Internasional (Selected Works), (Bandung : PT Alumni, 2003), page. 107-108
[10]EdySuryono, Op.Cit. Page. 15.
[11]Ibid. . Page 15-16. See also Wisnu Aryo Dewanto, Op.Cit. Page. 102-103

a.Treaty

Treaty element meant here is that agreement must have international character. It means such agreement regulates international law aspects or inter-states problems.[1] In addition,Eddy Pratomosaid that basicly international law is a contract, international law concept must be able to differ contracts concept or general agreement as like in business contract.[2]Moreover, the element of Treaty also used to show that the definition of Treaty include all and every kind of agreement with international character, aside of whether the agreement made bilaterally, multilaterally, regionally, or universally.[3]

b. International Law Subject

International law subject in this study is international law subjects that binded to agreement. In closed Treatys and with more technical substances, i.e.: in limited bilateral agreement and multilateral agreement, the negotiating states are also parties that binded to agreement. Meanwhile, in open Treatys with general substances, the negotating states and the parties binded to the Treaty are not always the same parties.[4]

According to doctrine from ancient positivist, the only international law subject is the state, as argued by Lauterpachtand quoted byMalcom Shaw[5]: "*the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law"*

But according to modern international law subjects what can make or binded as parties in Treatys are: (1) State (including state as subdivision of a country, as long the constitution of related federal state regulates it or enable it); (2) International Organization; (3) Sacred Throne; (4) Belligerency; (5) International Red Cross.[6]

In addition, in limited definitions there are several international law subjects which are already acknowledged, i.e.:Individual and Multi National CorporationIndividu (MNC).[7]The individual's position in international judicial order have caused warm doctrinal debate. It was said that Treaty in the end is individual society regulated by Treaty.This statement surely contradicts the view that individual have no place in international judicial order.[8]

What is clear the individuals have interest towards a big ammount international law requirements, whether in the form of acquired benefits or the obligations that must be implemented.[9]

Meanwhile, Multi National Coeporations (MNCs)since these recent decades have shown its very important role in international society. This MNC have central office in a country and conducts it's activities in many countries. Therefore this MNC can be the focus of controversy since its economic power or even its political power, mobility, business activities complexity, and the difficulties it caused to the countries where it operates or its origin country which attempts to run its jurisdiction over those MNCs.[10]

It needs to be stressed here that those MNCs are private corporations and non-government unity and has no international legal person or international personality status. International personality states of MNC only exist if there is international relation it conducted regulates by international law.[11]Hence, it is natural if individual or MNC acknowledged as international law subject in the development of recent international law in certain limitations.

c. Written Form

Article 2 verse (1) Vienna Convention 1969 on Law of Treaties between States and Article 2 verse (1) Vienna Convention 1986 on the Law of Treaties between States and International Organizations or between International Organizations, which contains the definition of Treaty, firmly states that the scope of Treaty limited only to agreements in written from. The words of"*in written form"*in Article 2 verse (1) Vienna Convention 1969 very well resulted from the process of practice in the field.[12] Such limitations meant to avoid law impact desired by participating states caused by oral agreement. Eventhough Article 3 of Viennac Convention 1969

[1]Jan Klabbers, The Concept of Treaty in International Law, (Netherlands: M Nijhoff Publisher, 1996), page. 51, See also Anthony Aust, Modern Treaty Law And Practice, (London: Cambridge University Press, 2000), page. 14-15.
[2] Eddy Pratomo, Loc.Cit., page 47.
[3]Ibid.
[4]Wayan Parthiana, Loc.Cit.,page. 16.
[5]Shaw. N. Malcom, International Law, (Cambridge: Grotius Publications limited, 1986), Page 126.
[6] Eddy Pratomo, Op. Cit, hlm. 47-48, Wayan Parthiana, Op.Cit., page. 16.
[7] Boer Mauna, Loc. Cit.,page. 55-57.
[8]Ibid, page. 57.
[9]Ibid.
[10]Louis Henkin, Richard Crowford Pugh, OscaSchacter, and Hans Smith, International Law, Cases and materials, Third Edition, 1993,page. 368, quoted from Boer Mauna, Ibid, page. 55.
[11]Sefriani, Hukum Internasional Suatu Pengantar, (Jakarta, PT Raja GrafindoPersada, 2011), page. 151
[12] Eddy Pratomo, Loc. Cit, page. 51

acknowledge the enforceable legal validity of oral Treaty.[1] Nevertheless, the acknowledgement to this oral agreement contradict Article 102 of UN Charter which require registration and publication of Treaty made by the states to UN General Secretary.[2] Rebecca Wallace also states that each Treaty registered must attach real proof, i.e.: the Treaty made.[3]

This written form is the realization of authentic deal and binds all parties. Nonetheless theoretically there are two forms of Treaty, i.e.: written international and unwritten agreement or oral agreement.[4]Eventhough in practice, this unwritten agreement is rare to find, but it can not be said that international law considers writen form as the most important in formulating inter-states agreement.[5]

Unwritten or oral Treaty generally is a joint statement or mutual statement stated by Head of State, Head of Government, or Minister of Foreign Affairs, in the name of each state on particular problem related with the interests of involved parties. Moreover, an unwritten Treaty can take the shape of unilateral statement stated by the officials or organs of state government as mentioned above which those statements are furtherly positively responded by the officials or organs of government from other country who share the interest as it's approval sign. Therefore, it can be concluded that there is already an approval or oral agreement or unwritten agreement between the related parties involved.[6]Examples for that is the Legal Status of Eastern Greenland Case in the year of 1933. In this case Norway Minister of Foreign Affairs delivered oral statement to Dannish Ambassador for Norway. Permanent International Court of Justice (PICJ) then concluded the law meaning from the oral statement as following:

That an answer like this given by Minister of Foreign Affairs in the name of the government to answer request from diplomatic representation of other country on problems under his authority is binding the origin country of the ambassador.[7]

Such Permanent International Court of justice shown that oral statement can bind a state and considered an inter-state agreement has been made.

d. Subjected and Regulated by International Law

What is meant as international law here is both international law in general, or Treaty law in particular. As generally understood, each agreement results in law relation: the rights and obligations for each party binded to the agreement.[8]

In this case, an Treaty can be said fullfilling the element of "subjected to international law" when such agreement results in obligations in international law. Not every international instrument is considered as intertantional agreement, except if such instrument results in contractual rights and obligations between two countries or more which is the basic requirement of Treaty.[9]

e. In Any Name

There are many names, titles, or terminologies used to refer to Treaty, i.e.:treaty, convention, charter, agreement, covenant, arrangement, statute, agreed minutes, protocol, pact, act, final act, modus vivendi, proces verbal, and many others. The names or terminologies are entirely titles for Treaty, but each of them have certain characteristics. For example,treatyis often used inconsistently for more formal Treaty, such as Treaty on peace, neutrality, and international organization establishment. Meanwhileconvention is generally used for law making treaty, which is Treaty that results inin new international law norms for entire international society. Meanwhile agreement is generally used for bilateral agreement and not too important. Eventhough at a glance those terms are not very clear of it's differences from one to others and several of those terms are not really clear what it means and in what case it must be used. The using of them are often relted with Treaty material it self.

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[1]Article 3 of Vienna Convention 1969 states : The fact that the present Convention does not apply to Treatys concluded between States and other subjects of international law or between such other subjects of international law, or to Treatys not *in* written form, shall not affect :
(a) the legal force of such agreements;
(b) the application to them of any rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
(c) the application of the Convention to the relations of States as between themselves under Treatys to which other subjects of international law are also parties.

[2]AlinaKaczorowska, Op. Cit. Page. 220.

[3]Rebecca Wallace, International Law, Second Edition, (London: Sweet & Maxwell, 1992), Page.221.

[4]Wayan Parthiana, Perjanjian Internasional, Bagian I (Bandung: CV MandarMadju, 2002), Page. 35.

[5]Mc Nair, Sir Arnold, The Law of Treaties, (London: Oxford, 1973), Page. 7

[6]Wayan Parthiana, Op. Cit. Page 35.

[7] D.J. Harris, Cases and Materials on International Law, Sixth Edition, quotedfrom Eddy Pratomo, Op. Cit.Page. 52.

[8] Wayan Parthiana, Op. Cit. page. 17

[9] Eddy Pratomo, Loc.. Cit. page. 53-54.

2. Definition of Treaty According to Laws of Indonesia.

The investigation on the definition of Treaty in national laws of Indonesia is a very important thing to do in order that the understanding of what it meant by Treaty from the perspectif of national law of Indonesia not bias and clear.

In order to investigate the definition of Treaty in national law of Republic of Indonesia, we need to investigate in from the highest law, i.e.: 1945 Constitution (UUD 1945).

Pre ammandement 1945 Constitution, in the beginning only mentioned Treaty as an agreement with other country.[1]The sentence of "agreement with other country" in Article 11 of 1945 Constitution seems only viewed Treaty as state to state agreement, and did not include Treaty with other international law subject, for example with international organization. Thus,the draft of Article 11 of pre-ammandement 1945 Constitution after the ammandeent share the same meanings and definition with Treaty definition according to Vienna Convention 1969 on Agreement Law, because according to Article 2 verse (1) Vienna Convention 1969, Treaty meant only for state to state agreement.

In the third ammandement towards the 1945 Constitution in 2001 finally we found explicit mentioning of Treatys in the requirement of Article 11of 1945 verse (2). In this third amendment of Article 11 of 1945 constitution there are two additional verses,[2]where one verse remains written as pre-amendment version.

In previous elaboration I said that Article 11 of pre-ammandement 1945 Constitution is a seingle article, which only gave interpretation that agreement with other country meant is Treaty between states. Meanwhile the requirement of Article 11 of post amendment 1945 Constitution, in verse (2) and verse (3) gave comprehensive explanation on Treaty, i.e.: Treaty meant not as state to state agreement, but Treaty in the definition of what is acknowledged by international law.[3]

Actually. before the implementation of third amendment in 2001 towards 1945 Constitution, verse (2) and verse (3) explicitly mentions Treaty terminology, government with People's Representative Council (DPR) have made Law Number 24 Year 2000 on Treaty. In other words the draft of verse (2) and verse (3) of 1945 Constitution (further will be called as UUD NRI, for post amendment 1945 Constitution) seems influnced by Law Number 24 Year 2000 on Treaty.

Next we will observe the definition of Treaty in Law Number 24 Year 2000 on Treaty. In Article 1 point 1 Law Number 24 Year 2000:

Treaty is an agreement, in certain form and name, which regulatedin international law which is in written form and results in rights and obligations in public law.

The observation towards the definition of Treaty as stated by Article 1 point 1 Law Number 24 Year 2000 on Treaty above it can be concluded that the definition of Treaty in Law Number 24 Year 2000 explains what is meant by Treaty as mentioned by Article 11 of 1945 Constitution. Article 1 point 1 Law Number 24 Year 2000 also can be concluded that the formulation of the internatonal agreement is in Vienna Convention 1969 on Law of Treaties between Statesor Vienna Convention 1986 on the Law of Treaties between States and International Organizations or between International Organizations. The difference is only one element different from the bill of Law Number 24 Year 2000 compared to draft of Vienna Convention 1969 and Vienna Convention Year 1986, i.e.: in element "results in rights and obligations public law sector" in Law Number 24 Year 2000. This element is absent in Vienna Convention 1969 and Vienna Convention 1986.

3. Definition of Treaty Ratification

Indonesian Constitution, i.e.: 1945 Constitution, whether pre-amendment or post-amendment version contains no article which explicitly mention the requirements of ratificatio. Even in the level of norm, the basic law of nation of Indonesia since it's beginning intend not to touch the problems of ratification, which means state's act to bind it self to international agreeent. This can be seen from Article 11 of 1945 Constitution: *"President with the approval of DPR declare war, make peace, and agreement with other country".*This article does not mention ratification at all, therefore there is no complication of understanding on ratification.[4]

The complication of understanding only occurs after the formulation of Law Number 24 Year 2000 on Treaty. Article 1 point 2 Law Number 24 Year 2000 defined ratification as following:

"Ratification is a law act to bind to Treaty in the form of ratification, accession, acceptance, and

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[1] Look at article 11 the 1945 Constitution 1945,

[2]The complete sentences of Article 11 of post ammandment 1945 Constitution are:
Article 11: (1) President with the approval of People's Representative Council declare war, make peace, and agreement with other country;(2)President in making other Treaty which cause wide impact for people's life related with financial state's burden or enforcing change or formulation of Law must with the approval of People's Representative Council;(3) Further requirement on International Law regulated by Law.

[3] Eddy Pratomo, ***Op. Cit.,*** page 92

[4]Damos Dumoli Agusman**,** ***Loc. Cit.,*** page. 74.

approval".

Such definition adopted the definition of ratification in Vienna Convention 1969 on Treaty as following:

"ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby as a State establishes on the international plane its consent to be bound by a treaty.[1]

Observation towards Article 1 number 2 Law Number 24 Year 2000 is by definition only regulates on ratification in the perspective of external procedure, i.e.: law act to bind to Treaty in the form of ratification, accession, acceptance, and approval. This law act marked by the issuing of notification or ratification instrument issued by Minister of Foreign Affairs representing state.[2]

This Law Number 24 Year 2000 on Treaty is actually also the ratification terminology with different meaning from what is in Article 1 point 2 in the same Law. For example the requirements mentioned in Article 9 Law Number 24 Year 2000.[3]The ratification terminology in article 9 Law Number 24 Year 2000 explains law act which is actually fall into perspective category known in internal jurisprudence.

The definition of ratification in Article 9 verse (1) Law Number 24 Year 2000 is no longer precisely the same with what is meant by definition of ratification as mentioned in Article 1 point 2 Law Number 24 Year 2000 and accidentaly led the thoughts of many expers and public in Indonesia that as if the binding of Indonesia to an Treaty is conducted with Law or Presidential Decision and not with ratification instrument.[4]

D. LAW OF TREATY RATIFICATION AND RATIFICATION INSTRUMENT

The guide used to make and ratify Treaty in Indonesia before 2000 was in Presidential Letters Number 2826/HK/1960, which regulates on ratification through Law or Presidential Decision. Before Law Number 24 Year 2000 on Treaty is effective, there is still complexity and no uniformity and clear guide on how to make and ratify Treaty. This is because no regulation or law as the implementor for Article 11 of 1945 Constitution. Only Presidential Letter Number 2826/HK/1960 to People's Representative Council on the interpretation of Article 11 of 1945 Constitution, especially the one need approval and ratification from People's Representative Council, and international agrement is only delivered to be known by DPR.

That Presidential letters mainly classified Treaty in two definition, i.e.: most important agreement (treaties), which will be delivered by government to DPR to obtain DPR approval and other agreement (agreement) which will be delivered to DPR to be known and ratified by President. Eventhough that Presidential Letters is effective guide to decide Treaty criteria which fall into category of most important agreement, in the recent development there is not clarity on agreement sector and therefore the formulation and ratification suffered ambiguities and complexity.

Therefore Indonesian Government attempted to formulate Bill of Law on Treaty, which on 23 October 2000 approved as Law of Treaty, i.e.: Law Number 24 Year 2000. This Law is the basic law in making and ratifying Treaty in Indonesia.[5] Law foundation on formulation of Law on Treaty are Article 11 of 1945 Constitution and it's amendments, and Law Number 37 Year 1999 on International Relationship. Beside that, that Law contains principles mentioned in Vienna Convention Year 1969 on guide for international society in making and ratifying Treaty.

Based on Article 9 verse (2) Law Number 24 Year 2000, in practice there are two kinds of Treaty ratification in Indonesia , i.e.: through Law and Presidential Decision (Keppres). In ratifying Treaty, whether it will be ratified with Law or with Presidential Decision, it need to view the substances or materials of the agreement, not based on form and the name of agreement, and implemented by Ministry of Foreign Affairs. Classification based on agreement materials meant to achieve law certainty and uniformity on the ratification form of Treaty with law.

Based on Article 10 Number 24 Year 2000, ratification towards Treaty is implemented with Law if related to:

a. Political matters, peace, and national security;
b. Teritorial change and arrangement of the borders of Republic of Indonesia;
c. Soverignty or state's sovereign right;
d. Human rights and nature;
e. New law norm formulation;
f. International loan and or grant.

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[1] See Article 2 verse 1 (b) Vienna Convention year 1969.
[2]Damos DumoliAgusman**,** ***Ibid****,* page. 76.
[3]Article 9 Law Number 24 Year 2000 :
[4]Damos Dumoli**,** ***Op.Cit****.* Page76
[5] www.dfa-deplu.go.id

Particularly on international loan and/grant and its approval by People Representative Council (DPR), will be regulated by separate Law. This is discussed in the meeting to examine The Bill of Law of Treaty in government elucidation on The Bill of Law of Treaty on 22 May 2000.

Moreover, international agreeement ratification which it's materials are not included in Article 10 Law Number 24 Year 2000, is ratified by Presidential Decree.[1]This Treaty ratification through Presidential Decision is implemented for agreement that requires ratification before the agreement is effective but which has procedural material, and need implementation in short time without affecing national rules of law.The agreements which fall into this category are prime agreement on cooperaton in science and technology, economy, technique, trade, culture, sailings, business, double tax evation, and cooperation in investment protection, and technical agreements.[2]

Based on the above requirements, it is known that the law foundation on Treaty ratification with Law is Article 10 Law Number 24 Year 2000, meanwhile the law foundation on Treaty ratification through presidential decision is Article 11 verse (1) Number 24 Year 2000.

Ratification as regulated by Article 9 Law Number 24 year 2000 is actually internal ratification, in other words, such ratification is DPR confirmation to the executive, that DPR have agreed that the government participates in Treaty but that ratification Law is not instrument to bind to Treaty. Government bind to Treaty is implemented by issuing instrument of ratification made by Minister of Foreign Affairs in the name of President.

Therefore, it is clear that the difference between ratification Law and instrument of ratification, Law of ratification is not instrument that cause the Indonesian government binded to Treaty but only serves as condirmation to government that DPR agreed on government participation to international law. Meanwhile instrument of ratification is instrument that show Indonesian government binded to Treaty.

The problems that occur next is can Law of ratification towards Treaty judicially be reviewed in Constitution Court in accordance to it's authority?

E. JUDICIAL REVIEW CASE LAW OF RATIFICATION TOWARDS ASEAN CHARTER

In 2008 DPR have made Law Number 38 year 2008 on Ratification towards ASEAN Charter. Law Number 38 Year 2008 is then called as Law of Ratification towards ASEAN Charter.

5 May 2011, several Non Government Organization (NGO) requested judicial review towards Law Number 38 Year 2008 on ratification of ASEAN Charter to Constitution Court because the requesting parties argued that the requirements of ASEAN Charter ratified by Law Number 38 Year 2008 contradicts 1945 Constitution (UUD 1945), especially Article 33 verse (1), verse (2), and verse (3) and Article 27 verse (2). Meanwhile the requirements of ASEAN Charter considered contradicts 1945 Constitution are Article 1 verse (5) and Article 2 verse (2) of ASEAN Charter.

This writing does not intend to elaborate the substance of the contradictive requirements, but to return the problem identification, i.e.: can the Law of ratification towards an Treaty (in this case the Law of ratification towards ASEAN Charter, i.e.: Law Number 38 Year 2008) judicially reviewed by Constitution Court, meanwhile what is considered contradicts 1945 Constitution is the Treaty (in this caseASEAN Charter)?

One of the authority of Constitution Court is indeed to judicially review the Law towards 1945 Constitution, but when judicially review Law of Ratification towards Treaty, there is a problem occurs, because the Law of ratification on Treaty is "*beschikking*" or an implementation, not "*regeling"* or regulation.

The law of ratification on Treaty generally only consisted of two articles, i.e.: Article 1 which contains the requirement of ratificiation towards the referred Treaty, i.e.:by mentioning statement attaching copy of original script or original script with it's Indonesian translation. Meanwhile Article 2 contains requirements on when the agreement runs effective. Therefore, Law of ratification towards Treaty does not contain regulating requirements but establishing reqirements.

Law of ratification towards Treaty does not necessarily make an Treaty a part of Indonesian law. Therefore, law Number 38 Year 2008 which ratified ASEAN Charter is not *ipso facto* making ASEAN Charter into Indonesian national law. Therefore the Law of ratification towards Treatys does not automatically transformed international law norms into Indonesian national system.

The binding of Indonesia towards ASEAN Charter is not determined by Law of ratification, i.e.: Law Number 38 Year 2008 but it was decided but Indonesian Government it self, i.e.: Indonesian Government will deliver ratification document to ASEAN's General Secretary, as regulated by Article 54 ASEAN Charter.

ASEAN Charter ratified by Law Number 38 year 2008, means substantively that ASEAN Charter is not *wet in formelezijn*therefore it is not Law that can be judicially reviewed to Constitution Court. The same thing applies to Presidential Regulation which ratify Treaty, is substantively not a Presidential Regulation that can be

[1]See Article 11 verse (1) Law Number 24 Year 2000 on Treaty
[2]See elucidation on Law Number 24 Year 2000 on Treaty.

judicially reviewed in Supreme Court.

Therefore, the second problem in this article has answered, that Law of ratification towards Treaty can not be judicially reviewed.

E. Conclusion

Law politics of Law Number 24 Year 2000 on Treaty is basically intened to bring up national interest. This is visible from the requirements related with the ratification towards Treaty, it means, Indonesian participation in the Treatys, especially in the "important" agreements have to go through ratification with Law, it means it must involve DPR approval, eventhough this Law is only confirmation from DPR to Executive not Law which is a binding instrument.But it is very important to protect national interest, because without this Law of ratification, goverment can not issue instrument of ratification as binding instrument to Treaty.

Beside that, this Law of ratification towards Treaty is *beschikking*, not*regeling*, therefore this Law of ratification is not regulating but establishing, therefore this Law of ratification towards Treaty can not be judicially reviewed to Constitution Court.

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